NOO.

A DIGEST

OF THE

HINDU LAW

OF

INHERITANCE, PARTITION, AND ADOPTION

EMBODYING THE REPLIES OF THE ŚÂSTRIS.

WITH

INTRODUCTIONS AND NOTES.

BY

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FOURTH EDITION

OF

WEST & BÜHLER.

LONDON:

SWEET AND MAXWELL, LIMITED,

3 CHANCERY LANE, W.C.

1919.

PRINTED BY
THE EASTERN PRESS, LIMITED,
LONDON AND READING.

PREFACE TO THE FOURTH EDITION.

In order to increase the usefulness of this work, so often referred to by the Judicial Committee of the Privy Council, the present edition has been further extended to embrace the principles of the Hindu Law according to the various Schools in force throughout India. Book I., which deals with the Law of Inheritance, has been augmented by the addition of the Succession under the Dayabhaga. Portions have been re-written or discussed and the matter in general re-arranged to include the Sources of the Hindu Law and the works of authority according to the different Schools. The importance of *Benami* transactions, which form part of the Hindu Law in order to assist in the determination as to what property belongs to a joint family, at least in cases of partition, cannot be overrated, and consequently a separate chapter has been devoted to the subject. The extension takes the form of discussing the principles of law under the several heads according to the various Schools, with special reference to the important decisions of the Indian Courts and the most recent rulings of the Judicial Committee. The formation of Behar as a separate province necessitated more special attention to the doctrines of the Mithila School.

Since the publication of the last edition of this work a great many decisions have been given by the High Courts in India, not easily to be reconciled with one another or to the principles enunciated by the learned in the Hindu Law. The Judicial Committee of the Privy Council, in their endeavour to introduce uniformity, have laid down certain rulings aiming at the settlement of questions arising out of conflicting decisions. Those on the powers of a *Karta* or manager, interests of minors, alienation by a *Mahant*, duties of a mortgagee, *Benami* transactions, right of reversioners, maintenance out of impartible zemindari, partition, power of disposition over self-acquired property, gains of science, nature of estate held by a female in respect of inherited property,

adoption of an only son, religious ceremonies in adoption, power to adopt and succession by two widows, extension of the number of *bandhus*, deserve special mention. The limitation of the testamentary power of a Hindu in respect of ancestral property, the *Stridhan*, the nature of possession of property by a widow entitled only to maintenance, and the father's power to burden the ancestral property with his antecedent or present debt, require further careful consideration.

There appears to be a tendency amongst those who are entrusted with the administration of Justice according to the Hindu and the Mohammedan Laws in so far as these laws have been preserved to the Hindus and the Mohammedans by express declaration of the Legislature, to take into account as little as possible the principles of those laws and to introduce principles of other systems based upon entirely different conceptions of society. Resulting as it does in ignoring the principles of those laws which mould the manners, customs, usages and the sentiments of the people, reacting as it does on legal education, this tendency is to be very much deplored. If the dictum of the late Lord Parker of Waddington, who recognised equity as known to the Mohammedan Jurisprudence, that "the Indian law should be allowed to develop on its own lines," were to be kept in view, the certainty that the laws guaranteed to the Hindus and the Mohammedans were respected would give rise to a general sense of security and satisfaction throughout India.

Before his lamentable untimely death, Lord Parker, to whom I have already referred, had kindly expressed his willingness to accept the dedication of the present edition of this work. He was a great lawyer and a friend of India, but he has passed to the majority, and I can only therefore dedicate it to his memory.

H. R. ABDUL MAJID.

1 ELM COURT,
TEMPLE.
September, 1919.

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* Rani is sometimes spelled Rany, abbreviated "Ry." *See* under the latter word.

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D.

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P.

Parasara.
Prajapati.

ADDENDA.

While this edition was passing through the Press the following principles have been laid down by the Judicial Committee of the Privy Council :—

Adoption—

(1) A widow has no power to adopt a second time on the death of a first adopted son who had attained full legal capacity to continue the line either by the birth of a natural-born son or by the adoption to him of a son by his own widow.

Madana Mohana Deo v. *Purushothamma*,

L. R. 45 I. A. 156.

See pp. 876-878; 880; 887; 1037; 1061.

(2) In the Dravida country a Hindu widow may adopt a son with the assent of the male sapinda. In an undivided family such authority must be sought within the family.

Veera Basavaraju v. *Balasurya Prasada Rao*,

L. R. 45 I. A. 265.

See pp. 876-877; 881-882; 894.

(3) A Hindu widow cannot be compelled to adopt, and unless there is a time limit within which she is to adopt, she may exercise her power so long as it is not extinguished or exhausted.

In a grant by a Hindu "discendible in the direct male line" an adopted son, in the absence of custom, is included.

Pratapsing Shivsing v. *Agarsinghji*,

Dec. 13, 1918.

See pp. 68 and 872.

(4) A Kamma or a Reddi can lawfully take a son-in-law in *illatom* adoption when he has a son living.

Nalluri Kristnamma v. *Kainepalli*,

Feb. 25, 1919.

See p. 849.

Joint Family—

(1) A member of a Hindu family may convert his self-acquired property into ancestral family estate by throwing it into the common stock.

Radhakant Lal v. *Nazma Begum*,

Dec. 14, 1917.

See pp. 662; 667.

(2) A Hindu widow does not lose her right to maintenance by refusing to live in the house assigned to her on reasonable grounds.

Raja Braja Sundar Deb v. *Swarma Majari Dei*,

Dec. 29, 1917.

See pp. 237; 249-52.

(3) A Hindu widow can surrender her whole interest in the whole estate in favour of the nearest reversioners.

The consent of the nearest reversioners to an alienation is a presumptive proof that the transaction was a right and proper one.

Rangasami v. *Nachiappa*,

Dec. 16, 1918.

Bhagwat Koer v. *Dhanukdhari Prasad Singh*,

June 30, 1919.

See pp. 89, 90, 285.

(4) A decree fairly and properly obtained against a Hindu widow representing the estate is binding on the reversioners.

Amrit Narayan Singh v. *Gaya Singh*,

Nov. 22, 1917.

Risal Singh v. *Balwant Singh*,

L. R. 45 I. A. 168.

See p. 89.

(5) The sale of "the right, title and interest" of the defendants which included minor sons held to effect the sale of the whole estate.

Ganapathy Mudaliar v. *Krishnamachariar*,

Dec. 14, 1917.

Seth Ghunsham Das v. *Umapershad*,

June 23, 1919.

See pp. 169-172; 575; 581-82.

(6) Mere uninterrupted sole possession of a part of a joint property by a member of a joint family cannot be regarded as adverse to other interested members.

Hardit Singh v. *Gurmarkh Singh*,

Jan. 29, 1918.

See pp. 589; 640-44.

(7) A reversioner must claim possession of the estate within twelve years of an alienation of a portion by a widow entitled only to maintenance but placed in possession of the estate in lieu of maintenance by order of the Court.

Satgur Prasad v. *Raj Kishore Lal*,

June 26, 1919.

(8) Gains made by a member of a joint Hindu family by his peculiar skill, mental abilities and individual effort, without the aid of the joint funds, having only received an ordinary education suitable to his position as a

member of the family to which he belonged, are his self-acquired property.

Metharam v. *Rewachand*,

L. R. 45 I. A. 41.

See pp. 666-670.

(9) A mortgage of the joint property of a Mitakshara family by its *Karta* or manager, unless necessity or an antecedent debt is proved, is void; the transaction itself gives to the mortgagee no right against the Karta's interest in the joint family property.

Manna Lal v. *Karu Singh*,

July 29, 1919.

Anant Ram v. *Collector of Etah*,

Oct. 29, 1917.

Narain v. *Sarnam*,

L. R. 44 I. A. 163.

Nawab Nazir Begum v. *Rao Raghunath Singh*,

L. R. 46 I. A. 145.

See pp. 569-74; 590-93.

Impartible Zemindari—

(1) An impartible zemindari is alienable and discontinuance of a service attached to it does not render it partible.

Rao Kishore Singh v. *Gahenabai*,

July 29, 1919.

(2) There is no coparcenery in an impartible zemindari and no one (except the widow, the parents, and the infant child) who does not prove his right to maintenance by custom is entitled to it.

Gangadhar Rama Rao v. *Raja of Pittapur*,

L. R. 45 I. A. 148.

Maharajah of Jeypore v. *Vikrama Deo Singh*,

May 12, 1919.

See pp. 675-682; 65; 68-69.

Religious Endowment—

Acquisitions out of the Math or Asthal properties are subject to the same trust as the dedicated properties themselves, and that any alienation by the mahanth must show necessity for the benefit of the math, and the creditor is bound to make enquiries as to the necessity.

Basdeo Roy v. *Mahant Jugalkishwar Das*,

March 21, 1918.

Ram Parkash Das v. *Anand Das*,

L. R. 43 I. A. 73.

Sethuramaswamiar v. Meruswamiar,

L. R. 45 I. A. 1.

See pp. 198-200.

CORRIGENDA.

Page 103 note (*c*) for I. L. R. M. L. T. read 14 M. L. T.
179 note (*r*) for Saicar read Sircar.
556 note (*w*) for 263, 356 read 254, 339.
615 note (*f*) for 621 read 578.
628 note (*d*) for 464, 468 read 434, 439; for 238 read 232.
699 note (*t*) for 725 read 667.
702 note (*e*) for 613 read 572.
712 note (*w*) for 819 read 745.
713 note (*w*) for 259 read 250.
713 note (*x*) for 298, 303, 338 read 284, 288, 292, 331.
842 note (*x*) for 922 read 822.
845 note (*t*) for Vithal read Vithoba.
852 note (*x*) for L. A. read L. R.
969 note (*c*) for (*c*) . . . 1009 read (*f*) . . . 965.
1082 note (*o*) for L. R. read I. L. R.

INTRODUCTION.

I.—OPERATION OF THE HINDU LAW.

The Hindu Law, so far as it governed the private relations of the inhabitants of any part of India, was not affected by their reduction under British rule. But the new Sovereign thus acquired a power to legislate for them, and this sovereignty was in part delegated to the East India Company during its existence and down to 1833 A.D. (*a*).

The application of the Hindu Law to litigation by the Courts in British India is authorized and regulated by statutes of the Imperial Parliament and by Regulations and Acts of the local Legislatures (*b*).

It is subject even without a statutory provision to modification by custom (*c*), which indeed may be regarded as the basis, for all

(*a*) See *Campbell* v. *Hall*, 1 Cowp. 204; *Moodley* v. *The East India Company*, 1 Br. R. 460; *Dobie* v. *The Temporalities Board*, L. R. 7 A. C., at p. 136. Lewis on the Government of Dependencies, 203, ss., and Note (*m*).

(*b*) See the Statutes 13 Geo. 3. c. 63; 21 Geo. 3. c. 70; 37 Geo. 3. c. 142; 39 & 40 Geo. 3. c. 79, s. 5; 4 Geo. 4. c. 71, s. 9; St. 24 & 25 Vict. c. 104; and the Letters Patent of the High Court under these Statutes. These are discussed in the case of *Kahandas Narandas* (1880), I. L. R. 5 Bom. 154, and other cases there referred to. For the Mofussil, see Bombay Reg. IV. s. 26 of 1827. Under this a collection of the caste rules of Gujarat was made by Mr. Borradaile, to which the Courts were directed to conform in all cases to which they applied, by a Circular Order of the late Saddar Adalat, dated 24th December, 1827. For Bengal, Assam, and the United Provinces see 21 Geo. 3. c. 70, s. 17, and Act XII. of 1887, s. 37; for Madras see 37 Geo. 3. c. 142, s. 13; 39 & 40 Geo. 3. c. 79, s. 5; and Act III. of 1873, s. 16; for the Central Provinces see Act XX. of 1875, s. 5; for Oudh see Act XVIII. of 1876, s. 3; for the Punjab see Act IV. of 1872, ss. 5-7, and Act XII. of 1878, *cf.* Regulation XI. of 1825, s. 2; for Burma, except the Shan States, see Act XIII. of 1898, s. 13, and Burma Courts Act of 1889, s. 1; for Ajmere and Marwara and British Beluchistan, Regulation III. of 1877, s. 4, and Regulation III. of 1890, s. 89, respectively.

(*c*) See Manu I. 108, 110. II. 12, 18. VII. 203. VIII. 41, 42, 46. Vyavahara May. Chap. I. s. 13. Chap. IV. ss. 5, 10, 11. *Vijnanesvara* on

secular purposes, of the Hindu Law itself (*d*). Thus, when a custom, whether general or peculiar to a particular family or estate (*dd*), is proved, it supersedes the general law so far as it extends; but the general law still regulates all that lies beyond the scope of the custom (*e*). The duty devolving, according to the Hindu sages, upon a conqueror of maintaining the customary private law of the conquered territory (*f*), has been recognized as fully, or even more fully, by the British Courts than by the Legislature. Thus the Privy Council says in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (*g*):—" Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India." They give effect to a course of descent in a family, differing from the ordinary course of descent (*h*); and to a right of a reigning raja

Yajnavalkya Book II. Sloka 4; Col. Dig., Book 1., Chap. II., T. 49. Comm. ad fin. and note; T. 50. Book II., Chap. IV., T. 18 Com. Yajnavalkya, Book II. 117 note by Roer and Montriou; *Collector of Madura* v. *Mootoo Ramlinga*, (1868) 12 M. I. A. 397.

(*d*) See *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C. R. 249; *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom. 545; *Lulloobhoy Bappoobhoy v. Cassibai*, L. R. 7 I. A., at p. 237; Yajnavalkya, I. 40, 156 and 343; Mandlik's Mayukha.

(*dd*) *The Pittapur Maintenance Case*, P. C. May 2, 1918.

(*e*) *Neelkisto Deb Burmono* v. *Beerchunder Thakoor and others* (1868), 12 M. I. A. 523; S. C. 12 Suth. (P.C.), 21; S. C. 3 B. L. R. (P. C.), 13, *re* Tipperah Raj.

Gunesh v. *Moheshur*, (1862), 6 M. I. A. 164, *re Raj of Tirhoot; Anund* v. *Dheraj* (1861), 5 M. I. A. 82; *Rawut Urjun* v. *Rawut Ghunsiam* (1861), 5 M. I. A. 169; *Chowdhry Chintamun* v. *Nowlukhu*, L. R. 2 I. A. 263; *Yarlagadda Mallikarjuna* v. *Durga*, L. R. 17 I. A. 147; *Garurudhwaja* v. *Saparandhwaja*, L. R. 27 I. A. 238; *Chandika Baksh* v. *Muna Kuer*, L. R. 29 I. A. 70; *Parvati Kunwar* v. *Chandra Pal*, L. R. 36 I. A. 125; *Durbhunga Raj Case*, L. R. 36 I. A. 176; *Ekradeswar* v. *Bahuasin*, L. R. 41 I. A. 275.

On custom relating to large estates see *Hunsapore Case*, 12 M. I. A. 1; *Mutta Vaduganatha* v. *Dorasinga*, L. R. 8 I. A. 99; *Ram Nundun Singh* v. *Janki Koer*, L. R. 29 I. A. 178; *Mohammed Afzul Khan* v. *Ghulam Kasim*, L. R. 30 I. A. 190; *Nuzvid Case*, L. R. 7 I. A. 38; *Mirangi Zamindar* v. *Satrucharla Ramabhadra*, L. R. 18 I. A. 45; *Ramnad Case*, I. L. R. 24 Mad. 626. They lay down that confiscation and regrant of a raj in the absence of intention to let in the operation of ordinary law do not alter the nature of such a raj in respect ofimpartibility and primogeniture.

(*f*) Manu VII. 203. Yajnav. I. 342. The same edited by Janardan Mahadev, p. 358, Col. Dig., Book II., Chap. III., T. 60.

(*g*) 14 M. I. A. 570, 585.

(*h*) *Soorendranath Roy* v. *Massamut Heeramonee Burmoneah*, 12 M. I. A. 81, 91.

to select his heir (*i*) founded on custom though for some time disused or not distinctly asserted. In the *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (*k*) their Lordships dwell on the importance of the opinions of Pandits, such as those collected in the present work. By Bombay Regulation II. of 1827, a Hindu law officer was attached to the Saddar Adalat, and one to each Zilla Court, and questions of Hindu Law were generally disposed of in accordance with the responses of these officers. Each of the answers collected in this volume thus became the basis of an actual decision. The functions of the Hindu, as of the Mohammedan law officers were virtually set aside by the new Civil Procedure Code Act VIII. of 1859; and by Bombay Act IV. of 1864, supplementing (General) Act XI. of 1864, the sections of the Regulation relating to the Hindu law officers were repealed. Their services were discontinued, and the Hindu law has since then had to be collected from the recognized treatises and from the records which these officers (usually called Sastris) had left behind them.

Residence within a Presidency town of which the chief inhabitants are English, does not, of itself, subject a Hindu to the English law (*l*), though in Bombay particular legislation may to some extent have had this effect (*m*).

Emigration from one to another province of India does not necessarily alter the law of inheritance to which the emigrant family originally belonged (*n*); though, where the migration is

(*i*) *Neelkisto Deb Burmono* v. *Beerchunder Thakoor and others*, 12 M. I. A. 523.

(*k*) 12 M. I. A. 397, 438, 439. See also *Lulloobhoy Bappoobhoy* v. *Cassibai*, L. R. 7 I. A., at p. 230. That the Sastris were under strong religious obligation, see Vasishtha III. 6. Compare Savigny's History of the Roman Law, English Translation, p. 284.

(*l*) *The Administrator General of Bengal* v. *Ranee Surnomoyee Dosee*, 9 M. I. A. 387.

(*m*) *Naoroji Beramji* v. *Rogers*, 4 Bom. H. C. R., p. 28, *et seq*; *Kahandas Narandas, In re*, I. L. R. 5 Bom. 154, 165, 170.

(*n*) *Rutcherputhy Dutt et al.* v. *Rajunder Narrain Rae et al.* 2 M. I. A. 132. Compare on this point *Rani Pudmavati* v. *B. Doolar Singh et al.* 4 M. I. A. 259, with *Rany Srimuti Debeah* v. *Rany Koond Luta et al. Ibid.* 292; *Chundro Sheekhur Roy* v. *Nobin Soonder Roy et al.* 2 C. W. R. 197; *Nobin Chunder* v. *Junardhun Misser*, C. W. R. Sp. No. p. 67; *Lukkea Debea* v. *Gunga Gobind Dobey et al. Ibid.* for 1864, p. 56; the *Rajah of Coorg's Case*, and others quoted in 2 Nort. L. C. 474 and 12 M. I. A. 90; 1 Beng. Law. R. 26 P. C. 8 C. W. R. 261; *Abdurahim Haji Ismail Mithu* v. *Halimabai*, P. C. Dec. 3, 1915; *Ramdas* v. *Chandra Dassia*, I. L. R. 20 Cal. 409.

from one country to another, the presumption is in favour of adopting the law of new domicil, and the retention of the original family law must be affirmatively proved (*o*). In *Ramchandra Martand-Waikar* v. *Kothekar* (*p*) it has recently been held that "on settling down in a province of India a Hindu adopted the *lex loci* and was governed by the rules of the Mitakshara generally in force in that province." This marks the close connexion of the law of Inheritance amongst the Hindus with their family law. But at the same time a customary law of inheritance may, it appears, be changed at his election by the person subject to it attaching himself to a class of the community on which the custom does not operate (*q*) and subject to a different law. It may be abandoned in favour of the general law either by agreement or desuetude (*r*). In *Rajah Nugendur Narain* v. *Raghonath Narayan Dey* (*s*) it was held that a family custom as to intermarriages might be proved by declarations made by members of the family. But still the course of devolution prescribed by law cannot be altered by a mere private agreement (*t*).

The Madras High Court (*v*) has decided that since the passing of the Indian Succession Act native Christian families have no longer been free to adhere to the Hindu Law of Succession, but that members born before the Act came into operation would not be deprived of their rights under the Hindu law. The latter point has been similarly ruled at Calcutta (*w*). The Allahabad High Court has held that Hindu law might be applied to those who, though not Hindus, have always followed the Hindu law (*x*), and in the case of Cutchee Memons, who are Mohammedans, Hindu Law of Inheritance has been held applicable to them, though they

(*o*) *Abdurahim Haji Ismail Mithu* v. *Halimabai*, P. C. Dec. 3, 1915; S. C. L. R. 43 I. A. 35.

(*p*) L. R. 41 I. A. 290.

(*q*) *Abraham* v. *Abraham*, 9 M. I. A. 195; *Abdurahim Haji Ismail Mithu v. Halimabai*, P. C. Dec. 3, 1915.

(*r*) *Abraham* v. *Abraham*, *supra; Court of Wards* v. *Pirtha Singh*, 21 W. R. 89, 92, C. R.; *Baroda Debea* v. *Rajah Prankishen Singh*, 2 C. W. R. 81. 12 M. I. A. *supra*. *Rajkishan* v. *Ramjoy*, I. L. R. 1 Cal. 186. See further below, and Index "Custom."

(*s*) C. W. R. for 1864, p. 20.

(*t*) *Balkrishna Trimbak Tendulkar* v. *Savitribai*, I. L. R. 3 Bom. 54, 57. See *Kahandas Narandas, In re*, I. L. R. 5 Bom. 154, 164.

(*v*) *Ponnusami Nadan* v. *Dorasami Ayyan*, I. L. R. 2 Mad. 209.

(*w*) *Sarkies* v. *Prosonomoyee Dossee*, I. L. R. 6 Cal. 794.

(*x*) *Raj Bahadar* v. *Dagae*, I. L. R. 4 All. 343; *Jugmohundas* v. *Sir Mangaldas Nathubhoy*, I. L. R. 10 Bom. 539.

are outside the operation of the Hindu Wills Act (XXI.) of 1870 (*y*). This retention of a portion of the Hindu law would only be by way of an exception to the general law adopted by the Memons (*z*) and by the Borahs who are Sunnis (*a*) and by the Mohammedan Grasias (*b*) or by the Kolh tribe (*c*). Conversion does not necessarily put an end to an obligation under the former law (*d*); but it confers a right of choice, either to retain the old law or to adopt the new one (*e*).

In *Myna Boyee* v. *Ootaram* (*f*) it was held that the illegitimate sons of a European by two native women could not form a joint Hindu family in the proper sense, but could constitute "themselves parceners in the enjoyment of their property after the manner of a Hindu joint family." See further Lord Westbury's judgment in *Barlow* v. *Orde* (*g*) to the effect that in the absence of a general *lex loci*, the law applicable to the succession of any individual depends on his personal status, which again mainly depends on his religion (*h*).

By the Punjab Laws Act (IV.) of 1872, and Act XII. of 1878, the Hindus and the Mohammedans in the Punjab are governed by their own laws as modified by custom. The presumption, therefore, is in favour of the Hindu and the Mohammedan law, but for those who belong to the agriculturist tribes whose names have been announced in the local gazette the presumption is in favour of custom.

In litigation between a Hindu on the one side and a Mohammedan, a Christian or a Parsee on the other, it sometimes happens that the decision would be different according as the law governing the one or the other party as a member of a class should be applied. The Statute 21 Geo. 3. c. 70, § 17, enabling the Supreme Court to hear and determine all suits against

(*y*) *Haji Ismail, In re*, I. L. R. 6 Bom. 452; *Ahmadboy* v. *Kasambhai*, I. L. R. 13 Bom. 534.

(*z*) *Jawala* v. *Dharum*, 10 M. I. A. 537; *Hakim Khan* v. *Gool Khan*, I. L. R. 8 Cal. 826.

(*a*) *Bai Baija* v. *Bai Santook*, I. L. R. 20 Bom. 57.

(*b*) *Fatesangji* v. *Hasisangji*, I. L. R. 20 Bom. 181.

(*c*) *Fanindra Deb* v. *Rajiswar*, L. R. 12 I. A. 72.

(*d*) *Ram Kumari's Case*, I. L. R. 18 Cal. 264; *Skinner* v. *Skinner*, I. L. R. 25 Cal. 537, 541.

(*e*) *Abraham* v. *Abraham*, 9 M. I. A. 237; *Jalbhai* v. *Manoel*, I. L. R. 19 Bom. 680.

(*f*) 8 M. I. A. 400, 420.

(*g*) 13 M. I. A. 277, 307.

(*h*) See *Kahandas Narandas, In re*, I. L. R. 5 Bom. 154.

inhabitants of Calcutta provides "that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined, in the case of Mohammedans, by the laws and usages of Mohammedans, and in the case of Gentoos, by the laws and usages of Gentoos; and where only one of the parties shall be a Mohammedan or Gentoo, by the laws and usages of the defendant." The Statute 4 Geo. 4. c. 71, §§ 7, 17, enabled the Crown to confer a jurisdiction on the Supreme Court of Bombay, similar to that enjoyed by the Supreme Court of Bengal, and the Charter founded on this Statute, after giving authority to the Supreme Court "to hear and determine all suits and actions that may be brought against the inhabitants of Bombay," continues thus— "yet, nevertheless, in the cases of Mohammedans or Gentoos, their inheritance and succession to lands, rents, and goods and all matters of contract dealing between party and party, shall be determined, in the case of the Mohammedans, by the laws and usages of the Mohammedans, and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a Native Court; and where only one of the parties shall be a Mohammedan or Gentoo, by the laws and usages of the defendant."

On the construction of the Statute 21 Geo. 3. c. 70, § 17, Pontifex, J., would "confine the words 'their inheritance and succession' to questions relating to inheritance and succession by the defendants." "The present," he said, "is a question of the plaintiff's succession and, therefore, not determinable by the laws and usages of the Gentoos" (*i*). It can hardly have been intended that a Gentoo should lose his law of inheritance whenever he entered the Court to enforce it. In the Bombay Charter (as in that of the Supreme Court of Madras, par. 32) the expression is slightly varied, yet the mere words would, equally with the Statute, admit of the construction put on the latter at Calcutta. It cannot well be doubted, however, that the Statutes and the Charters alike were intended to preserve the Hindu and Mohammedan laws of inheritance amongst Hindus and Mohammedans (*k*). The provision for the case of "only one

(*i*) *Sarkies* v. *Prosonomoyee Dossee*, I. L. R. 6 Cal. 794, 808. "Gentoo" means Hindu.

(*k*) See *Kahandas Narandas, In re*, I. L. R. 5 Bom. 154, 166.

of the parties " being " a Mohammedan or Gentoo " had relation primarily, if not solely, to the cases of " contract and dealing between party and party " in which the principle " In pactionibus et conventionibus unusquisque se sua lege defendere potest "— is one of general though not of universal application. On a different construction of these provisions the property of a Hindu transferred to a Christian might have been freed from the claim of widows and daughters to maintenance, but at the same time subjected to dower. " It could not have been intended by the Legislature that the power of a Mohammedan to convey should be measured by the Hindu law " (*l*). But where there has been a contract between a Christian and a Hindu, on which the Hindu is sued, the right of each to his own law is equal to that of his adversary, and in such a case it is provided in favour of the defendant that he shall have the benefit of his own law, with which he is assumed to have been comparatively familiar (*m*).

In the mofussil of the Bombay Presidency the Regulation (IV. of 1827, § 26) says—" The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone." Here the law of the defendant prevails, failing Statute law and usage of the country, but such usage there is governing inheritance, partition, adoption and the whole province of family law amongst the Hindus. The provision in favour of the defendant is not meant to have an operation such as to enable one man to dispose of another's rights (*n*). It is frequently a matter of accident which of the two parties to a suit is plaintiff and which defendant, and only where the plaintiff for instance could dispose and has disposed of rights of his own, is he deprived, failing Statute law and custom, in case of an alleged infringement of the right under another's personal law, of a remedy adhering to the right under his own personal law. A son or a wife cannot be deprived of a real right under the Hindu law by a mere transfer

(*l*) *Per* Sir M. R. Westropp, C.J., in *Lakshmandas Sarupchand* v. *Dasrat*, I. L. R. 6 Bom. 168, 184.

(*m*) Compare the language of Lord Ellenborough in *R.* v. *Picton*, 20 Howell's St. Trials, 944-5, quoted by Sir G. C. Lewis, Government of Dependencies, Note (*m*), p. 372.

(*n*) *Lakshmandas Sarupchand* v. *Dasrat*, I. L. R. 6 Bom. 183.

to a Christian; the "ownership" transferred cannot be greater than that of him who transfers it, and cannot be enlarged in the Christian's hands merely because under the English law the (Hindu's) ownership would perhaps have been unencumbered. How far then the volition of a Hindu passes property, depends on his law, as in the case of a Christian on the English law. What personal duty can be enforced against a Hindu will sometimes depend on the Hindu law, and especially the law of Inheritance. In the sphere of contract the Statute law (*o*) has now, for most purposes, superseded the Hindu law, and even in giving effect to the Hindu law of property and family law, equitable principles derived from the English Courts are brought to bear on its development in the exigencies to which the present age gives rise (*p*). This process is consistent with the Hindu law which seeks always to undo what has been fraudulently done (*q*), and strives to enforce a conscientious fulfilment of engagements (*r*); but as regards a heritage or the mutual relations of the persons interested in property through family connection or by rights derived from those so connected, it rests always on the basis of the positive law. This, therefore, is by no means superseded by the perpetual extension and the diversity of the cases brought to decision in the Courts: a firm grasp of its principles and main provisions becomes all the more necessary as details and particular instances multiply in the reports, in order to prevent the confusion which must arise from the incautious admission of rules incongruous in their logical consequences with the Hindu system.

To be correctly apprehended the Hindu law, like other systems of law, must be studied in its history, and in its connection with the religious and ethical notions of the people amongst whom it has come to prevail. The interpretation given to its ancient precepts by the commentators of authority, has been largely influenced by the philosophical systems (*s*). The texts have in

(*o*) The Indian Contract Act IX. of 1872. See also in *Mollwo March & Co.* v. *The Court of Wards*, the *dictum* Supp. I. A., at p. 100.

(*p*) See *Kahandas Narandas, In re*, I. L. R. 5 Bom. 154. File of Printed Judgments for 1880, p. 118, referring to 1 Morl. Dig. 106; 2 Bom. H. C. R. 52; 4 Beng. L. R. 8 A. C. As to the doctrine of notice, see I. L. R. 6 Bom. 193, 207, referring to *Radhanath Doss* v. *Gisborne*, 14 M. I. A., at p. 17.

(*q*) Vyav. May. Chap. IV. s. 7, para. 24. Stokes's H. L. B. 79.

(*r*) Vyav. May. Chap. IX. 4, 10. Stokes's H. L. B. 134, 136.

(*s*) See Vasishtha, Chap. XVI. paras. 1, 5, and Note. Transl. p. 79. Col. Dig. Book I., Chap. II., T. 49. Comm. and note.

some instances been manipulated in order to bring them into accordance with notions of comparatively recent growth. Thus to reduce to precision and harmony the law presented by the sources, there is need for a strict and rather widely-ranging criticism. Those sources, however, or at least the more ancient ones, are looked on as of so sacred a character; the references to them by the accepted guides of ethical and legal thought, are so frequent and so submissive; the tendency of custom, even where it has diverged from their teaching, is so strong to revert to obedience to their rational commands (*t*), that a study of them, some comprehension of their character and teachings, is indispensable as a foundation for a true mastery of the practical law of to-day.

II.—SOURCES OF THE HINDU LAW.

"God produced the transcendent body of law; since law is the King of kings, far more powerful and rigid than they; nothing can be mightier than law by whose aid, as by that of the highest monarch, even the weak may prevail over the strong" (*v*). Thus the Hindus regard their laws—religious and civil—as of divine origin. "That which was heard or revealed" is called the Sruti, and consists of the Vedas revealed by Brahma himself; "that which was remembered" is called the Smriti, and comprises the Dharma Shastra communicated to mankind through inspired Rishis or sages whose lives are recorded in the Puranas, commonly called the fifth Veda (*w*), attributed to Vyasa. The Sruti, divided into Mantras, Brahmanas and Upnishads, is of little legal value beyond furnishing evidence of some legal usage, while the Smriti embodies the law proper, both substantive and adjective. For interpretation the same rules are applied to both these authorities. They are collected in the Mimansas or disquisitions on proof and authority of precepts. Jaimini was the founder of the School of Purva Mimansa, which teaches the art of reasoning with the

(*t*) Compare the remarks of Innes, J., as to the submission of the non-Aryan tribes to the Hindu Law in *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*, I. L. R. 3 Mad., at p. 309.

(*v*) Veda (Gloss of Sancara), Sa. Br., 14, 4. 2, 23; Bri. Ar. Up. 1, 4, 14.

(*w*) *Ganga Sahai* v. *Lekhraj Singh*, I. L. R. 9 All. 289. Colebrooke, Pref. p. XII.

express view of aiding the interpretation of the Vedas; Vyasa founded the Uttara Mimansa, commonly called the Vedanta, which deduces from the text of the Indian Scriptures a refined psychology leading to a denial of a material world (*x*). The Sutras were devised for the study of the Vedas, and consisted of strings of rules containing the substance of oral lessons to aid the memory. Those which related to law and practical life were called the Dharma Sutras, and were classified into Charanas, embodying the views of certain well-known teachers such as Gautama (*y*), Baudhayana (*y*), Anastamba (*y*), Vaisishtha and Vishnu (*z*).

The Dharma Shastra may be divided into three classes:

1. The Smritis or Text-Books or Institutes, or Sanhitas, the foundation of all Hindu law, are attributed to various Rishis or ancient sages. There are three Kandas or sections in each: the first, Achara or ritual, which treats of the initiatory ceremonies, caste duties, rites of purification and sacrifice and social and domestic obligations; the second, Vyavahara or law proper, substantive and adjective; and the third, Prayaschita, relating to expiation and religious sanctions. In form and doctrine they are practically the same as Manva Dharma Shastra or the Institutes of Manu. These are no longer regarded as *final* authorities in deciding questions of law.

2. The Vyakhyana or Glosses and Commentaries upon the Smritis. They form the second great authority of Hindu law, and their number is fairly numerous. Some are merely explanatory of the texts taken from the Smritis, while others are regarded as *final* authorities; "and these latter together with the Digests, the third class of law books, are the immediate authorities for the opinion of lawyers in the respective Schools where the doctrines they uphold may prevail." (*zz*). The Commentaries on the Institutes of Manu is an instance of the first kind, while the Mitakshara, a commentary on Yajnavalkya, is an instance of the second kind.

3. The Nibandhana Grantha or Digests. In conformity with the precept of Manu—"Where there are two sacred texts

(*x*) Morley's Digest, Introduction, p. CLXXXIX.; Colebrooke on the Philosophy of the Hindus, Essays, Vol. I. p. 227.

(*y*) Translated by Dr. Bühler.

(*z*) Translated by Dr. Jolly. Sacred Books of the East, Vol. II., VII. and XIV.

(*zz*) Morley's Digest, Introduction, p. CCI.

apparently inconsistent both are held to be law, for both are pronounced by the wise to be valid and reconcilable "—they aim at reconciling apparent contradictions in the texts of the Smritis. These Digests are either general or treat of particular portions of the law embodying texts taken from the Smritis. An instance of this class of work may be mentioned the famous *Smriti Tatwa of Raghunandana Vandyaghatiya*, in twenty-seven volumes, the greatest authority of law in the Gauriya or Bengal School.

The Vedas and the Mimansas are more studied in the South of India than in the East, and the jurists of Behar and Bengal take the Nyaya or dialectic philosophy, of which Gautama is the acknowledged author, for rules of reasoning to interpret the law to suit the requirements of a progressive society. Impelled by ideals of progress, civilisation and expansion, the Hindus spread all over the Indian Peninsula, carrying their laws with them. They came into contact with other peoples with different habits of thought and of action. Sages arose to meet the emergency. Thus to the sources of the law of divine origin we find Manu adding "approved or immemorial usages" or custom of the people and equity that which was acceptable to reason (*a*). Interpretation of the law moved apace, and jurists wrote with reference to the needs of a particular locality. Schools of law thus sprang into existence. Wherever joint property system had taken firm root, based upon agricultural life or political ideals, the Mitakshara had to be interpreted with due consideration of the local wants; wherever the patriarchal system had superseded the joint property system, as in Bengal, perhaps consequent upon the ideals inculcated by Gautama, the individualistic system had to be introduced. In the extreme south, the people of which were regarded as less civilised, and to which the ray of civilisation had little penetrated, the matriarchal system still held sway.

Thus it was in the eleventh century that we find five Schools of the Hindu Law as definitely formed—namely, the Maharashtra, the Dravida, the Benares, the Mithila and the Gauriya (*b*).

This may have been due to the impact of the Hindu civilisation with the Islamic (*c*). Revival in the shape of reorganisation

(*a*) Manu, II. 6; Yajnavalkya, I. 40, 156 and 343, II. 21; *Sanjivi* v. *Kashi*, I. L. R. 21 Mad. 229.

(*b*) Morley's Digest, Introduction, p. CLXXXIX.; *Collector of Madura* v. *Motoo Ramlinga*, 12 M. I. A. 397; *Narasammal* v. *Balaramcharlu*, 1 Mad. H. C. 420.

(*c*) Saravadhikari's Hindu Law of Inheritance.

brought into existence powerful kingdoms which patronised the compilation of the various works based upon the interpretation of the Mitakshara leading up to the formation of the various schools which are grouped under that head; while in Bengal, where the patriarchal system had replaced the joint-property system, we find Jimutavahana in the fifteenth century asserting the force of the Dayabhaga as an individualistic system much on the same lines as was taught by Islam.

(I.)—On the Authorities of the Hindu Law as prevailing in the Bombay Presidency.

(I.) The Maharashtra School.

1. The authorities on the written Hindu Law in Western India are, according to Colebrooke (*d*), the Mitakshara of Vijnanesvara and the Mayukhas, especially the Vyavaharamayukha of Nilakantha. Morley (*e*) adds the Vyavaharamadhava Nirnayasindhu, Smritikaustubha, Hemadri, Dattakamimamsa, and Dattakachandrika. The quotations of the Sastris, appended to their Vyavasthas, which perhaps afford the most trustworthy information on the subject, show that the following works are considered by them the sources of the written law on this side of India:—

1. The Mitakshara of Vijnanesvara,

2. The Mayukhas of Nilakantha, and especially the Vyavaharamayukha,

3. The Viramitrodaya of Mitramisra,

4 and 5. The Dattakamimamsa of Nandapandita and the Dattakachandrika of [Devandabhatta] Kubera (*f*),

6. The Nirnayasindhu of Kamalakara,

7 and 8. The Dharmasindhu of Kasinatha Upadhyaya and the Samskarakaustubha of Anantadeva,

(*d*) Strange, El. H. L., 4th ed., p. 318. Preface to Treatises on Inheritance, Stokes's H. L. B., p. 173.

(*e*) Digest II. CCXXII.

(*f*) Roa Saheb V. N. Mandlik, Vyavaharamayukha and Yajn. Introd. p. lxxii., is right in objecting to Mr. Sutherland's conjecture, which attributes the authorship of the Dattakachandrika to Devandabhatta.

9, and lastly, in certain cases the Dharmasastras, or the Smritis and Upasmritis, which are considered to be Rishivakyani, "sayings of the sages," together with their commentaries. These results have been corroborated by the concurrent testimony of those Law Officers and Pandits whom we have had an opportunity of consulting.

RELATIVE POSITION.

2. The relative position of these works to each other may be described as follows:—In the Maratha country and in Northern Kanara the doctrines of the Mitakshara are paramount; the Vyavaharamayukha, the Viramitrodaya and the rest are to be used as secondary authorities only. They serve to illustrate the Mitakshara and to supplement it. But they may be followed so far only as their doctrines do not stand in opposition to the express precepts or to the general principles of the Mitakshara (*g*). Among the secondary authorities, the Vyavaharamayukha takes precedence of the Viramitrodaya (*h*). The questions of inheritance in the island of Bombay are to be determined in accordance with the Mitakshara, subject to any varying doctrine contained in the Vyavaharamayukha; they should be harmonised wherever it is reasonably possible (*i*). The Dattakamimamsa and the Dattakachandrika, the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance, but that they may be set aside on general grounds, in case they are opposed to the doctrines of the Vyavaharamayukha or of the Dharmasindhu and Nirnayasindhu. The two latter works and the Samskarakaustubha, occupy an almost equal position in regard to questions on ceremonies and penances. They are more frequently consulted

(*g*) See *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, 12 M. I. A. 438; S. C. 10 Suth. (P. C.) 17; S. C. 1 B. L. R. (P. C.) 1; *Nayaran Babaji* v. *Nana Manohar*, 7 Bom. H. C. R. 167, 169, A. C. J.; *Krishnaji Vyankatesh* v. *Pandurang*, 12 *Ibid.* 65; *Rahi* v. *Govind valad* Teja, I. L. R. 1 Bom. 106; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, 565 S. C. in appeal to P. C. L. R. 7 I. A., at p. 191; *Ramkoonwur* v. *Ummer*, 1 Borr. R. 460.

(*h*) See Colebrooke's Introduction to Treatises on Inh., Stokes's H. L. B. 173, 176, 178; *Gridhari Lall* v. *The Bengal Govt.*, 12 M. I. A. 448; S. C. 1 B. L. R. (P. C.) 44; *Jagannath Prasad* v. *Ranjit Singh*, I. L. R. 25 Cal. 367.

(*i*) *Bai Kesserbai* v. *Morariji*, L. R. 33 I. A. 176.

by the Sastris of the Maratha country than the Mayukhas, which refer to the same portions of the Dharma. Among these three, the Nirnayasindhu is held in the greatest esteem.

All points of law, which may be left undecided by the works mentioned, may be settled according to passages from the Smritis or Dharmasastras, or even from the Puranas. The latter have less authority than the former, and may be overruled by them (*k*). In case of a conflict between the rules of the Smritis either may be followed, as reasoning on principles of equity (yuktivichara) shall decide the solution (*l*).

The law of Gujarat in some cases, it seems, alters the order of the authorities and places the Vyavaharamayukha before the Mitakshara. As an instance may be quoted the case of a sister's succession to her brother's estate, immediately after the paternal grandmother, which, in accordance with the Mayukha, is allowed in Gujarat. How far precisely this preference of the Mayukha goes, is a matter of some doubt, to be cleared up by judicial determination (*m*).

(*k*) Vyasa I. 4. "Where a conflict between the Sruti, Smriti and Puranas appears, the text of the Sruti is the norm; but in case of a conflict between the (latter) two, the Smriti is preferable."

(*l*) See Muir's Sanskrit Texts, II., 165, and III., 179, etc.

(*m*) See below; B. I. Introd., s. 4, B. (7); Introductory remarks to Chap. II. s. 14 I. A. 1; the case of *Vijayarangam* v. *Lakshman*, 8 Bombay H. C. R. 244 O. C. J.; *Lalubhai* v. *Mankuvarbai*, I. L. R. 2 Bom. 388; L. R. 7 I. A. 212; S. A. No. 158 of 1870, decided on March 27, 1871, Bom. H. C. printed Judgments File for 1871.

Rao Saheb V. N. Mandlik (Introd. to Vyavaharamayukha and Yajnavalkya, p. l.) has found fault with the above statement of the sources of the Hindu Law in Bombay, and of their relative importance. He thinks that the editors of the Digest consider the Mitakshara, the Mayukha and the Nirnayasindhu the only recognised official guides for settling the Hindu law, and adds that this opinion is a grave error. The censure, however, rests on an entire misapprehension of the views entertained. In the first two editions of this work, the *Dharmasastras and their Commentaries* have been mentioned as the ninth division of the sources of the law (as administered in Bombay), and in the amplification of that passage, the *Puranas*, likewise, have been named. What the editors have stated and still hold, is that the eight works, enumerated by name, hold the first rank among the legal works used in Bombay, and that their doctrines cannot be set aside lightly in favour of conflicting opinions of other authors, however much the latter may please individual taste. The editors have further pointed out that the numerous omissions in the standard works may be supplied by information, derived from the *dicta* of the authors of Smritis, whether these be contained in complete original treatises (Sutras or Dharmasastras), or in quotations given

MITAKSHARA.

3. The first of these authorities, the Mitakshara (*n*), is the famous commentary of Vijnanesvara on the Institutes of

by the medieval Nibandhakaras, and by reasoning on principles of equity. In accordance with these principles they have, in the notes on the cases, freely drawn on published and unpublished legal works, not contained in their list, in order to elucidate points left undecided or doubtful in the Mitakshara Mayukha, &c. But it did not enter into their plan to give a review of the medieval literature on Dharma or on Vyavahara, and without such a review no useful purpose, they thought, could be served by printing a mere list of authors' names and of titles. The Rao Saheb has given such a list, at pp. lx. and lxi. of his Introduction, but one drawn up with so little regard to system that in some instances the same works are entered under two names, and treatises on sacrifices, astrology, astronomy and philosophy, nay, poetical and story-books are placed side by side with works on the civil and religious law. The list, given at pp. lxviii. and lxix., which is stated to have been compiled from answers of Sastris, contains several double and inaccurate entries (such as Mitakshara and Vijnanesvara, Sarvamayukha,= all the Mayukhas and the separate titles of the twelve Mayukhas, such as Madhava, Dinakaroddyota, &c., where specifications are required. It is incomplete also, as the Rao Saheb himself suspects, and appears to have been made up exclusively by Konkanastha and Desastha Pandits. Much fuller information on the legal books, consulted by the Bombay Pandits, may be obtained from Dr. Bühler's Catalogues of MSS. from Gujarat (facs. III., p. 67 *seq.*) and Dr. Kielhorn's Catalogue of MSS. from the Southern Maratha Country. As regards the comparative estimation in which the books, contained in the Rao Saheb's list, are held, no information is given—an omission which makes it almost valueless for the purpose which it is intended to serve. The fact that a good many other books besides those enumerated in the Digest are consulted—that is, occasionally referred to by Pandits—proves nothing against the opinion advanced by the editors that the eight works, named above, are the standard authorities, nor do the Rao Saheb's remarks on the Mitakshara (p. lxxi.) disprove its pre-eminence, as far as questions of the Civil Law are concerned. His *dictum* that there is nothing remarkable about the book is controverted by the view of the responsible Court Sastris as pointed out in *Krishnaji Vyankatesh* v. *Pandurang*, 12 Bom. H. C. R. 65, and in *Lallubhai Bapubhai* v. *Mankuverbai*, I. L. R. 2 Bo. S., at pp. 418, 445, and of many excellent native authorities, as well as by the respectful treatment accorded to Vijnanayogin, in the best native compilations of the sixteenth and seventeenth centuries. His remark that the works of Kamalakara, Madhava, Narayana and other Bhattas are more frequently consulted than the Mitakshara is true. But the reason of this is that, under British rule, with its organised judiciary, Pandits are consulted by the people not on civil law, but on vows, penances, ceremonies, and other matters of the religious law, on which subjects the books, named by him, give fuller information than the Mitakshara.

(*n*) The proper title of the work, which however is used in the MSS. only, is Rijumitaksheratika.

Yajnavalkya. The latter work, which probably is a versification of a Dharmasutra—that is, of a set of aphorisms on Dharma belonging to the White Yajurveda (*o*), contains about a thousand verses divided into three chapters (kandas) which treat respectively "of the rule of conduct" (achara), of civil and criminal law (vyavahara), and of penances (prayaschitta). As may be inferred from the small extent of Yajnavalkya's work, this author gives fragmentary rules only, which neither exhaust their subject, nor are in every case easily intelligible. Vijnanesvara remedies the defects of his original, not only by full verbal interpretations, but also by adding long discussions on doubtful points, and by illustrating and developing Yajnavalkya's and his own doctrines by quotation from the Institutes of other Rishis. For he holds the opinion, which is also the one generally received among modern Hindu lawyers, that the Smritis or various Institutes of Law form one body, and are intended to supplement each other (*p*). But this opinion occasionally misleads him, and causes him in some few cases to explain the text of Yajnavalkya in a manner inconsistent with the rules of sound interpretation. With these occasional exceptions, his expositions certainly merit the high repute in which they long have stood with the learned of the greater part of the Indian Peninsula. The discussions and amplifications, added by Vijnanesvara to his explanation of

(*o*) See below.

(*p*) Vijnanesvara says in his commentary on Yajnavalkya I. 5, which contains an enumeration of certain authors of Smritis (Mit. Acharak, 1*b*. 15, Bahuram's edition of Samvat 1869) :—

"The meaning (of this verse, I. 5) is that the Institutes of Law composed by Yajnavalkya ought to be studied. The enumeration (of authors of Smritis given in this verse) is not intended to be exhaustive, but merely to give examples. Therefore (this verse) does not exclude (the works of) Baudhayana and others (who are not mentioned) from the Institutes of Law; as each of these (Smritis) possesses authority, the points left doubtful (by one) may be decided according to others. If one set of Institutes contradicts the other, then, there is an option."—See Manu II. 10, 14; XII. 105, 106; Vyav. May. Chap. I. pl. 12; Col. Dig. V. s. 7, 424; Mit. in 1 Macn. H. L. 188. Muir's Sanskrit Texts II. 165; III. 179, ss., and as to the applications of the texts, *Bhyah Ram Singh* v. *Bhyah Ugur Singh*, 13 M. I. A. 390, and *Collector of Madura* v. *Mootoo Ramalinga Sathapathy*, 12 M. I. A., at p. 438.

The Hindu commentators always endeavour, even at the cost of much straining, to extract consistent rules from texts which they regard as equally above human censure "comme d'après la méthode des légistes il faut que les textes aient raison lorsqu'ils ne présentent aucun sens." See Goldstücker "On the Deficiencies in the Administration of the Hindu Law," p. 2.

Yajnavalkya's text, make the Mitakshara rather a new and original work, based on Yajnavalkya than a mere gloss, and one more fit to serve as a code of law than the original. But extensive as the Mitakshara is, it does not provide for all the cases arising, and, if used alone, would often leave the lawyer without guidance for his decision.

Regarding the life and times of Vijnanesvara little is known. Recent discoveries, however, make it possible to fix his date with greater certainty than could be done formerly. Mr. Colebrooke (*q*) placed Vijnanesvara between 800—1300 A.D., because, on the one hand, he is said to have belonged to an order of ascetics founded by Sankaracharya, who lived in the eighth century A.D., and because, on the other hand, Visvesvara, the oldest commentator, flourished in the fourteenth century of the Christian era. He adds that if the Dharesvara (*r*), "the lord of Dhara," quoted in the Mitakshara, is the same as the famous Bhojaraja, king of Dhara, the remoter limit of Vijnanesvara's age will be contracted by more than a century. In favour of Mr. Colebrooke's latter statement, Kamalakara's testimony may be adduced, who in the Vivadatandava (succession of a widow) ascribes the same opinion to Bhojaraja, which the Mitakshara attributes to Dharesvara (the lord of Dhara).

A much better means for settling the date of Vijnanesvara is, however, furnished by some verses, which are found at the end of the Mitakshara in some of the oldest MSS. (*s*), and in the Bombay lithographed edition, and which were apparently not unknown to Mr. Colebrooke (*t*).

There we read verses 4 and 6 (*v*):—

4. "There has not been, nor is nor will be on earth a city, comparable to Kalyanapura; no king has been seen or heard of,

(*q*) Stokes's H. L. B., p. 178.

(*r*) See, for example, Col. Mit. II. 1, 8 (Stokes, p. 429).

(*s*) The MS. of the Govt. of Bombay, dated Saka Samvat 1389, Dr. Bhau Daji MS. and Ind. Off. No. 2170, dated Vikrama Samvat, 1835.

(*t*) Stokes, p. 178.

(*v*) See Journ. Bo. Br. Roy. As. Soc. IX., pp. 134-138, and lxxiv.—lxxvi. The recovery of the Vikramankadevacharita makes it probable that Vikramankopamah, not Vikramarkopamah, is the correct reading in verse 4. The statement made at the end of the article, that the concluding verses belong not to Vijnanesvara, but to some copyist, is no longer safe. Recent researches show that most if not all Sanskrit authors appended to their works statements regarding their own private affairs, which frequently are not in harmony with our notions of modesty.

who is comparable to the illustrious Vikramanka; nothing else that exists in this kalpa bears comparison with the learned Vijnanesvara. May these three who resemble (three) kalpa-creepers, be endowed with stability."

6. " Up to the bridge of famous (Rama), the best of the scions of Raghu's race, up to the lord of mountains, up to the western ocean, whose waves are raised by shoals of nimble fishes, and up to the eastern ocean, may the lord Vikramaditya protect this world, as long as moon and stars endure."

Vijnanesvara lived, therefore, in a city called Kalyanapura, under a king named Vikramaditya or Vikramanka. As the learned Pandit, by speaking of his opponents as " the Northerners " shows (*w*) that he was an inhabitant of Southern India, it cannot be doubtful that the Kalyanapura named by him is the ancient town in Nizam's dominions, which from the tenth to the fourteenth century was the seat of the restored Chalukya dynasty (*x*). This identification is supported by the consideration that Kalyana in the Dekhan is the only town of that name, where princes, called Vikramaditya, are known to have ruled. One of these Vikramaditya-Kalivikrama-Parmadiraya, bore also, according to the testimony of his chief Pandit and panegyrist, Bilhana, the not very common appellation, Vikramanka (*y*). He appears to be the prince named as Vijnanesvara's contemporary. His reign falls according to his inscriptions between the years 1076—1127 A.D. Hence it may be inferred that Vijnanesvara wrote in the latter half of the eleventh century, a conclusion which agrees well enough with his quoting Bhoja of Dhara, who flourished in the first half of the same century (*z*). It may be added that Vijnanesvara certainly was an ascetic, because he receives the title paramahamsaparivrajakacharya. By sect he was a Vaishnava. His father's name was Padmanabha-bhatta, and he belonged to the Bharadvaja gotra. The discovery that Vijnanesvara was an inhabitant of Kalyana in the Dekhan, and a contemporary, if not a protegé, of the most powerful king whom the restored Chalukya dynasty produced, explains why his book was adopted as the standard work in Western and Southern India, and even in the valley of the Ganges.

(*w*) See Journ. Bo. Br. As. Soc. IX., p. lxxv.

(*x*) Regarding the Chalukya dynasty, see Sir W. Elliott, Journ. Bengal Br. As. Soc. IV., p. 4.

(*y*) See Vikramankadevacharita of Bilhana, *passim*.

(*z*) See Indian Antiquary, VI., p. 50 *seq*.

The explanation of the Mitakshara is facilitated by two Sanskrit commentaries, the above-mentioned Subodhini of Visvesvarabhatta and the Lakshmivyakhyana, commonly called Balambhattatika, the work of a lady, Lakshmidevi, who took the *nom de plume* Balambhatta (*a*). Visvesvara's comment explains selected passages only, while Lakshmidevi gives a full and continuous verbal interpretation of the Mitakshara accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation possible to every term of Yajnavalkya.

Instances of this tendency may be seen in the quotations given below. Her opinions are held in comparatively small esteem, and are hardly ever brought forward by the Sastris, if unsupported by other authorities.

Two other works, the Viramitrodaya and the Yajnavalkya-dharmasastranibandha, a commentary on Yajnavalkya, by Aparadityadeva, or Aparарka, also give great assistance for the explanation of the Mitakshara. About the former more will be said below. As regards Apararka's bulky work, it must be noted that Mr. Colebrooke recognised its importance, and frequently quoted it (*b*). If his example has not been followed in the first edition of this work, the sole reason was that no MSS. were then procurable in Bombay. The Nibandha is now accessible in several copies, and has been used to elucidate several important points. Apararka or Aparadityadeva belonged to the Konkana branch of the princely house of the Silaras, or Silaharas, who had their seat at Puri, and held the Konkana as well as the adjacent parts of the Dekhan as feudatories, first of the Rathors of Manyakheta-Malkhet, and later of the Chalukyas of Kalyana. He reigned and wrote between 1140—1186 A.D., shortly after Vijnanesvara's times (*c*). His doctrines closely resemble those of his illustrious predecessor; several passages of his work look like amplifications of Vijnanesvara's *dicta*, and are of great value for the correct interpretation of the Mitakshara. It is, however, difficult to say whether Apararka in these cases actually used the Mitakshara, or whether both drew from a common source.

(*a*) See Colebrooke Stokes's H. L., p. 177, Aufrecht, Catal. Oxf. MSS. p. 262*a*; F. E. Hall Contribution *towards* Ind. Bibl., p. 175. The correct form of Lakshmidevi's family name is *Payagunde*.

(*b*) Stokes's H. L. B., p. 177, and Translation of the Mit. on Inh., *passim*.

(*c*) See Journ. Bo. Br. As. Soc. Vol. XII. Report on Kasmir, p. 52.

Besides the Indian commentaries and Nibandhas, there is the excellent translation of the Mitakshara on Inheritance, by Colebrooke (*d*), which has always been made use of in translating the authorities appended to the Vyavasthas. In some places we have been compelled to dissent from Colebrooke; but we are persuaded that in nearly all these instances Colebrooke had different readings of the text before him. The first part of the Vyavaharakanda of the Mitakshara has been translated by W. H. Macnaghten. The edition of the Sanskrit text of the Mitakshara used for the Digest is that issued by Baburam, Samvat, 1869.

VYAVAHARAMAYUKHA.

4. The Vyavaharamayukha is the sixth Mayukha or "ray" of the Bhagavanta-bhaskara, "the sun," composed (with the permission of, and dedicated to, king Bhagavantadeva) by Nilakanthabhatta. The Bhaskara, which consists of twelve "rays" or divisions, forms an encyclopedia of the sacred law and ethics of the Hindus. It contains:—

1. The Samskaramayukha, on the sacraments.
2. The Acharamayukha, on the rule of conduct.
3. The Samayamayukha, on times for festivals and religious rites.
4. The Sraddhamayukha, on funeral oblations.
5. The Nitimayukha, on polity.
6. The Vyavaharamayukha, on Civil and Criminal Law.
7. The Danamayukha, on religious gifts.
8. The Utsargamayukha, on the dedication of tanks, wells, &c.
9. The Pratishthamayukha, on the consecration of temples and idols.
10. The Prayaschittamayukha, on penances.
11. The Suddhimayukha, on purification.
12. The Santimayukha, on averting evil omens (*e*).

(*d*) Two treatises on the Hindu Law of Inheritance, translated by H. T. Colebrooke, Calcutta, 1810, 4to. Reprinted in Wh. Stokes's H. L. B., Madras, 1865, and by Girish Chandra Tarkalankar, Calcutta, 1870.

(*e*) See Borradaile in Stokes's H. L. B., p. 8. The correctness of the order in which the books are enumerated is proved by the introductory verses of each Mayukha, where the immediately preceding one is always mentioned, as well as by the longer introduction to one of the MSS. of the Nitimayukha.

The Vyavaharamayukha, which has the greatest interest for the student of Hindu law, is, like all the other divisions of the Bhaskara, a compilation based on texts from ancient Smritis, and interspersed with explanations, both original and borrowed from other writers on law. It treats of legal procedure, of evidence, and of all the eighteen titles known to Hindu law, which, however, are arranged in a peculiar manner differing from the systems of other Pandits. In his doctrines Nilakantha follows principally the Mitakshara and the Madanaratna of Madanasimhadeva (*f*), sometimes preferring the latter to the former. From a comparison of the portions on inheritance of the Mayukha and Madanaratna, it would seem that Nilakantha sometimes even borrowed opinions from Madana without acknowledgment. Some passages of the Mayukha—for example, the discussion on the validity of certain adoptions—are abstracts of sections of the Dvaitanirnaya, a work by Sankara, the father of Nilakantha, and are not intelligible without the latter work (*g*).

Of Nilakantha's life and times some account has been given by Borradaile (*h*). According to him, that Pandit was of Desastha-Maharashtra descent and born in Benares. He lived, as one of his descendants, Harabhatta Kasikar, told Captain Robertson, the Collector of Puna, upwards of two hundred years ago—that is, about 1600, sixteen generations having passed since his time. Other Puna Pandits gave it as their opinion that Nilakantha's works came into general use about the year 1700, or 125 years before Borradaile wrote (*i*). Borradaile adduces also the statement made at the end of some MSS. of the Vyavaharamayukha, that Nilakantha lived, whilst composing the Bhaskara, under the protection of Bhagavantadeva, or Yuddhasura, a Rajput chief of the Sangara tribe, who ruled over the town of Bhareha, near the confluence of the Chambal and of the Jamna. A possible doubt as to whether the passage containing these notes is genuine and

(*f*) This author compiled an encyclopedia, similar to that of Nilakantha, the twelve Uddyotas. The work, commonly called Madanaratna, bears also the title Vyavaharaddyota.

(*g*) Stokes's H. L. B., p. 58 *seq.*; May., Chap. IV. sect. V. ss. 1—5.

(*h*) Stokes's H. L. B., p. 7 *seq.*

(*i*) The correctness of the information given to Borradaile is now attested by the paper of Professor Bal Sastri, translated in the Introd. to Rao Saheb V. N. Mandlik's Vyavaharamayukha, p. lxxv. For it appears that Nilakantha was the grandson of Narayanabhatta, who wrote in Saka Samvat 1459, or 1535 A.D.

its contents trustworthy, is removed by the fact that many copies of the Sraddha, Samskara and Nitimayukhas likewise contain the statement that Nilakantha-bhatta, son of Sankara-bhatta, and grandson of Narayanasuri, was ordered by Bhagavantadeva, a king of the Sangara dynasty, to compose the Bhaskara. Some copies of the Nitimayukha and of the Vyavaharamayukha enumerate also nineteen or twenty ancestors of Bhagavantadeva (*k*). At the same time the author calls himself there Dakshinatya-vatamsa "of Dekhani descent," and thus confirms the report of the Puna Brahmins. The edition of the Sanskrit text of the Vyavaharamayukha used for the Digest is the oblong Bombay edition of 1826. The translation of the passages from the Mayukha quoted in the Digest has been taken from Borradaile's translation. This work, though in general of great service, is frequently inaccurate. Some passages of the text have been misunderstood, and others are not clearly rendered. Where this occurs in the passages quoted, the correct translation has been added in a note (*l*).

VIRAMITRODAYA.

5. The Viramitrodaya is a compilation by Mitramisra, which consists of two kandas on Achara and on Vyavahara (*m*). The latter is written nearly in the same manner as the Mayukha. But Mitramisra adheres more closely to the Mitakshara than any other writer on law. He frequently quotes its very words; to which he adds further explanations and paraphrases. At the same time he enters on lengthy discussions regarding the opinions advocated by Jimutavahana, Raghunandana, and the Smritichandrika. Occasionally he goes beyond or dissents from the doctrines of the Mitakshara. In the Vyavaharakanda (*n*) which has been published, Mitramisra says that he was the son of Parasurama and grandson of Hamsapandita, and that he composed his work by order of king Virasimha, who, according to the last

(*k*) See Aufrecht, Oxf. Cat., pp. 280-81. His list does not quite agree with that given in the first edition of the Digest. The text of the verses is so corrupt that it cannot be settled without a collation of fresh and more ancient copies.

(*l*) The translation of Rao Saheb V. N. Mandlik, published in Bombay, 1880, is, though in some respects better than Borradaile's, not sufficiently accurate to warrant its adoption in the place of the old one.

(*m*) This would not be a matter of surprise if a third kanda on penances (prayaschitta) were found. But hitherto only two have become known.

(*n*) Viramitrodaya, sloka 2

stanza of the book, was the son of Madhukarasaha. The beginning of the unpublished acharakanda gives a fuller account of the ancestors of Mitramisra's patron, among whom, Medinimalla, Arjuna, Malakhana, Prataparudra, and Madhukara are enumerated. Besides, it is stated that these kings were Bundelas (*o*). This last remark makes it possible to identify the author's patron.

Virasimha is nobody else but the well-known Birsinh Deo of Orchha, who murdered Abul Fazl, the minister of Akbar, and author of the Ayin-Akbari (*p*). This chief, who was violently persecuted by Akbar for the assassination of his minister, was also a contemporary of Jehangir and Shah Jehan. The Viramitrodaya, therefore, must have been written in the first half of the seventeenth century, or a little later than we had placed it according to internal evidence in the first edition of this work. The references in the Digest are to the quarto edition published by Chudamani at Khidirapura, 1815. A careful translation of the part of the Viramitrodaya relating to inheritance has been published, accompanied by the text, by Mr. Golapchandra Sarkar Sastri, Calcutta, 1879.

DATTAKAMAMSA AND DATTAKACHANDRIKA.

6. The next two authorities, the Dattakamimamsa and Dattakachandrika, do not call for any remark here, as they have little importance for the law of inheritance. The discussion of them belongs to the law of adoption.

NIRNAYASINDHU.

7. The Nirnayasindhu of Kamalakara, called also Nirnayakamalakara, consists of three parichhedas, or chapters. The first and second contain the kalanirnaya—that is, the division of time, the days and seasons for religious rites, eclipses of the sun and moon, and their influence on ceremonies, &c. The third chapter is divided into three prakaranas or sections. The first of these treats of the sacraments or initiatory ceremonies, the second of funeral oblations, and the third of impurity, of the duties of Samnyasis and other miscellaneous topics of the sacred law. The book is a compilation of the opinions of ancient and modern

(*o*) Viramitrodaya, Ind. Off. No. 930, slokas 1—37.

(*p*) See Gazetteer North-West Provinces, I., pp. 21—23, where Birsimh's pedigree, which exactly corresponds with Mitramisra's genealogy of Virasimha, has been given.

astronomers, astrologers, and authors on sacred law, from whose works it gives copious quotations. The passages quoted are frequently illustrated by Kamalakara's own comments, and occasionally lengthy discussions are added on points upon which his predecessors seem to him to have been at fault. Kamalakara himself tells us that in the first and second chapters he chiefly followed Madhava's Kalanirnaya and the section of Hemadri's work which treats of Times (*q*). His learning is esteemed very highly in Western India, especially among the Marathas, and the Nirnayasindhu is more relied upon in deciding questions about religious ceremonies and rites than any other book.

In the introductory and in the concluding slokas of the Nirnayasindhu, Kamalakara informs us that he was the son of Ramakrishna, the grandson of Bhatta Narayanasuri, and the great grandson of Ramesvara. He also names his mother Uma, his sister Ganga, and his elder brother Dinakara, the author of the Uddyotas (*r*). His literary activity was very extensive. He wrote, also, the Vivadatandava, a compendium of the civil and criminal law, based on the Mitakshara, a large digest of the sacred law, called Dharmatattva-Kamalakara, divided into ten sections: 1, vrata, on vows; 2, dana, on gifts; 3, karmavipaka, on the results of virtue and sin in future births; 4, santi, on averting evil omens; 5, purta, on pious works; 6, achara, on the rule of conduct; 7, vyavahara, on legal proceedings; 8, prayaschitta, on penances; 9, sudradharma, on the duties of Sudras; 10, tirtha, on pilgrimages. The several parts are frequently found separately, and many are known by the titles sudrakamalakara, danakamalakara, &c. Kamalakara, further, composed a large work on astronomy, the siddhantatattva, vivekasindhu and other treatises (*s*). He himself gives his date at the end of the Nirnayasindhu, where he says that the work was finished in Vikrama Samvat 1668 or 1611—12 A.D. The edition of the Nirnayasindhu, used for the Digest, is that issued by Vitthal Sakharam, Saka 1779, at Puna.

(*q*) Nirnayasindhu I. 7.

(*r*) Compare also Professor Bal Sastri's paper in Rao Saheb Mandlik's Vyavaharamayukha, &c. pp. lxxv.—vi.

(*s*) See Rajendralal Mitra, Bikaner Catalogue, pp. 499, 504.—Hall Index of Indian Philosophical Systems, pp. 177, 183, where the date is, however, given wrongly. The latter is expressed by words : vasu (8), ritu (6), bhu (1), mite gatebde narapativikramato. The second figure has, as is frequently required in dates, to be read twice.

SAMSKARAKAUSTUBHA.

8. The Samskarakaustubha of Anantedeva, son of Apadeva, or one of the numerous compilations treating of the sixteen sacraments and kindred matters. It is said to belong to the same time as the Nirnayasindhu.

The author (*t*) compiled a good many other treatises on philosophical subjects, a Smritikaustubha and a Dattakaustubha on the law of adoption (*v*). The edition referred to in the Digest is the one printed at Bapu Sadasiv's Press, Bombay, 1862.

DHARMASINDHU.

9. The Dharmasindhu or Dharmasindhusara, by Kasinatha (*w*), son of Anantadeva, is a very modern book of the same description as the Nirnayasindhu. The author, according to the Pandits, was a native of Pandarpur, and died about seventy-five or eighty-five years ago.

SMRITIS.

10. The word Smriti means literally "recollection," and is used to denote a work or the whole body of works (*x*), in which the Rishis or sages of antiquity, to whose mental eyes the Vedas were revealed, set down *their recollections* regarding the performance of sacrifices, initiatory and daily rites, and the duty of man in general. The aphorisms on Vedic sacrifices (Srautasutras), the aphorisms on ceremonies for which the domestic fire is required (Grihyasutras) and the works treating of the duties of men of the various castes and orders (Dharmasutras, Dharmasastras) are all included by the term Smriti. In the common parlance of our days, however, the term has a narrower meaning, and is restricted

(*t*) The author's patron was a certain Raja Chandadeva Bahadur, about whom nothing further is known.

(*v*) Compare F. E. Hall, l. c., pp. 62, 145, 186, 190, 191, and particularly p. 185, Rajendralal Mitra, Bikaner Catalogue, p. 466.

(*w*) Prof. Goldstücker "On the Deficiencies in the present Administration of Hindu Law," App., p. 35, is mistaken in stating that the Editors of the Bombay Digest have invented the abbreviation "Dharmasindhu." Pandits of the Maratha Country generally use this form, and the Law Officers quote the book under this title. The form Dharmasindhusara finds just a little favour with the learned of Western India, as the full title of Vijnanesvara's great commentary, Rijumithakshara, instead of which the abbreviation Mitakshara, alone, is current.

(*x*) Hence the word is sometimes used in the singular as a collective noun and sometimes in the plural.

to the last class of works. Of these there exist, according to the current tradition, thirty-six, which are divided, at least by the Sastris of the present day, into Smritis and Upasmritis, or supplementary Smritis. Neither the limitation of the number, nor the division is, however, found in the older works on law, such as the Mitakshara and those books which contain it, do not always place the same works in the same class (*y*). According to Hindu views, the Smritis were mostly composed and proclaimed by the Rishis whose names they bear. But in some cases it is admitted that the final arrangement of these works is due to the pupils of the first composers (*z*). The Hindus are driven to this admission by the circumstance that some times the opening verses of the Dharmasastras contain conversations between the composer and other Rishis, stating the occasions on which the works were composed. In other cases the Smritis are considered to have originally proceeded from gods or divine beings, and to have descended from them to Rishis, who in their turn made them known among men. Thus the Vishnu Smriti is ascribed to Vishnu; and Nandapandita in his commentary suggests that it must have been heard by some Rishi who brought it into its present shape. Or, in the case of the Manava Dharmasastra, it is asserted that Brahma taught its rules to Manu, who proclaimed them to mankind. But his work was first abridged by Narada, and the composition of the latter was again recast, by Sumati, the son of Bhrigu (*a*). But, as even such Smritis were proclaimed by men, they partake of the *human* character, which the Mimamsakas assign to this whole class of works, and the great distinction between them and the revealed texts, the Veda or Sruti remains.

Hindu tradition is here, as in most cases where it concerns literary history, almost valueless. Firstly, it is certain that more than thirty-six Smritis exist at the present time, and that formerly a still greater number existed. From the quotations and lists given in the Smritis, their commentaries, the Puranas and the modern compilations on Dharma, as well as from the MSS. actually preserved, it appears that, counting the various redactions

(*y*) Borradaile in Stokes's H. L. B., p. 4 *seq*.

(*z*) Mit. Achara 1*a*, 13. "Some pupil of Yajnavalkya abridged the Dharmasastra composed by Yajnavalkya, which is in the form of questions and answers, and promulgated it, just as Bhrigu, that proclaimed by Manu."

(*a*) See preface to Narada, translated by Sir W. Jones, Institutes of Manu, p. xvi. (ed. Haughton)

of each work, upwards of one hundred works of this description must have been in existence. Their names are: 1, Agni; 2*a*, Angiras; 2*b*, Madhyama-Ang.; 2*c*, Brihat-Ang. (two redactions in verse exist, which seem to me different from the treatises quoted); 3, Atri (two redactions exist); 4, Atreya; 5*a*, Apastamba (prose, exists); 5*b*, Ditto (verse, exists); 6, Alekhana; 7, Asmarathya; 8*a*, Asvalayana (verse, exists); 8*b*, Brihat-A. (verse, exists); 9*a*, Usanas (prose, fragment exists); 9*b*, Ditto (verse, exists); 10, Rishyasringa; 11, Eka; 12, Audulomi; 13, Aupajandhani; 14, Kanva (verse, exists); 15, Kapila (verse, exists); 16, Kasyapa (prose, exists); 17*a*, Kanva; 17*b*, Kanvayana (prose, exists); 18, Katya; 19*a*, Katyayana (verse); 19*b*, Ditto (karmapradipa, exists); 19*c*, Vriddha Katy (verse); 20, Karshnajini; 21*a*, Kasyapa; 21, Upa-Kasyapa (prose, exists) (*b*); 22, Kuthumi; 23, Kunika; 24, Kutsa; 25, Krishnajini; 26, Kaundinya; 27, Kautsa; 28, Gargya; 29*a*, Gautama (prose, exists); 29*b*, Ditto (verse, exists); 29*c*, Vriddha Gaut; 30, Chidambara; 31, Chyavana; 32, Chhagaleya; 33, Jamadagni; 34, Jatukarnya; 35, Jabali (*c*); 36, Datta; 37*a*, Daksha (verse, exists); 37*b*, Ditto (quoted); 38, Dalbhya (verse, exists); 39*a*, Devala, (verse, exists); 39*b*, Ditto (quoted); 40, Dhaumya; 41, Nachiketa; 42, Narada (verse, vyavahara-section, exists); 43*a*, Parasara (verse, exists); 43*b*, Brihat Par. (verse, exists); 44, Paraskara; 45, Pitamaha; 46*a*, Pulastya; 46*b*, Laghu Pul; 47, Pulaha; 48, Paithinasi; 49, Paushkarasadi or Pushkarasadi; 50*a*, Prachetas; 50*b*, Laghu. Prach.; 51, Prajapti (verse, exists); 52, Budha (prose, exists); 53*a*, Brihaspati (verse, part exists); 53*b*, Brihat Brihaspati; 54, Baudhayana (prose, exists); 55, Bharadvaja (verse, exists); 56, Bhrigu (said to exist); 57*a*, Manu (prose, quoted); 57*b*, Ditto (verse, exists); 57*c*, Vriddha M.; 57*d*, Brihat M.; 58, Marichi; 59, Markandeya; 60, Maudgalya; 61*a*, Yama; 61*b*, Laghu Y. (verse, exists); 62*a*, Yajnavalkya (verse, exists); 62*b*, Vriddha Y.; 62*c*, Brihat Y. (exists); 63, Likhita (verse, exists); 64, Lohita (verse, exists); 65, Laugakshi; 66, Vatsa; 67*a*, Vasishtha (prose, exists); 67*b*, Ditto (verse, exists); 67*c*, Ditto (verse, exists); 67*d*, Vriddha V.; 67*e*, Brihat V.; 68, Varshyayani; 69, Visvamitra (verse, exists); 70*a*, Vishnu (prose, exists); 70*b*, Laghu V. (verse, exists); 71, Vyaghra; 72, Vyaghrapada (verse, exists); 73*a*, Vyasa; 73*b*, Laghu Vy. (verse, exists); 73*c*, Vriddha Vy. (verse, exists);

(*b*) Burnell, Tanjor Cat., p. 124.
(*c*) Sometimes spelt Jabala.

74*a*, Sankha (prose); 74*b*, Ditto (verse, exists); 74*c*, Brihat or Vriddha S. (chiefly verse, exists); 75, Sankha, and Likkita (verse, exists); 76, Sakatayana; 77, Sakalya (verse, part exists); 78, Sankhayana (verse, part exists); 79, Satyayana; 80, Sandilya (verse, exists); 81*a*, Satatapa (verse, exists); 81*b*, Vriddha or Brihat S. (verse, exists); 82*a*, Saunaka (prose); 82*b*, Ditto (karika or brihat, verse, exists); 82*c*, Ditto Yajnanga (verse, exists); 83*a*, Samvarta (verse, exists); 83*b*, Laghu S.; 84, Satyavrata; 85, Sumantu; 86, Soma; 87*a*, Harita (prose); 87*b*, Brihat H. (verse, exists); 87*c*, Laghu H. (verse, exists); 88*a*, Hiranyakesin (prose, exists) (*d*).

Even this list most likely does not comprise all the ancient works on Dharma, and a more protracted search for MSS., and a more accurate investigation of the modern compilations, will, no doubt, enlarge it considerably.

As regards the value of the Hindu tradition about the origin and history of the Smritis, the general assertion that these works belong to the same class of writings as the Srauta and Grihyasutras, and that in many instances they have been composed by persons who were authors of such Sutras, is in the main correct. But the tradition is utterly untrustworthy in the details regarding the names and times of the authors, and the immediate causes of their composition, and it neglects to distinguish between the various classes, into which the Smritis must be divided.

It is, of course, impossible for the critic to agree with the Hindu in considering Vishnu or any other deity of the Brahmanic Olympus, or Manu, the father of mankind, as authors of Dharmasastras. But it is, in most cases, also highly improbable that the Rishis, who may be considered historical personages, composed the Smritis which bear their names. For, to take only one argument, it is not to be believed, that, for instance, Vasishtha and Visvamitra, the great rival priests at the court

(*d*) All those Smritis, to which the word "exists" has been added, have been actually procured. The remainder of the list is made up from the authorities quoted in Wh. Stokes's H. L. B., p. 5, note (*a*) in the Apastamba, Baudhayana, Vasishtha Dharmasutras, in the Madhava Parasara and other modern compilations. Owing to the looseness of the Hindu Pandits in quoting, it is not always certain if the redactions, called Vriddha (old) and Brihat (great) had a separate existence. In some cases the same book is certainly designated by both. Collections of Smritis, and extracts from them, such as the Chaturvimsati, Shattrimsat, Kokila and Saptarshi Smriti have been intentionally excluded from the above list.

of King Sudas, or Bharadvaja or Samvarta, are the authors of the hymns preserved in the Rigveda under their names, and of the Smritis called after them, as the language of the former differs from that of the latter more considerably than the English of the fifteenth century from that of the present day. Much less can it be credited that Angiras or Atri, who, in the Rigveda, are half mythic personages, and spoken of as the sages of long past times, proclaimed the treatises on law bearing their names, the language of which obeys the laws laid down in Panini's grammar. Nor can we, with the Hindus, place some of the Smritis in the Satyayuga, others in the Treta, others in the Dvapara, and again others in the Kali age (*e*). The untrustworthiness of the Hindu tradition has also been always recognised by European scholars, and, in discussing the age and history of the Smritis they have started from altogether different data. In the case of the Manava and of the Yajnavalkya Dharmasastras, Sir W. Jones, Lassen, and others have attempted to fix their ages by means of circumstantial, and still more, of internal evidence, and the former work has been declared to belong perhaps to the ninth century, B.C. (*f*), or, at all events, to the pre-Buddhistic times, whilst the latter is assigned to the period between Buddha and Vikramaditya (*g*). But the bases on which their calculations and hypotheses are grounded are too slender to afford trustworthy results, and it would seem that we can hardly be justified in following the method adopted by them. The ancient history of India is enveloped in so deep a darkness, and the indications that the Smritis have frequently been remodelled and altered are so numerous that it is impossible to deduce the time of their composition from internal or even circumstantial evidence (*h*).

(*e*) This division is found in Parasara Dharmasastra I., 12.

(*f*) Sir W. Jones, Manu, p. xi.

(*g*) Lassen, Ind. Alt. II., 310.

(*h*) A statement of the case of the Manava Dharmasastra will suffice to prove this assertionn. Tradition tells us that there were three redactions of Manu—one by Manu, a second by Narada, and a third by Sumati, the son of Bhrigu, and it is intimated that the Dharmasastra, proclaimed by Bhrigu, and in our possession, is the latter redaction. Now this latter statement must be incorrect, as the Sumati's Sastra contained 4,000 slokas, whilst ours contain only 2,885. Sir W. Jones, therefore, thought that, as we find quotations from a vriddha or "old" Manu, the latter might be a redaction of Brighu, a conjecture for which it would be difficult to bring forward safe arguments. Besides the Vriddha Manu, we find a Brihat-Manu, "great Manu," quoted. Further, Manu VIII., 140, quotes Vasishtha on a question

Of late, another attempt to fix the age of the Dharmasastras, at least approximately, and to trace their origin, has been made by Professor M. Müller. According to him, the Dharmasastras formed originally part of those bodies of Sutras or aphorisms in which the sacrificial rites and the whole duty of the twice-born men is taught, and which were committed to memory in the Brahminical schools. As he is of opinion that all the Sutras were composed in the period from 600—200 B.C., he, of course, assigns Dharmasastras in Sutras or Dharmasutras to the same age, though he states his belief that they belong to the latest productions of the period during which the aphoristic style prevailed in India (*i*). He moreover considers the Dharmasastras in verse to be mere modern versifications of ancient Dharmasutras. Thus he takes the Manava Dharmasastra not to be the work of Manu, but a metrical redaction of the Dharmasutra of the Manavas, a Brahminical school studying a peculiar branch or Sakha of the Black Yajurveda. This view of the origin of the Smriti literature was suggested chiefly by the recovery of one of the old Dharmasutras, that of Apastamba, who was the founder of a school studying the Black Yajurveda, and author, also, of a set of Srauta and Grihyasutras.

The results of our inquiries in the main agree with those of Professor Müller, and we hope that the facts which, through the collection of a large number of Smritis, have come to light, will still more fully confirm his discovery, which is of the highest importance, not only for the Sanskrit student, but also for the lawyer and for the Hindu of our day, who wishes to free himself from the fetters of the achara.

We also divide the Smritis into two principal classes, the Sutras and the metrical books. In the first class we distinguish between

regarding lawful interest, and this rule is actually found in the Vasishtha Dharmasastra (last verse of Chap. II.). But nevertheless the Vasishtha Dharmasastra quotes four verses from Manu (manavan slokan), two of which are found in our Manavadharmasastra, whilst one is written in a metre which never occurs in our Samhita. Besides, the Mahabharata and Varahamihira, who lived in the sixth century A.D., quote verses from Manu which are only found in part in our Dharmasastra. See Stenzler in the Indische Studien I., p. 245, and Kern Brihatsamhita, preface, p. 43.

(*i*) See M. Müller's Hist. of Anc. Skt. Lit., pp. 61, 132, 199, 206—208, and his letter printed in Morley's Digest and Sacred Books, vol. II., p. lx. That Sutras, especially the Grihyasutras, were the sources of the Smritis, was also stated by Professors Stenzler and Weber in the first volume of the Indische Studien.

those Dharmasutras which still form part of the body of Sutras studied by a Charana or Brahminical school, those which have become isolated by the extinction of the school and the loss of its other writings, those which have been recast by a second hand, and finally those which appear to be extracts from or fragments of larger works.

The second class, the poetical Dharmasastras, may be divided into—

1. Metrical redactions of Dharmasutras and fragments of such redactions.
2. Secondary redactions of metrical Dharmasastras.
3. Metrical versions of Grihyasutras.
4. Forgeries of the Hindu sectarians.

As regards the Dharmasutras, it will be necessary to point out some of the most important facts connected with the history of the ancient civilisation of India, in order to make the position of these works in Indian literature more intelligible. The literary and intellectual life of India began, and was, for a long time, centred in the Brahminical schools or Charanas. It was from the earliest times the sacred duty of every young man who belonged to the twice-born classes, whether Brahman, Kshatriya, or Vaisya, to study for a longer or shorter period under the guidance of an acharya, the sacred texts of his Sakha or version of the Veda. The pupil had first to learn the sacred texts by heart, and next he had to master their meaning. For this latter purpose he was instructed in the auxiliary sciences, the so-called Angas of the Veda, phonetics, grammar, etymology, astronomy, and astrology, the performance of the sacrifices, and the duties of life, the Dharma.

In order to fulfil the duty of Vidyadhyayana, studying the Veda, the young Aryans gathered around teachers who were famous for their skill in reciting the sacred texts, and for their learning in explaining them; and regular schools were established, in which the sacred lore was handed down from one generation of pupils and teachers to another. We still possess long lists which give the names of those acharyas who successively taught particular books. These schools divided and subdivided when the pupils disagreed on some point or other, until their number swelled, in the course of time, to an almost incredible extent. If we believe the Charanavyuha, which gives a list of these schools or Charanas, the Brahmans who studied the Samaveda were divided into not less than a thousand such sections.

The establishment of these schools, of course, necessitated the invention of a method of instruction and the production of manuals for the various branches of science. For this purpose the teachers composed Sutras, or strings of rules, which gave the essence of their teaching. In the older times these Sutras seem to have been more diffuse, and more loosely constructed than most of those works are, which we now possess. Most of the Sutras, known to us, are of a highly artificial structure. Few rules only are complete in themselves; most of them consist of a few words only, and must be supplemented by others, whilst certain general rules have to be kept constantly in mind for whole chapters or topics. The Sutras are, however, mostly interspered with verses in the Anushtubh and Trishtubh metres, which partly recapitulate the essence of the rules, or are intended as authorities for the opinions advanced in the Sutras.

Each of the Charanas seems to have possessed a set of such Sutras. They, originally, probably, embraced all the Angas of the Veda, and we can still prove that they certainly taught phonetics, the performance of sacrifices, and the Dharma or duties of life. We possess still a few Pratisakhyas, which treat of phonetics, a not inconsiderable number of Srauta and Grihyasutras, and a smaller collection of Dharmasutras. Three amongst the latter, the Sutras of Apastamba, of Satyashadha Hiranyakesin, and of Baudhayana, still form part of the body of Sutras of their respective schools.

In the cases of the Apastamba and Hiranyakesi-Sutras, the connection of the portion on Dharma with those referring to the Srauta and Grihya sacrifices appears most clearly. The whole of the Sutras of the former school are divided into thirty Prasnas or sections, among which the twenty-eighth and twenty-ninth are devoted to Dharma (*k*). In the case of the Hiranyakesi-Sutras, the twenty-sixth and twenty-seventh of its thirty-five Prasnas contain the rules on Dharma. As no complete collection of the Sutras of the Baudhayana school is as yet accessible, it is impossible to determine the exact position of its Dharmasutra (*l*). All these three books belong to schools which study the Black

(*k*) Compare Burnell Indian Antiquary I., pp. 5-6; Sacred Books of the East, vol. II., pp. 11-15.

(*l*) The Baudhayana Dharmasutra seems to have suffered by the disconnection of the whole body of the Kalpas of that school, and has been considerably enlarged by later hands. See Sacred Books, vol. XIV., Introd. to Baudhayana.

Yajurveda. The first and second agree nearly word for word with each other. Among the remaining Dharmasutras, those of Gautama and Vasishtha stand alone, being apparently unconnected with any Vedic school. But in the case of the Gautama Dharmasutra we have the assertion of Govindasvamin, the commentator of Baudhayana, that the work was originally studied by the Chhandogas or followers of the Samaveda. Moreover, its connection with that Veda has been fully established by internal evidence, and it is highly probable that, among the adherents of the Samaveda, one or perhaps several schools of Gautamas existed, which also possessed Srautasutras. The obvious inference is that our Gautama Dharmasutra formed part of the Kalpa of one of these sections of Samavedis (*m*). In the case of the Vasishtha Dharmasutra it is clear from the passage of Govindasvamin, referred to above, that it originally belonged to a school of Rigvedis (*n*). Though it has not yet been possible to determine the name of the latter with certainty, it is not improbable that it may have been called after the ancient sage, Vasishtha, who plays so important a part in the Rigveda. It is, however, hardly doubtful that a considerable portion of our Vasishtha Dharmasutra has been recast or restored after an accidental mutilation of the ancient MSS. (*o*), while Gautama has probably suffered very little (*p*).

As regards another Dharmasutra, the so-called Vishnusmriti, which formerly was considered to be a modern recension of a Vishnusutra, further investigations have shown that it is a somewhat modified version of the Dharmasutra of the Katha school of the Yajurveda. The first information on this point was furnished by a Puna Pandit, Mr. Datar, whose opinion was subsequently confirmed by the statements of several learned Sastris at Benares (*q*). The recovery of the Kathaka Grihyasutra in Kasmir, and a careful comparison of its rules with those of the Vishnusmriti, as well as of the mantras or sacred formulas

(*m*) For the details of the arguments which bear on this question, see Sacred Books of the East II., XLI.—IX.

(*n*) Sacred Books, II., XLIX. The older theory that the work belonged to the Samaveda is, of course, erroneous.

(*o*) Sacred Books, XIV. Introduction to Dr. Bühler's translation of the Vasishtha Dharmasastra.

(*p*) Sacred Books, II., LIV.

(*q*) Journ. Bo. Br. Roy. As. Soc. XII., p. 36 (Supplement, Report on Kasmir).

prescribed in the Smriti, with the text of the Kathaka recension of the Yajurveda, and with those given by Devapala, the commentator of the Grihyasutra, leave no doubt as to the correctness of the tradition preserved by the Pandits (*r*). It is now certain that the Vishnusmriti on the whole faithfully represents the teaching of the Katha school on dharma, the sacred law. The portions which have been added by the later editor, who wished to enhance the authoritativeness of the work by vindicating a sacred character to Vishnu, are the first and last chapters and various isolated passages, chiefly verses, in the body of the book which enjoin bhakti or devotion to Vishnu or amplify the prose portions (*s*).

There are finally the Kanvayana, Kasyapa and Budha Dharmasastras, small treatises in sutras or aphorisms, which refer to portions only of the sacred law. By their style and form they undoubtedly belong to the Dharmasutras. But it would seem that they are extracts from, or fragments of, larger works. In the case of the Usanas Dharmasastra this is certain, as we meet in the medieval compilations on law with numerous quotations from the Usanas Sutras, which refer to other topics than those treated in the chapters now extant. It is, however, not clear to what Veda or school these books originally belonged.

As may be seen from the translations of the five Dharmasutras, published in Vols. II., VII., and XIV. of Professor M. Müller's Sacred Books of the East, these works treat the Dharma much in the same manner as the metrical law books—for example, those of Manu and Yajnavalkya. But they are not, like some compilations of the latter class, divided into sections on achara, "the rules of conduct," vyavahara, "civil and criminal law," and prayaschitta, "penances." They divide the sacred law into varnadharma, "the law of castes," asramadharma, "the law of orders," varnasramadharma, "the law of the orders of particular castes," gunadharma, "the law of persons endowed with peculiar qualities" (for example, kings), nimittadharma, "the law of particular occasions" (penances), and so forth, exactly in the manner described by Vijnanesvara in the beginning of the Mitakshara (*t*).

(*r*) See Jolly, Das Dharmasutra des Vishnu und das Kathakagrihyasutra, and Sacred Books VII., X.—XIII.

(*s*) Sacred Books VII., XXIX.—XXXI.

(*t*) Mitakshara I. A. 7.

The order in which the several topics follow each other is, however, not always the same.

The materials out of which the Dharmasutras have been constructed are, besides the opinions of the individual authors, passages from the Vedas quoted in confirmation of the doctrines advanced, rules given by other teachers which are also considered authoritative or are controverted, and maxims which were generally received by the Brahminical community. These maxims contain that which had been settled by *samaya*, the agreement of those learned in the law (dharmajna). Hence the Dharmasutras are also called Samayacharika Sutras—that is, aphorisms referring to the rule of conduct settled by the agreement (of the Sishtas). The passages, containing such generally approved maxims, are frequently in verse, and introduced by the phrase athapyudaharanti, "now they quote also." Numerous verses of this kind recur in nearly all the Dharmasutras. All the Sutras, with the exception of those attributed to Gautama, Budha and Kanvayana, which are written throughout in prose, are, besides, interspersed with other slokas or gathas, as they are sometimes called, which partly are attributed to schools or individual authors, such as the Bhallavins, Harita, Yama, Prajapati, Manu and others, and partly have been inserted by the writers of the Sutras in order to sum up the substance of the doctrines taught in the preceding prose portion. The introduction of slokas is found not only in the Dharmasutras, but also in the Grihya and Srauta Sutras, nay, even in the Brahmana portions of the Veda, where several of the verses, read in the Dharmasutras, occur. The same verses, too, recur in great numbers in the metrical Smritis, and they contributed, as we shall show presently, a good deal to the rise of the latter class of works.

As regards the age of the Dharmasutras, they are mostly each as old as the school to which they belong, and consequently possess a very considerable antiquity. The existence of Dharmasutras is expressly testified by Patanjali, the author of the famous commentary on Panini, who wrote in the second century B.C. (*v*). As Yaska, the author of the Nirukta, who belongs to a much remoter age than Patanjali, quotes a number of rules on the civil law in the Sutra style, it may be inferred that Dharmasutras

(*v*) Weber, Indische Studien I., 143; XIV., 458. Mahabhashya (ed. Kielhorn) I. 115 and I. 5, where Sutras on permitted and forbidden good are quoted.

existed in his time too (*w*). But, of course, this does not prove anything for the age of the particular Dharmasutras which have come down to us. Regarding them we learn from the Brahminical tradition, which in this case is confirmed by other evidence (*x*), that among the three Sutras connected with the Taittiriya Veda, Baudhayana is older than Apastamba and Hiranyakesin Satyashadha. Among the latter two Apastamba is the older writer, as is shown by the modern tradition of the Pandits, and by the fact that the Hiranyakesi-Dharmasutra, which agrees almost literally with Apastamba's work, is clearly a recast of the latter. Further, the quotations from Gautama and the unacknowledged appropriation of several lengthy passages of Gautama, which occur in the Sutras of Baudhayana and Vasishtha, show that Gautama is older than both, and, in fact, the oldest Dharmasutra which we possess (*y*). As regards the absolute determination of the age of the existing Sutras, the school of Apastamba, or Apastambha, as the name is also spelt, is mentioned in inscriptions which may be placed in the fourth century A.D. (*z*). The Apastambasutras on sacrifices, together with a commentary, are quoted in Bhartrihari's gloss on the Mahabhashya, which, as Professor Max Müller has discovered, was composed in the seventh century A.D. (*a*). The oldest quotations from the Apastamba Dharmasutra occur in the Mitakshara, the date of which has been shown to be the end of the eleventh century A.D. From internal evidence it would, however, appear that the Apastamba Dharmasutra cannot be younger than the fifth century B.C. (*b*). If that is so, the works of Baudhayana and Gautama must possess a much higher antiquity. It is of some interest for the practical lawyer to know that four of the existing Dharmasutras, those of Gautama, Baudhayana, Apastamba and Hiranyakesin, have been composed in the South of India, while the fifth, Vasishtha, probably belongs to the North.

The original of the remodelled Kathaka Dharmasutra or Vishnu Smriti was probably composed in the Punjab, the original seat of the ancient Katha school, and no doubt, dates from very remote

(*w*) Yaska, Nirukta I., 3.
(*x*) Sacred Books II., XXII.—XXIV.
(*y*) Sacred Books II., XLIX.—LIV.
(*z*) Sacred Books II., XXXIII.
(*a*) MS. Chambers, 553, fol. 10*b*. (Berlin Collection).
(*b*) Sacred Books VII., XIV.—XV.

times (*c*). The existing recension, the Vishnu Smriti, cannot be older than the third century A.D. For in chapter 78, 1—7, the weekdays are enumerated, and the Thursday is called *Jaiva*—that is, the day of Jiva. Jiva is the usual Sanskrit corruption of the Greek Ζευς, or rather of its modern pronunciation Ζεϝς (Zevs). Whatever the origin of the Indian week may be, there can be no doubt that a Sanskrit work which gives a Greek name for a week-day cannot be older than the time when these names came into use in Greece (*d*).

Among those Smritis which are quoted, but no longer preserved entire, there were probably many Dharmasutras. In most cases, however, especially in those where the quotations occur in the old Dharmasutras, it is difficult to decide, if the opinions attributed to the ancient authors are given in their own words, or if the quotations merely summarise their views. But, in a few instances, it is possible to assert with some confidence that the works quoted really were Dharmasutras and written in aphoristic prose, mixed with verses. This seems certain for that Manava Dharmasastra, which Vasishtha repeatedly quotes, for the work of Harita, which Apastamba, Baudhayana and Vasishtha cite, and for the Sankha Smriti to which the medieval compilators frequently refer. About Manu more will be said below. As regards Harita there is a long passage in prose, attributed to him by Baudhayana and by Apastamba (*e*), which looks like a verbal quotation, while Vasishtha II., 6, quotes a verse of his. It has long been known that Harita was a teacher of one of the schools connected with the Black Yajurveda. A quotation from his Dharmasutra, given by the Benares commentator of Vasishtha (XXIV., 6), indicates that the particular school to which he belonged was that of the Maitrayaniyas.

As regards the third work, the Dharmasastra of Sankha, our knowledge of its character is not derived from quotations alone. We still possess a work which is partly an extract from and partly a versification of the old Smriti. Among the now current Smritis, there is Brihat Sankha, or, as it is called in some MSS., a Vriddha Sankha, consisting of eighteen chapters, which treat of the rule of conduct (achara) and penances (prayaschitta). The whole work is written in verse, with the exception of two chapters, the twelfth

(*c*) Sacred Books VII., XIV.—XV.
(*d*) Sacred Books VII., XXIX., XXXII.
(*e*) Apastamba I., 10, 29, 13-14.

and thirteenth, where prose and verse are mixed. A comparison of the passages from the Sànkha Smriti, quoted by Vijnanesvara in the Prayaschittakanda of the Mitakshara, with the corresponding chapters of the existing Brihat Sankha, shows that the latter contains nearly all the verses of the work which Vijnanesvara had before him, while the Sutras have either been left out, or in a few instances, have been changed into verses (*f*). As at the same time our Brihat Sankha does not contain anything on civil law which, according to the quotations in the Mitakshara and other works, was treated of in the old Sankha Smriti, it appears that the existing work is not even a complete extract. But, nevertheless, it possesses great interest, as it clearly shows how the metrical law-books arose out of the Sutras. In the classification of the Smritis, a place intermediate between the Dharmasutras and the metrical Smritis must be assigned to the Brihat Sankha.

In the first division of the second class of Smritis to which the metrical versions of Dharmasutras have been assigned, we may place the works, now attributed to Manu and to Yajnavalkya, and perhaps those of Parasara and Samvarta, as well as the fragments of Narada and Brihaspati. The first two among these works begin, like many other metrical Smritis, with an introduction, in which the origin of the work is described, and its composition, or rather, revelation, is said to have been caused by the solicitations of an assembly of Rishis. In the case of the Manu Smriti this exordium has been excessively lengthened by the introduction of philosophical matter, and has been so much expanded that it forms a chapter of 119 verses. Moreover, the fiction that the book is being recited is kept up by the insertion of verses in the middle of the work, in which the conversation between the reciter and the sages is again taken up, while in the Yajnavalkya Smriti the Rishis in the last verses are made to praise the rules promulgated by the Yogin. This kind of introduction which the metrical Smritis have in common with the Puranas, Mahatmyas, the sectarian Upanishads and the forged astronomical Siddhantas, though based on the ancient custom of reciting literary productions at the festive assemblies of the Pandits, the Sabhas of our days may be considered as a sign of

(*f*) The verses identified are Vijnanesvara on Yajn. III. 260=B. S. XVII. 1*b*—3*b*; on Yajn III. 293=B. S. XVII. 46*b*—47*a*, 48*b*—49*a* and 50*b*—51*a*; on Yajn III. 294=B. S. XVII. 43*a*, 37*b*, 38*a*, 39*a*; on Yajn. III. 309=B. S. XII. 7—9.

comparatively recent composition. For most of the works, in which it occurs, have been proved to be of modern origin, or to have been remodelled in modern times.

Another reason to show that the metrical Dharmasastras are of modern date has been brought forward by Professor Max Müller (*g*). He contends that the use of the Indian heroic metre, the Anushtubh sloka, in which they are written, belongs to the age which followed the latest times of the Vedic age, the Sutra period. Professor Goldstücker has since shown (*h*) that works written throughout in slokas existed at a much earlier period than Professor Müller supposed; in fact, long before the year 200 B.C., which Professor Müller gives as the end of the Sutra period. Still it would seem that we may avail ourselves of Professor Müller's arguments in order to prove the late origin of the metrical Smritis. For, though the composition of works in slokas and of Sutras may have gone on at the same time, nevertheless, it appears that in almost every branch of Hindu science where we find text books, both in prose and in verse, one or several of the former class are the oldest. If we take, for instance, the case of grammar, the Samgraha of Vyadi, which consisted of one hundred thousand slokas, is certainly older than the Sutras of Vopadeva, Malayagira and Hemachandra, authors who flourished in the twelfth century A.D. But we know that in its turn it was preceded by the works of Sakatayana, Panini and others who composed Sutras. In like manner the numerous Karikas on philosophy are younger than the Sutras of the schools to which they belong, just as the Samgrahas, Pradipas and Parisishtas are mostly of more recent date than the Sutras on Srauta and Grihya sacrifices, which they illustrate and supplement. For all we know, the Grihyasamgraha of Gobhilaputra, or the Karmapradipa of Kadyayana may be older than the Grihyasutras of Paraskara or Asvalayana, but both are of later date than the Grihyasutra of Gobhila which they explain, and the Pradipa is younger than the writings of Vasishtha, the founder of the Vasishtha school of Samavedis, whose Sraddhakalpa it quotes. It short, we never find a metrical book at the head of a series of scientific works, but always a Sutra, though, at the same time, the introduction of metrical handbooks did not put a stop to the composition of Sutras (*i*). If we apply

(*g*) Hist. Anc. Lit., p. 68.

(*h*) Manavakalpasutra, p. 78.

(*i*) The most modern Sutra of which I know is a grammar of the Kasmirian language in Sanskrit aphorisms, which in 1875 was not quite finished.—*G. B.*

these results to the Smritis, it would seem probable that Dharmasastras, like those ascribed to Manu and Yajnavalkya, are younger than the Sutras of the schools to which they belong, though, in their turn, they might be older than the Sutra works of other schools.

The opinion that the metrical Smritis are versifications of older Sutra may be supported by some other general reasons. Firstly, if we take off the above-mentioned introductions, the contents of the metrical Dharmasastras, entirely agree with those of the Dharmasutras, while the arrangement of the subject-matter differs only slightly, not more than the Dharmasutras differ among themselves. Secondly, the language of the metrical Dharmasastras and of the Sutras is nearly the same. Both show archaic forms and in many instances the same irregularities. Thirdly, the metrical Smritis contain many of the slokas or gathas given in the Dharmasutras, and some in a modified more modern form. Instances of the former kind are very numerous. A comparison of the gathas from Vasishtha, Baudhayana and Apastamba with the Manu Smriti shows that a considerable number of the former has been incorporated in the latter. As an instance of the modernisation of the form of ancient verses in the metrical Dharmasastras, we may point out the passage in Manu II., 114-115, containing the advice given by Vidya, the personification of sacred learning, to a Brahman regarding the choice of his pupils, which is clearly an adaptation of the Trishtubh verses, found in Nirukta II., 4, Vasishtha II., 8-9, and Vishnu XXIX., 10. Another case where Manu has changed Trishtubh verses into Anushtubhs occurs II., 144, where the substance of Vasishtha II., 10, has been given. Finally, the fact that several peculiarities of the Sutra style are, also, found in the metrical Smritis, affords a strong presumption that the latter draw their origin from the former. As the great object of Sutra writers was shortness, in order that the pupils in their schools might, by learning as few words as possible, be able to remember the more explicit teaching of the masters, they invented a peculiar and very intricate system for arranging their subjects, according to which certain fundamental rules have constantly to be kept in mind and certain important words, given once in the main rule, have to be understood with a long string of succeeding ones. Besides, they use certain words, especially particles, in a peculiarly pregnant sense, which is unknown in the common language. All these peculiarities occur in the metrical Smritis also. Every-

body who has read Manu in Sir W. Jones's translation will know how frequently the text is expanded by the addition of words, printed in italics, without which it would be either unintelligible or self-contradictory. Students of the Mitakshara, moreover, will remember how considerable the additions are which Vijnanesvara is obliged to make in order to render Yajnavalkya's rules intelligible. This cramped and crabbed style of the metrical Smritis finds an easy explanation if their derivation from the Sutras is admitted. Without such a supposition it is difficult to account for the fact. As regards the peculiar meanings in which particles are used, it will be sufficient to point out that the particle cha "and," as well as chaiva "likewise," in the Yajnavalkya Smriti repeatedly are intended to include something that is known from other sources, but not specially mentioned in the text. Thus Yajnavalkya II., 135, the particles chaiva "likewise" which follow in the enumeration of heirs to a separated male deceased without leaving sons, indicate, according to the very plausible explanations of the Mitakshara, that the daughter's son must be inserted after the daughter (*k*). Similar eccentricities of language occur frequently in the Sutras where "the saving of half a short vowel is considered as joyful an event as the birth of a son." If they are found in the metrical Smritis, too, the probable reason is that they are remnants of the style of the works on which the metrical Smritis are based.

If we turn from these general considerations to the particular books, placed in the first class of metrical Smritis, we find that several facts, connected with the Dharmasastras, attributed to Manu and Yajnavalkya, further corroborate the views expressed above. As regards Manu, Professor Max Müller (*l*) conjectured as long ago as 1849 that the existing Smriti, attributed to the son of Brahman Svayambhu, was a modern redaction of a lost Dharmasutra, belonging to the Manava school, a subdivision of the Maitrayaniyas (*m*), who study a peculiar version of the Yajurveda. One portion of this conjecture has been fully confirmed. Owing to the discovery of trustworthy MSS. of the Visishtha Dharmasutra, it is now possible to assert with confidence that Vasishtha IV., 5—8, quotes a *Manavam*—that is,

(*k*) Stokes's H. L. B., p. 441. For similar cases, see the Sanskrit text of the Mitakshara, 16, 12; 26 a 1 and *passim*.

(*l*) Letter to Mr. Morley, Sacred Books II., p. 9.

(*m*) See L. von Schroeder's edition of the Maitrayani Samhita.

a work proclaimed by Manu, which was written, like most of the Dharmasutras, partly in prose and partly in verse. In the note of the translation on the above passage (*n*) it has been pointed out that Vasishtha gives two Sutras (5 and 8) and two verses (6—7) taken from a Manava Dharmasutra. At the end of the first Sutra the unmistakeable words *iti* manavam, " thus (says) the manava " are added. The first of the following verses (6), which is marked as a quotation by the addition of the word *iti*, " thus," is found entire in the existing Manu Smriti. The second (7) has been altered so as to agree with the ahimsa doctrine which forbids the slaughter of animals under any circumstances, while the verse, quoted by Vasishtha, declares " the slaughter of animals at sacrifices not to be slaughter " (in the ordinary sense of the word). This discovery furnishes a firm basis for Professor Müller's opinion that the existing Manu Smriti is based on a Dharmasutra, and makes it a good deal more than an ingenious speculation. The other half of his proposition that the Manava Dharmasutra, on which the metrical Smriti is based, originally belonged to the school of the Manavas, can, as yet, not be proved with equal certainty. For, though the Srautasutra and the Grihyasutra of the Manavas have been recovered, and though these works are distinctly ascribed by the tradition of the school to a human teacher, called Manu or Manava (*o*), the Dharmasutra has not yet been recovered, and no clear proof has been furnished that the teaching of the Manu Smriti regarding the ritual closely agrees with that of the Sutras of the Manava school. Nevertheless, Professor Müller's suggestion seems very probable. On the question when the Manava Dharmasutra was turned into a metrical Smriti very little can be said. From the times of Medhatithi, the oldest commentator known to us, who certainly cannot have lived later than the ninth century A.D., the text has not undergone any great change. But the earliest quotation from a metrical Manusmriti which occurs in the Brihatsamhita of Varahamihira (died 580 A.D.) differs very considerably from the text known to us (*p*). It would, however, be dangerous to infer from this fact that the existing metrical law book dated from a later time than Varahimira, because,

(*n*) Sacred Books XIV., p. 26.

(*o*) Both forms occur in the commentary on the Grihyasutra, which probably belongs, like that of the Srautasutra, to the ancient Mimansaka, Kumarila.

(*p*) Kern, Brihatsamhita, p. 43.

firstly, several metrical works ascribed to Manu Svayambhuva or to his pupils seem to have existed, and, because inscriptions of the fourth century A.D., when speaking of the Smritis, invariably place Manu first (*q*), and thereby indicate the existence of a law book which possessed greater or more general authoritativeness than would belong to a simple school book studied and reverenced by the title Manava Charana alone.

In the case of the Yajnavalkya Smriti, it is possible to determine with perfect exactness the Vedic school to which its original belonged. But, hitherto, no trace of the actual existence of the Dharmasutra has been found. As regards the former point, Yajnavalkya is known to have been the founder of the school of the Vajasaneyins, who study the White Yajurveda. In the Smriti III., 110, it is expressly stated that its author is the same Yajnavalkya, to whom the Sun revealed the Aranyaka—that is, the Brihadaranyaka, which forms part of the Brahmana of the Vajaneyins, the Satapatha. On account of this assertion, and because a number of the Mantras or sacred formulas, the use of which is prescribed in the Yajnavalkya Smriti for various rites (*r*), have been taken from the Vajasaneyi-Samhita of the White Yajurveda, it is highly probable that the Sutra on which the Smriti is based belonged to one of the Charanas in which the Vajasaneyi-Sakha was studied. Possibly the lost Sutra may even have been composed by the founder of the Vajasaneyi-Charana himself.

As regards the Parsara and Samvarta Smritis and the fragments of Brihaspati and Narada, it is, at present, not possible to say to what Vedas or schools they or their originals belonged. But a verse of Brihaspati which Nandapandita quotes in elucidation of Vishnu IV. 9, shows that the metrical law book ascribed to the Guru of the gods, probably was written within the last sixteen or seventeen hundred years.

(*q*) See, for example, the description of Maharaja Dronasimha on the plates of Dhruvasena I. of Valhabi, dated 207 and 216; Indian Antiquary IV. 106, V. 205.

(*r*) See, for example, Yajn. I. 229=Vaj. Samh. VII. 34; Yajn. I. 231=Vaj. Samh. XIX. 70; Yajn. I. 238=Vaj. Samh. XIII. 27. It is a general maxim that the Mantras, used for daily and occasional rites, must be taken from that redaction of the Veda which is hereditary in the family of the sacrificer. Hence it is only necessary to find out from which redaction the Mantras prescribed in any work or those used by any individual are taken in order to ascertain the Vedic school to which the author or the sacrificer belongs.

In the passage quoted there, Brihaspati gives an accurate definition of a gold *dinara*. It has been pointed out long ago (*s*) that the occurrence of the word *dinara*, which is a corruption of the Latin *denarius*, is a test for the date of Sanskrit works, and that no book in which it occurs can belong to a remote antiquity. Golden denarii were first coined at Rome in 207 B.C., and the oldest Indian pieces corresponding in weight to the Roman gold denarius, which are known are those of the Indo-Scythian kings (*t*), who reigned in India from the middle of the first century B.C. It is, therefore, impossible to allot to Sanskrit authors, who mention golden *dinaras*, and accurately define their value, an earlier date than the first century A.D., and, it is not improbable, that that limit is fixed rather too high than too low. If, then, the verse of Brihaspati, quoted by Nandapandita, is not a later interpolation, the Smriti called after him cannot be older than sixteen or seventeen hundred years.

The same remark applies to the lost metrical Smriti of Katyayana, from which Nandapandita quotes (*loc. cit.*), also a verse, defining the value of the dinara and to the fragment of Narada which treats of civil and criminal law. With respect to the latter work, it must, however, be noted that the *vulgata*, which has been translated by Professor J. Jolly (*v*), does not contain the verse giving the definition of the term dinara, while another recension of the same work which is accompanied by the commentary of Asahaya, re-arranged by one Kalyanabhatta, has it (*w*). Asahaya is one of the oldest and most esteemed writers on civil law, whose name is quoted in several of the older Nibandhas and commentaries. In Balambhatta's commentary on Mitakshara I., 7, 13, where the opinion of Asahaya, Medhatithi and others is contrasted with the view of Bharuchi, it is stated that Asahaya, literally "the Peerless," is an epithet of Medhatithi. Colebrooke, however, doubts the correctness of Balambhatta's statement, because he found the word Asahaya used as a proper name in the Vivadaratnakara. His doubts are confirmed by the circumstance that in other digests, too (*x*), Asahaya is mentioned as an individual writer, and that Kalyanabhatta says nothing about the identity of Asahaya and Medhatithi,

(*s*) See, for example, Max Müller, Hist. Anc. Sansk. Lit., p. 245.
(*t*) E. Thomas, Jainism, p. 71 *seqq.*
(*v*) The Institutes of Narada, translated by J. Jolly, London, Trübner, 1876.
(*w*) Sacred Books VII., p. 25, and Report on Sansk. MSS. for 1874-75.
(*x*) For example, in Varadaraja's Vyavaharanirnaya, p. 38 (Burnell).

but evidently takes the former for a separate individual. As in the passage of the Mitakshara, quoted above, Asahaya stands before Medhatithi, and as it is the custom of Sanskrit writers in quoting the opinions of others to name the oldest and most esteemed author first, it may be inferred that Asahaya preceded Medhatithi, who probably wrote in the eighth or ninth century A.D. Under these circumstances it must be conceded that the version of Narada's Institutes accompanied by Asahaya's commentary has greater weight than the *vulgata* and that the definition of the term dinara belongs to the original. Hence it would appear that the Narada Smriti cannot lay claim to any greater antiquity than the first or second century A.D. On the other hand, the discovery that as ancient an author as Asahaya composed a commentary on the work, gives support to the view of Professor Jolly (*y*) that the Narada Smriti is not later than the fourth or fifth century of our era. To the same conclusion points also the circumstance that the prose introduction, prefixed to the *vulgata* of the Narada Smriti (*z*), which gives a clearly erroneous and mythical account of the origin of the work, belongs to the commentary of Asahaya. The tradition, given there, asserts that the Narada Smriti is a recast of Sumati's abridgment of the original Manu Smriti. But a comparison of the doctrines of Narada with those of Manu shows that the connection between the two authors is not very close. They differ on most essential points, such as the titles or heads of the civil and criminal law, the number and manner of the ordeals, the permissibility of the Niyoga, and the remarriage of widows, the origin of property, the kinds of slavery, and so forth (*a*). Now if Asahaya's erroneous statement regarding the origin of the Narada Smriti is not a deliberate fabrication, its existence can be accounted for only by the assumption that between his own times and those of the real author of the Narada Smriti so long a period had elapsed that the true origin of the latter work had been forgotten. With respect to the latter point it may be mentioned that hitherto it has not been possible to determine the Vedic school to which the Narada Smriti belongs.

Among the lost metrical Smritis, that ascribed to Laugakshi, was possibly based on the Kathaka Dharmasutra. For, according

(*y*) Institutes of Narada, p. 19.
(*z*) *Ibid.*, pp. 1—3.
(*a*) *Ibid.*, pp. 13—18.

to the tradition of the Kasmirians, Laugakshi was the name of the author who composed the Sutras of the Katha school.

The Smritis which may be placed under the second head, that of secondary redactions of metrical Dharmasastras, may be subdivided into extracts and enlarged versions. Of the first kind are the various Smritis which at present go under the names of Angiras, Atri Daksha, Devala, Prajapati, Yama, Likhita, Vyaghrapada, Vyasa, Sankha, Sankha-Likhita and Vriddha Satatapa. All these works are very small and of small importance. That they are really extracts from, or modern versions of more extensive treatises, and not simply forgeries, as has been supposed, seems to follow from the fact that some of the verses quoted by the older commentators, such as Vijnanesvara, from the works of Angiras and so forth, are actually found in them. On the other hand, it is clear that they cannot be the original ancient works, which Vijnanesvara and other old Nibandhakaras knew, because many verses quoted from the latter are not traceable in them. In the case of the Vriddha Satatapasmriti, the author himself states in the beginning (sl. 1) that he gives only so much of the ancient work "as is required to understand its meaning." To the second sub-division, that of the enlarged metrical Smritis, belongs the so-called Brihat Parasara. It is expressly stated that the book was composed or proclaimed by Suvrata (Suvrataprokta Samhita). Though it is divided, like the original Parasara, into twelve chapters, it contains 3,300 slokas against the 581 or 592 of the older book.

To the third class, that of the more recent compilations in verse which are not based on any particular old works, belong, besides the Kokila, Saptarshi, Chaturvimsati and similar Smritis, mentioned above, the existing Lohita Smritis, and perhaps that ascribed to Kapila. The author of the Lohita Smriti states in the last verse of his book "that Lohita having extracted the quintessence from the Sastras, has proclaimed this work for the welfare of mankind."

The fourth division, that of the versified Grihyasutras, includes the two Asvalayanas, the so-called Brihat Saunaka, or Saunakiya Karika, and the fragments of Sakala and Sankhayana. Both the Asvalayana Dharmasastras are simply metrical paraphrases of the Asvalayana Grihyasutra, and the Brihat Asvalayana is distinguished only by the peculiarity that it contains the same matter twice, "for the sake of the slow-minded," together with some verses on Rajaniti, on "polity." The Brihat Saunaka is particu-

larly interesting, not only because it seems to be the last remnant of the Smarta writings of that famous teacher of the Rigveda, but also because it apparently has been remodelled by a Vaishnava of the sect of Ramanuja, and affords another instance of the activity which the Vaishnavas displayed in turning ancient writings to their account. A detailed notice of this work will be found in a paper laid before the Asiatic Society of Bengal in September, 1866. It is characteristic of the negligence and want of critical discernment shown by Hindu writes, that Nilakantha in the Vyavahara Mayukha treats the Brihat Saunaka as a genuine production of the old Acharya.

The fifth class, or that containing the forgeries, is unfortunately of not small extent. The Vaishnavas seem to have been most unscrupulous in using old names in order to give weight to their doctrines. They have produced the Brihat Harita, two Vasishtha Smritis, a Sandilya and the Laghu Vishnu. These books represent various shades of the Vaishnava creed. Some are extremely violent in their diatribes against other sects, and teach practices and doctrines which would have astonished the ancient Rishis whose names they appropriated, while others are more moderate and conform more to the Smarta practices. The most extreme are the Brihat Harita and the third Vasishtha of our list. There is only one work which may be safely called a Saiva forgery, the second Gautama of the list. It is distinguished from the common Smarta works only by occasionally inculcating the worship and pre-eminence of Siva. The rites prescribed are what one at the present day would call Smarta. Besides these, some other small works belong to this class, among which the second Apastamba and the second Usanas may be named. Their rules do not show any particular sectarian tendencies. It will, however, be proper to call them forgeries, because they bear the names of ancient teachers, though they apparently have nothing to do with the authentic writings of these persons. On the other hand, it must for the present remain undecided whether the commonplace Sastras attributed to Visvamitra and Bharadvaja are modern fabrications, or versifications of older Sutras. In the case of Bharadvaja there is some foundation for the latter opinion, as a great portion of the Sutras of a Bharadvaja school, which belongs to the Black Yajurveda, is still in existence.

In concluding this sketch of the Smriti literature, it ought to be remarked that the opinions advanced with respect to its origin and development are supported by the analogies of other branches

of Hindu literature. The older portions of the Upanishads, or the philosophical portions of the Vedas which inculcate the "road of knowledge," either still form part of the collections of texts or Sakhas studied by the various Vedic schools, or can be shown to have belonged to such collections. Thus the Aitareya and Kaushitaki Upanishads are incorporated in the Sakhas of the Rigveda which bear these names. The Taittiriya, the Varuni and other Upanishads still form part of the Taittiriya Sakha, the Maitrayani of the Maitrayana Sakha, the Brihadaranyaka of the Madhyandina and Kanva Sakhas of the White Yajurveda. Again, the names and contents of such works as the Bashkala and Jabala Upanishads show that they belonged to extinct Sakhas of the Rig and Samavedas. Next we have the Upanishads which have been recast by the adherents of the fourth Veda, the Atharvanas, further Upanishads which, though counted as parts of the Atharvaveda, proceed apparently from adherents of the philosophical schools, and lastly, the fabrications of sectarians, Vaishnavas, Saivas, Ganapatas and so forth. While the first classes of Upanishads are written in archaic Sanskrit prose, or in prose mixed with verse, the later works show the common Sanskrit, and many of them are *in verse*. In some instances the connection between the prose and the metrical treatises can be clearly traced. In all this the analogy to the Smriti literature is obvious, and in the case of the Upanishads, too, the truth of our fundamental position is apparent—namely, that the fountain of intellectual life in India and of Sanskrit literature is to be found in the Brahminical schools which studied the various branches of the Vedas. Even in the case of grammar, of astrology and astronomy, the correctness of this principle might be demonstrated, though not with equal certainty, because the oldest works in those branches of science are lost, or at all events have not yet been recovered.

The bearing of our view regarding the history of the Smritis, on their interpretation, and on the estimation in which they must be held, is obvious. The older still existing Smritis, and the originals of the rest, are not codes, but simply manuals for the instruction of the students of the Charanas or Vedic schools. Hence it is not to be expected that each of these works should treat its subjects in all its details. It was enough to give certain general principles, and those details only which appeared particularly interesting and important. It is, therefore, inappropriate to call the Smritis "codes of law," and unreasonable to charge

their authors with a want of precision of discrimination between moral and legal maxims, &c. (*b*). Such strictures would only be

(*b*) In the ancient societies in their earlier stages there was no such thing as systematic legislation on a utilitarian basis. The civic or national consciousness was developed under the influence mainly of religious conceptions, and all that belonged either to the State in its relation to individuals or to the mutual rights and duties of members of the community was wrought out under this sacred control. The ethical and the social laws spring forth as offshoots from the relations of mortal men to supernatural beings, to their own ancestors, and to their families united to them in close ties of religious interdependence. The ceremonial law seeking to propitiate beings, whose nature may be variously conceived, acquires the intricacy of a purely artificial system, and its interpreters are invested with a sacred character on account of their association with awful thoughts, and their exclusive command of potent formulas. The priesthood shared—and could not but share—the chief emotions of the people, but they moulded these into forms consonant to their own ruling notions, by connecting every phase of moral or legal change with some doctrine or some phrase regarded as of divine authority. As inventiveness and constructive faculty were set to work by the prompting of new needs in altered circumstances, the expression of the result, whether wholly original or partly borrowed, was grafted on to the existing system, and if it corresponded to any permanent want or form of moral energy it was preserved by frequent recitation; and as in India the people, owing perhaps to physical conditions, were much less stirred to distinctly civic activity than in Greece or Rome, the purely religious element in their body of thought has maintained its early predominance down even to modern times. The source and the sanction of the "municipal" being thus in the religious law, it was natural that a severe discrimination of the one from the other should not be attempted. In the Mosaic law, as in the Hindu law, we find sacrificial ceremonies, family relations, the conditions of property, criminal laws, and legal procedure all put pretty much on the same level and all in some degree intermingled because all regarded mainly from the same standpoint of their supernatural origin. Thus viewed, many parts of the law have a certain harmony with one another, which, from our modern standpoint, seems incongruous, otiose, or unmeaning. Amongst the Greeks and Romans, as amongst the Hindus, the laws being regarded as of divine origin, were committed to the memory and the care of the priestly class. This class furnished the only jurists, and when laws were reduced to writing, their proper repositories were the temples of the gods. A council of priests, as of Levites or of Brahmans, could alone pronounce on the most important questions of the civil law, or give the requisite assent to some proposed deviation from established use and wont. It seems that in the early period the Greek laws were mostly, if not wholly, rhythmical. [Wachsmuth Hist. Ant. of Gr., Chap. V. § 39.] The same form of the Roman laws is suggested by the word "Carmina," commonly applied to them. They were special to the Greeks and to the Romans as the Brahmanic law is special to Hindus. Rights as existing beyond the pale of the religious connexion are hardly recognised except by a faint analogy. The Smritis, therefore, and the mental evolution which they embody may be regarded as a most natural product of the human

justified if the Smritis were really "codes" intended from the first to settle the law between man and man. At the same time it will appear that the statement of the modern Nibandhakaras and commentators that the various Smritis are intended to supplement each other is, at least to a certain extent, correct. As none of the Smritis is complete in itself, it is, of course, natural that the lawyer should, if one fails, resort to the others which, on the whole, are written in a kindred spirit. It would, however, be unwise to use them indiscriminately, since they contain also a great many contradictory or conflicting statements. It will be necessary to examine in each case whether the Smriti from which supplementary information is to be derived, agrees in its principles on the point in question with the book which serves as the fundamental authority. For in the latter case only will it be possible to use the additional information. A considerable caution in the use of unknown texts, said to belong to Dharmasastras, regarding which we possess no full information, is also advisable on account of the great number of forgeries and recasts of ancient works which exist at the present day. A full enquiry into the authenticity of such texts is very necessary.

VEDAS.

11. *The Vedas.*—The fountain-head of the whole law is according to the Hindus, the Veda, or Sruti. By the latter term they understand the four Vedas, the Rik, Yajus, Saman and Atharvan in all their numerous Sakhas or recensions, all of which they believe to be eternal and inspired. Each Veda consists of two chief portions, the Mantras and the Brahmanas. The former are passages in prose and verse which are recited or sung by the priests at the great sacrifices; the latter contain chiefly rules for the performance of the sacrifices and theological speculations on their symbolical meaning and their results, as well as, in the Aranyaka portion, discussions of philosophical problems. As may be expected, the Vedas include no continuous treatises on Dharma, but, incidentally, a good many statements of facts

mind at a particular stage of growth. An economical, or purely political aim not having been admitted except as subordinate, the conduct of men was not prescribed by reference to it as distinguished from the religious aim. The rhythmical form of the precepts has its analogue even in the English law, many rules of which and even the statutes were in early times converted into verse, as a convenient means of committing them to memory.

connected with all sections of the law are found. The authors of the Dharmasutras frequently cite such passages as their authorities. But it is a remarkable fact that they by no means agree regarding their applicability (*c*). For the practical lawyer of the present day the Veda has little importance as a source of the law. But a careful investigation of the state of the law, as it was in the Vedic age, will no doubt yield important results for the history of the Hindu law.

(II.) The Dravida School.

The Dravida School prevails in the whole of the Southern portion of India, which is divided into Dravida proper where Tamil is spoken, Karnataka where the Karnataka language is spoken, and Andra where Telugu or Telinga is the spoken language. The Mitakshara, the Madhaviya, the Sarasvati Vilasa, the Varadarajya, and Smriti Chandrika are the recognised authorities (*d*) in the order mentioned. The Varadarajya is, however, an authority in the Dravida division only, and Smriti Chandrika being an authority in the Andra division comes before the Sarasvati Vilasa.

1. The Mitakshara—already dealt with.

2. The Madhaviya of Vidyaranyasvami is a comment on the Parasara Smriti, and was written in the middle of the fourteenth century. The author was the virtual founder of the Vidyanagara Kingdom, and his work became the standard of its law as well as being of some authority in the Benares School.

3. The Sarasvati Vilasa (*e*). The author, Pratapa Ruda Deva, was a prince of the house of Kakateya, which reigned in Warangal in the fourteenth century. It is a general digest, and the customs, particularly those regarding the land tenures in the Andra country, are based upon it.

4. The Varadarajya or Vyavahara Nirnaya (*f*). The author, Varadaraja, was born in the province of Arcot towards the end of the sixteenth or the beginning of the seventeenth century. It is a digest, and is based upon the Narada Smriti.

5. Smriti Chandrika. Its author, Devanand Bhatta, is said to

(*c*) Sacred Books II., p. 20.
(*d*) Morley's Digest, Introduction, p. CCXII.
(*e*) Translated by Rev. Mr. Foulkes.
(*f*) *Ramnad Adoption Suit*, 12 M. I. A. 437.

have been born in the South of India in the twelfth century (*g*). It is supposed to be the basis on which the Madhaviya was formed.

(III.) The Benares School.

The Benares School is an authority in the city and the province of Benares, Middle India and Orissa, extending from Midnapur to the mouth of the Hoogly and thence to Cicacole. The works of authority are the Mitakshara, the Viramitrodaya, the Madhaviya, the Vivada Tandava, and the Nirnaya Sindhu, of which the first, second, third and fifth have already been mentioned in the preceding pages. The author of the Vivada Tandava, Kamalakara, was the brother of Dinkara Bhatta and son of Ram Krishna Bhatta. He is opposed to the doctrine of the Bengal School and supports the view of Vijnanesvara.

(IV.) The Mithila School.

The doctrines of the Mithila School are in force in Tirhoot and Northern Behar, the ancient Kingdom of Mithila. The Mitakshara, the Vivada Ratnakara, the Vivada Chintamani, the Vyavahara Chintamani, the Dwaita Parisishta, the Vivada Chandra, the Smriti Sara, the Samuchchaya, and the Madana Parijata are well-known authorities in this province.

1. The Mitakshara.

2. Vivada Ratnakara (*h*). It is a digest of great authority. It was compiled in the beginning of the fourteenth century under the superintendence of Chandeswara, minister of Hara Sinha Deva, king of Mithila.

3 and 4. The Vivada Chintamani (*i*) and the Vyavahara Chintamani were written by Vachaspati Misra, who flourished in Semaul in Tirhoot in the beginning of the fifteenth century. These are of the highest authority in this part of India.

5. The Dwaita Parisishta. It is a general treatise, and its author is Kesava Misra.

6. The Vivada Chandra (*k*). Its author, a lady named Lachmidevi, wrote in the name of her nephew Misaru Misra, and

(*g*) Saravadhikari's Hindu Law of Inheritance, 1880, pp. 387-9.

(*h*) Translated by Golabchandra Sarkar Sastri.

(*i*) *Rutcheputty* v. *Rajunder*, (1839) 2 M. I. A. 134, 146; translated by Prosono Koomar Tagore.

(*k*) *Rutcheputty* v. *Rajunder*, (1839) 2 M. I. A. 147.

took the title of her work from Chandra Sinha, the grandson of Hara Sinha Deva, king of Mithila.

7. The Smriti Sara Samuchchaya. Its author, Sri Dhar Acharya, was a priest of the Dravir tribe. It is a treatise on religious duties, and the questions on civil duty are only incidentally introduced.

8. The Smriti Samuchchaya is a short work, and is known amongst the Mahrattas.

9. The Madana Parijata. It is a treatise on civil duties. Its author, Visweswara Bhatta, derived its name from Madana Pala, a prince of the Jat race, who reigned at Diah in the twelfth century. This work is sometimes quoted in the name of Madana Pala.

(V.) The Gauriya or Bengal School.

The Gauriya or Bengal School holds its sway among the Bengali-speaking Hindus. It is a patriarchal system and differs in essential particulars from the Mitakshara. It appears that the teachings of Gautama bore fruit amongst the enlightened people of this part of India, from where Hindu law moulded the lives of peoples inhabiting diverse climes such as Burma and Nepaul. It asserted itself with renewed vigour in the fifteenth century, when JimutaVahana wrote his famous Daya Bhaga, when the forcible contact with another patriarchal system of law—the Moslem—was felt. The following are the books of authority in this School of law.

1. The Dharma Ratna. Its author, Jimuta Vahana, is practically the founder of the Gauriya School and flourished in the fifteenth century (*l*). The work itself is a digest, and the chapter on inheritance, the celebrated Daya Bhaga (*m*), is the standard authority, and is opposed to Mitakshara on almost every disputed point.

2. The earliest commentary on the Daya Bhaga is that of Srinath Acharya Chudamani, which is a general exposition of the text (*n*). That by Sri Krishna Tarkalankara, who also wrote the Daya Krama Sangratha (*o*), is the most celebrated of all treatises explaining the text of the Daya Bhaga.

(*l*) Saravadhikari's Tagore Lect., VIII.
(*m*) Translated by Colebrooke.
(*n*) Colebrooke.
(*o*) Translated by Mr. Wynch.

3. The Smriti Tatwa. Its author, Raghunandana, flourished in the beginning of the sixteenth century. He lived in Navadwipa in Bengal. He is regarded as the greatest authority in Bengal, and is often referred to as Smarta Bhattacharya or *the* great expounder of law. This work covers no fewer than twenty-seven volumes, and the portion which deals with the law of inheritance is called the Daya Tatwa and is very highly spoken of.

4, 5 and 6. Vivadarnava Setu, Vivada Sararnava and Vivada Bhangarnava. These three were compiled owing to the British influence. Warren Hastings was responsible for the first. It was translated into Persian for Mr. Halhed, whose translation into English is called "A Code of the Gentoo Laws." The second and third owe their existence to the suggestion of Sir. W. Jones, the last being translated by Mr. Colebrooke.

There are two works of great authority on the law of adoption—namely, the Dattaka Mimansa by Nanda Pandit, and Dattaka Chandrika by Devanda Batta (*p*). The former is an authority in Mithila and Benares, while the latter is the governing factor in Bengal and Southern India.

(*p*) Translated by Sutherland.

BOOK I.

THE LAW OF INHERITANCE.

I.—GENERAL VIEW OF THE HINDU LAW OF INHERITANCE.

1.—DEFINITION OF THE LAW OF INHERITANCE.

The Law of Inheritance comprises the rules according to which property, on the civil or natural death of the owner, devolves upon other persons, solely on account of their relation to the former owner.

REMARKS.

The title of the Hindu Law under which the law of inheritance falls is the Dayavibhaga—that is, according to the usual translation, "the division of inheritance." Daya, *lit.* a "portion," is defined by Vijnanesvara as "the wealth (property) which becomes the property of another solely (*a*) by reason of his relation to the owner," and vibhaga, *lit.* "division," as "the adjustment of divers rights regarding the whole by distributing them in particular portions of the aggregate" (*b*).

It thus appears that the Dayavibhaga includes not only the law of inheritance, but the rules for the division of any estate, in which several persons have vested rights, arising out of their relation to the owner. Actually, however, the contents of the chapter called Dayavibhaga are still more miscellaneous, as the Hindu lawyers were obliged to introduce into it discussions on the nature and the various kinds of property, on account of the want of a separate title for these matters in the system of the Smritis.

The civil death of a person results from his entering a religious

(*a*) Colebrooke, Mit. Chap. I., sec. I., para. 2.
(*b*) *Ibid.*, para. 4. See Book II.

order, or being expelled from his caste by means of the ceremony called Ghatasphota, the smashing of the waterpot (c).

The relation or connection (sambandha) which gives to a person a right to inherit another's property, may be of six kinds:—

a. Blood relationship.

b. The relation of adoptee to the adoptor and his family.

c. Connection by marriage.

d. Spiritual connection.

e. Co-membership of a community or association.

f. Relationship of a ruler to his subjects.

2.—SUBDIVISIONS OF THE LAW OF INHERITANCE.

The Law of Inheritance may be arranged, according to the natural or legal status of the person by whom the property is left, under the following heads:—

I. Rules Regarding the Succession to a Male.

A. To a householder (grihastha) who is a member of an undivided family (avibhakta).

B. To a temporary student (upakurvana brahmacharin), to a separated householder (vibhakta grihastha), and to a united householder in respect of his separate property.

C. To a re-united coparcener (samsrishtin).

D. To a professed student (naishthika brahmacharin) and to an ascetic (Yati or Sannyasin).

II. Rules Regarding the Succession to Females.

A. To unmarried females.

B. To married females having issue.

C. To childless married females.

III. Rules Regarding Persons Excluded from Inheritance.

(c) The Viramitrodaya, *f.* 221, p. 2, l. 7, states expressly that persons who are only *patita* may inherit on performing the penance prescribed to them, and it is said, *f.* 222, p. 1, l. 10, that the person solemnly expelled does not inherit. Bhalchandra Sastri, in Steele's Law of Castes, p. 55, says that a member of a family who has lost caste, is to receive his share after expiation, notwithstanding an intermediate partition.

"Deus facit heredem," says Glanville—that is, heirship properly so called arises only from natural relation. In the *Tagore Case*, Willes, J., says, "Inheritance does not depend upon the will of the individual; transfer does. Inheritance is a rule laid down (or in the case of custom recognised) by the State, not merely for the benefit of the individuals, but for reasons of public policy" (*d*).

Under the Roman Law inheritance was a devolution of the property and rights, with the obligations and duties of a deceased as an indivisible aggregate on the heir designated by the law or appointed by will. The heir might be bound to carry out bequests and discharge debts as directed, but the defining characteristic was that he essentially continued, for legal purposes, the persona of the deceased. The sacra were not conceived as divisible, nor consequently was the familia which sustained them. Thus it was said Nemo pro parte testatus, pro parte intestatus decedere potest. Under the Hindu Law also the heir or the group of heirs (wills not being contemplated), who in the undivided family take a succession, continue the person with which they have already been identified (*e*). One joint owner of the common property having been removed, the others take it as an undivided aggregate, capable of partition, but subject to a primary obligation in favour of the family sacra (*f*) and of creditors of a father whose claims have not arisen from transactions of an obviously profligate character, tending to defraud the manes and the children bound to sacrifice to the manes of past ancestors. It is in accordance with this theory that Vijnanesvara construes the text on the origin of property (Mitakshara, Chap. I., sec. I., par. 13). "Inheritance" as a source of property he conceives as pointing to a continuation of the legal person by the unobstructed heir as joint owner. "Partition" he refers to the case of property descending to obstructed heirs as collaterals taking necessarily according to distinct and several shares, on rights arising to each severally at the owner's death. So, too, at Chap. I., sec. I., par. 3, he carefully distinguishes between the cases of sons, whose the patrimony *becomes* immediately and indefeasibly on their birth, and of parents, &c., on whom the estate *devolves* only on the death of the owner, and who mean-

(*d*) L. R. S. I. A., at p. 64.
(*e*) See Viramit. Trans. p. 2.
(*f*) Viramit. Trans. pp. 133, 256.

while have not like sons a share in the ownership, only an expectancy which may be defeated by the act of the owner unembarrassed by a joint ownership of sons or grandsons (*g*).

The Teutonic laws preferring males to females divided the allodial holding equally. They distinguished inherited property from acquisitions and moveables from immoveables: the inheritance under them might pass by different rules to several successors. Then came the right of primogeniture and the other extensive modifications induced by the Feudal system. The historical development of the English, having been so widely different from that of the Hindu Law of Inheritance, great caution ought to be exercised in applying any analogy derived from the former to the solution of questions arising under the latter. The language of Willes, J., in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (*h*) rests on a principle of general application. He says: "The questions presented by this case must be dealt with and decided according to the Hindu law prevailing in Bengal, to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto. Various complicated rules which have been established in England are wholly inapplicable to the Hindu system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty, a distinction not known in Hindu law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property: *Dyke* v. *Walford* (*i*). In the Hindu law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased."

Resting on this, he says:—"the will contains a variety of limitations which are void in law, as, for instance, the limitations in favour of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail

(*g*) Comp. Viramit. Chap. I., p. 54, Transl. p. 39.

(*h*) L. R. S. I. A., at p. 64.

(*i*) 5 Moore P. C., 434.

male which is a novel mode of inheritance inconsistent with the Hindu law" (*k*). But after rejecting these, his Lordship, from the principle that an owner may by contract bind himself to allow another the usufruct, deduces the consequence that a temporary possession and enjoyment may be given by will, to be followed by other interests simultaneously constituted. Here he follows the English as distinguished from the Roman Law.

Special care should be taken not to build on particular expressions in the English text books. In translating from the Sanskrit law-books the most nearly equivalent words have to be used to render those of the original, but this is in many cases an equivalence only for the particular purpose and in the context where the words occur. For drawing inferences the original must in cases of any nicety be referred to with as much care as the Greek or Hebrew text of the Bible for the support of a theological doctrine, or the Pandects for determining the true sense of a Roman law.

"The law of inheritance amongst the Hindus is regulated generally by the performance of funeral oblations" (*l*) in this sense that the duty of performing the obsequies and subsequent rites being regarded as of paramount importance, the determination of the person on whom it devolves and the nature of the ceremonies to be celebrated settles incidentally who in sequence are entitled to the estate. The interest in it of the deceased is supposed not to be wholly extinguished, and as the possession of property is essential to an effectual sacrifice, the proper performer of the Sraddh is endowed with the means of performing it. A rigid regulation of the right to succession by funeral oblations is, however, peculiar to Bengal, having been adopted as a general principle by Jimuta Vahana (*m*). In other parts (*n*) of India the criterion is admitted only partly (*o*), and the Mitakshara and the Mayukha make the duty and the right collateral, meeting usually in the same person but not connected necessarily as cause and consequence. Consanguinity has greater influence, and may

(*k*) L. R. S. I. A., at p. 74.

(*l*) H. H. Wilson's Works, V., 11; *Soonrendronath Roy v. Musst. Heeramonee Burmoneah*, 12 M. I. A., at p. 96; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, *Ibid.*, at p. 541.

(*m*) Dayabh., Chap. XI., sec. VI., para. 29, 2.

(*n*) Viramit., p. 39, Col. Dig., Book V. T. 420, Comm.

(*o*) *Ibid.* 14.

be looked on as the foundation on which the rules as to succession on the one hand and as to inheritance on the other really rest (*p*). Where there is a connection of blood through males or females, there is, except in remote cases, a possibility of succession. A new connection is established by marriage, and the family springing from this union is linked both to the father's and less closely to the mother's ancestors and their descendants. Except amongst those in whom there is really or by a fiction a sharing of identical blood, as derived from an identical source, there is no relationship giving rise to the ordinary rights of succession with which the law of inheritance is concerned, and the accompanying duties prescribed by the religious law (*q*).

The law of inheritance is divided by the Hindus according to the nature of the rights of heirs, into unobstructed (apratibandha) succession, and succession liable to obstruction (sapratibandha). Unobstructed succession comprises the rights of sons, sons' sons, and their sons, to the inheritance of their fathers and ancestors, whether these were members of undivided or of divided families, and the succession in an undivided family in general. Succession liable to obstruction is subdivided into succession—(1) to a male who dies without sons, sons' sons, or great-grandsons in the male line, (2) to a re-united coparcener, (3) to an ascetic, and (4) to women. This arrangement of the subject-matter is necessary if, as is done by the Hindu lawyers, the laws of inheritance and of division are treated of under one title. But, as it is greatly wanting in clearness, especially in the first part, relating to unobstructed succession, it seems advisable to desert it when the Law of Inheritance is treated by itself.

As the descent of property varies under the Hindu law, chiefly according to the natural and the legal status of the last possessor, it will be more convenient to divide the rules on this subject according to the latter principle. "Succession" should therefore be first divided into succession to males and to females.

(*p*) How far this is carried in favour of females by Balambhatta may be seen from the extracts given in the Tagore Lectures, 1880, Lec. X. *Rutcheputty* v. *Rajunder*, 2 M. I. A. 132; *Srimuti Dilecah* v. *Rony Koona*, 4 M. I. A. 292; *Bhyah Ram* v. *Bhayah Ugar*, 13 M. I. A. 373; *Thakur Jeobnath* v. *Court of Wards*, L. R. 2 I. A. 163; *Naraini Kuar* v. *Chandidin*, I. L. R. 14 All. 366, P. C.; *Ram Baran* v. *Kamala Prasad*, I. L. R. 32 All. 594.

(*q*) The succession of one spiritually related, as of a teacher or pupil, may be ascribed to an imitative method of preserving religious ceremonies and the property dedicated to them. The Brahmin community and the king serve to complete the scheme. See below.

Hindu males are divided according to their castes into Brahmins, Kshatriyas, Vaisyas, and Sudras (*r*). The members of the first three castes are divided according to the "orders" (asramas) into Brahmacharis, "students," Grihasthas, "householders," and Yatis or Sannyasis, "ascetics." The Brahmacharis, again, are of two kinds, paying or temporary students, Upakurvanas, or else Naishthikas, "professed students," such as from the first renounce the world. Grihasthas, householders, also are of three kinds. They may be avibhakta, members of an undivided family, vibhakta, "separate," or samsrishtin, "re-united," and lastly the avibhakta or united householder may be separate, in some respects—namely, he may hold property to which his coparceners have no right.

It is, however, unnecessary to take into account all these several varieties of status. Under the present law, especially as amended by the Acts of the Government of India, caste has little importance for the descent of property. In one instance only, that of the illegitimate son of the Sudra, the old distinction holds good. Besides the separate property (*s*) of the united householder, the property of the Upakurvana Brahmachari, the temporary student, descends like that of the Vibhakta Grihastha, the divided householder (*t*). The principles, at least, applicable to the succession to Naishthika Brahmacharis, professed students, are the same as in the case of Sannyasis. We obtain, therefore, for the succession to males four subdivisions: (1) the succession to the Avibhakta Grihastha, a householder of an undivided family; (2) to the Upakurvana Brahmachari, a temporary student, and to a Vibhakta Grihastha, a separate householder; (3) to a Sansrishti Grihastha, a re-united householder; (4) to Sannyasis or Yatis, ascetics, and to Naishthika Brahmacharis, professed students.

In the case of females, it is of importance whether they are unmarried or married, and whether, if married, they leave issue or not. The rules regarding the succession to their property may therefore be divided under three heads as above.

(*r*) Sudras are always considered Grihasthas, as the study of the Veda is forbidden to them.

(*s*) There are no particular rules regarding the descent of this kind of property. But the fact that it is exempted from the rules regarding the division of the property of united coparceners, shows that it must fall under the rules regarding the property of separate males. For the definition of such "separate property" (avibhajya), see Mit. Chap. I., sec. V.; Vyav. May. Chap. IV., sec. VII.; and Book II.

(*t*) See Mit. Chap. II., sec. VIII., para. 3.

II.—SUCCESSION UNDER THE MITAKSHARA AND VYAV. MAYUKHA.

§ 1—*A.* SUCCESSION TO THE PROPERTY OF AN AVIBHAKTA GRIHASTHA.

(1) Sons, Sons' Sons, and their Sons.—*The property of a male member of a united family, Avibhakta Grihastha, descends,* per stirpes, *to his sons, son's sons, and son's son's sons, who were united with the deceased at the time of his death.*

See Digest of Vyavasthas, Chap. I., sec. I., Q. 1.

"That under the law of the Mitakshara each son upon his birth takes a share equal to that of his father in ancestral immovable estate is indisputable" (*v*).

"The ownership of the father and the son is the same in acquisitions made by the grandfather, whether of land, of a fixed income, or of movables" (*w*).

The three descendants in the male line take the inheritance by virtue of the right which vests in them from their birth to the ancestral family estate, and to the immoveable property acquired by their father, grandfather, or great-grandfather (apratibandha daya), and they *represent* these persons in the undivided family (*x*). The ultimate reason for their preference to other coparceners must be sought in the importance attached by the Hindu to the continuation of his race, and to the regular and continuous presentation of the oblation to his manes (sraddha) (*y*).

(*v*) P. C. in *Suraj Bunsi Koer* v. *Sheo Prasad Singh*, L. R. 6. I. A. 88, 99; *Bhyah Ram* v. *Bhyah Ugur*, 13 M. I. A. 378.

(*w*) Mitakshara, Chap. I., sec. 5, para. 3; Viramitrodaya, Tr., p. 68. *Nana Tawker* v. *Ramachandra Tawker*, I. L. R. 32 Mad. 377; *Jagmohandas* v. *Nathubhoy*, I. L. R. 10 Bom. 528.

(*x*) Mit., Chap. I., sec. 5 and sec. 1, para. 3; Vyav. May. IV., sec. 1, para. 3.

(*y*) Gaius, Lib. II. § 55, points to the importance attached by the Romans in early times to the due performance of the sacra and the connection of these with the inheritance. Compare the remarks at 11 B. H. C. R. 265 [*Bhau Nanaji Utpat* v. *Sundrabai.*]

In § 152 *et sqq.*, Gaius deals with heredes necessarii, sui et necessarii, aut. extranei. Of the "sui et necessarii" he says § 157 : "Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque parente, quodam modo domini existimantur."

Against these joint owners, "Nihil pro herede posse usucapi suis heredibus existentibus, magis obtinuit. [Cod. Lib. VII., 29; 2.] This passage may perhaps indicate that the 'sui' formed a fourth class." [Tomkins and Lemon's Gaius, p. 341.] Sons and daughters of the last proprietor or of his

Actual birth is necessary to the full constitution of right as son. The succession is not suspended for one not begotten (*z*). See below Book II., Digest of Vyavasthas, Chap. I., sec. 1, Q. 8, Remark 2.

The rule extending the apratibandha daya to three descendants conforms to the views of Nilakantha, Balambhatta, Mitramisra, and of the eastern lawyers (*a*).

son were forced to take the inheritance with its burdens. They were thus "necessarii" as well as "sui."

The death of the son was necessary to bring in his children [Gaius, Lib. II. § 156] and they must have been still within the potestas of the grandfather at his death.

Paulus in the Digest describes the position of the son inheriting his own, "suus heres," in a way very analagous to that found in the Hindu treatises.

"In suis heredibus evidentius apparet continuationem domini eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur, unde etiam filiusfamilias appellatur sicut paterfamilias, sola nota hac adiecta, per quam distinguitur genitor ab eo qui genitus sit, itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur, hac ex causa licet non sint heredes instituti, domini sunt; nec obstat, quod licet eos exheredare, quod et occidere licebat."

In the Hindu as in the Roman law the essential notion of what we call "Inheritance" was that of a continuity of the "persona" and of the "familia" over which headship was exercised, while in "Partition" the central idea is that of a break of continuity, of a substitution of new relations and of new rights, individualised or differently aggregated, for the group out of which they have been formed; and as a true union of the composite persona taking a family estate on the death of the former head implies, according to Hindu notions, a joint family united in domestic worship and in interests, we see how it is that the Mitakshara, Chap. I., sec. 1, para. 13, says "daya" is the unobstructed inheritance of the "sui heredes" taking fully and jointly what was partly theirs before, while "partition" intends "heritage subject to obstruction." In the latter case wholly new rights come into existence, the continuity is broken up; and the several collateral heirs, supposing there are more than one, take several shares by means of a parcelling inconsistent with the mere replacement of one head by another, the family corporation still preserving its personal and proprietary identity, as in inheritance not subject to obstruction. It is in this sense and in this only that the Mitakshara [Chap. I., sec. 1, paras. 3, 7, 8, 13, 17, and 18] recognises partition as a source of property; the several rights of those entitled cannot in some cases be made effectual without partition, though they come into existence simultaneously with the devolution of the estate; and thus they in a manner spring from the partition as a source of property, which the Smriti declares it may be, but which in ordinary cases Vijnanesvara says it is not.

(*z*) *Koylasnath Doss* v. *Gyamonee Dossee*, C. W. R. for 1864, p. 314. *Musstt. Gowra Chowdhrain* v. *Chummun Chowdhry*, *Ibid.* 340.

(*a*) See Vyav. Mayukha Ch. IV., sec. 4; Manu IX. 185; Col. Dig. B. v. T. 396, Comm.

The Mitakshara nowhere mentions the right of the son's son's son, and its commentator, Visvesvara, states, in the Madanaparijata, that the vested right to inherit does not extend further than the grandson (*b*). Among the authors of the Dharmasastras a like difference of opinion seems to have existed. But at present the right of the great-grandson may be considered to be established, and the Sastris assume that the word "son" includes the son's son's son.

Sons who have separated from their father and his family are passed over in favour of sons who have remained united with him, or were born after the separation (*c*).

This is an application of the principle that a joint and undivided succession of the descendants being taken as the general rule, those who have become exceptions to it, or who having been exceptions have since ceased to be so, are treated accordingly. Their rights of succession are, as to their mutual extent, their rights as they would be in a partition made immediately on the death of the propositus. This is brought out most clearly perhaps in the first Section of the Daya Kramasangraha. It is in general rather assumed than propounded, as after providing for representation of sons by grandsons and great-grandsons, the discussions proceed on the basis of the deceased owner's having held separately, without which there would be no room for the several rules to operate, since in a partition on his death, the then joint owners with him would take the whole. Even "a widow cannot claim an undivided property" (*d*). And the widow comes first amongst the heirs on failure of male descendants. She and her daughter are entitled only to maintenance and residence (*e*) from the coparceners (*f*), or successors to a separate owner (*g*).

In *Chaudhri Ujagar Singh* v. *Chaudhri Pitam Singh* (*h*) the

(*b*) Madanaparijata, f. 228, pp. 2, 1, 7 (of Dr. Bühler's MS.). In the Subodhini, however, commenting on Mitakshara, Chap. I., sec. 1, pl. 3, Visvesvara Bhatta seems to recognise a representation extending to the great-grandson, if not even farther.

(*c*) Mit. Chap. I., sec. 2, paras. 1 and 5; Vyav. May. Chap. IV., sec. 4, paras. 16, 33, ss. *Marudayi* v. *Doraisami*, I. L. R. 30 Mad., 348; *Fakirappa* v. *Yellappa*, I. L. R. 22 Bom., 101.

(*d*) *Rewan Pershad* v. *Musstt. Radha Beebee*, 4. M. I. A. 137.

(*e*) *Parvati* v. *Kisansing*, Bom. H. C. P. J. F. for 1882, p. 183.

(*f*) *Mankoonwur et al.* v. *Bhugoo et al.*, 2 Borr. 162.

(*g*) *Ramaji Huree* v. *Thukoo Baee*, *Ibid.* 497.

(*h*) L. R. 8 I. A., at p. 196.

Privy Council say of a father whose son was a plaintiff on the ground that by an imposition the father had been allotted but a quarter instead of a half of an estate, " supposing that he was so imposed upon, and that there was some right in him to procure an alteration of the grant, that is not such an interest as a son would by his birth acquire a share in. Whatever the nature of the right might be—whether it could be enforced by a suit or by a representation to the Government—it does not come within the rule of the Mitakshara law, which gives a son, upon his birth, a share in the ancestral estate of his father." Regarded as a bounty, the property could not be recovered by a suit, but if there was a right in the father to property enforceable by suit that right would not indeed be shared by the son except subordinately, the property not being ancestral, but it would be inherited by him on his father's death. The property recovered by one of several sons would be subject to the rules of Book II., Partition, § 5 *A*.

PRIMOGENITURE.

The ancient Hindu law presents many traces of a once-subsisting law of primogeniture in this sense that on the father's death the eldest son succeeding as the paterfamilias, exercised the same, or nearly the same, functions of authority and protection as the previous head of the household (*i*). This rule and the rule of absolute dependence of the junior members was gradually

(*i*) Manu Chap. IX. 105; Narada Pt. I., Chap. III., 2, 36, 39. The preference given by several texts to the first born, combined with the principle of representation, may in the case of an impartible estate form a ground for preferring the son of a deceased first-born son as heir before his uncle, the former owner's eldest surviving son. [See Manu Chap. IX., 124, 125; the Ramayana quoted Col. Dig. B. 11, Chap. IV. T. 15, Com.; Ait. Brahm. IV 25, VII. 17, 18 quoted Tagore Lec., 1880, Lec. V.; *Ramalakshmi Ammal* v. *Sivanantha*, 14 M. I. A., at p. 591.] Other texts in some degree favour the son of the first married wife, though later born, in competition with the earlier born son of a second or third wife; [Manu Chap. IX. 123, Col. Dig. B. IV. T. 51 and Com.]; yet this may have originally rested on the taking of wives in the order of the classes. [Manu Chap. IX. 122, and Kulluka ad loc.; Manu III., 4, 12, 13.] Recourse must be had in practice to the custom of the family for a rule which cannot be gathered with absolute certainty from the texts. [*Ramalakshmi Ammal* v. *Sivanantha Perumal*, 14 M. I. A. 570; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523.] In *Jagdish Bahadur* v. *Sheo Pertab* [L. R. 28 I. A. 100; see also *Pedda Ramappa* v. *Bangari*, L. R. 8 I. A. 1; *Ramasami Kamayya* v. *Sundralingasami*, L. R. 26 I. A. 55] the Judicial Committee decided that priority of birth among

superseded by the present law of equal joint succession of all the sons standing in a like legal relation apart from priority of

sons determined the succession irrespective of the status of the mothers, whether puttabi stri (first-married wife) or not. At Madras it has been held that a junior brother, allowed by the others to take an impartible joint estate, transmitted it to his own descendants, the other members being entitled only to subsistence, but that on the extinction of his line an heir was to be sought in the descendants of the eldest of the original group of brothers. The rule of precedence by seniority of outgrowth from the parent stem and by representation was thought to apply to an estate which, though impartible, had all along been joint family property, and this though the eldest brother was apparently dead when the fourth one took the estate. [*Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru*, I. L. R. 4 Mad. 250.] In the Tipperah case [*Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523] the Judicial Committee had ruled that the nearest in blood to the last holder was his heir, not the senior member of the whole group of agnates. This the Madras High Court thought inconsistent with the statement in the Shivaganga case [*Katama Natchiar* v. *The Rajah of Shivaganga*, 9 M. I. A., at p. 593] that the succession to a raj is governed by "the general Hindu law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject," such character being consistent with a continued joint ownership, survivorship, and precedence by seniority of origin in the group; but it would seem that the Judicial Committee *did* think a rule of survivorship and of latent rights to succession of collaterals was excluded by the impartibility of the estate and the singular succession to it. [See *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A., at pp. 540, 541.] However, the view of the Madras High Court that "when impartible property passes by survivorship from one line to another, it does not necessarily devolve on the coparcener nearest in blood, but on the nearest coparcener of the senior line" was affirmed by the Privy Council in *Muttuvadaganadha* v. *Periasami* [L. R. 23 I. A. 28; *Kachi Kalinyana* v. *Kachiyava*, L. R. 32 I. A. 261]. The *Pittapur Case* [I. L. R. 22 Mad. 382, P. C.] laid down that the holder of an impartible estate was competent to alienate it by gift or will; but this decision is not regarded by the High Court in India [*Nachiappa Chettiar* v. *Chinnasami Naicker*, I. L. R. 29 Mad. 453; *Kali Krishna* v. *Raghunath Deb*, I. L. R. 31 Cal. 224; *Harpal Singh* v. *Bishan Singh*, 6 A. L. J. 753; *Contra*, *Rajah of Kalahasti* v. *Achigadu*, I. L. R. 30 Mad. 454; and *Zamindar of Karvetnager* v. *The Trustee of Tirumalai*, I. L. R. 32, Mad. 429, which lay down that there is no joint estate in moneys due to the holder of the impartible estate during his lifetime] as affecting the question of succession to the estate, and in *Indar Sen Singh* v. *Harpal Singh* [I. L. R. 34 All. 79] the Allahabad High Court held "that where ancestral property is impartible and is held by a single member of the family, all the members of the family must be deemed to be joint in estate, and the rule of succession to the property is the same as that which governs the case of partible property, so that a junior member of the family, who gets maintenance from the person holding the impartible estate, succeeds to the estate by right of survivorship." In the *Partapgiri Adoption Suit* (P. C. April 26, 1918) the Judicial Committee seem to approve of this view; though in the *Pittapur Maintenance Suit* (P. C. May 2, 1918) it has been held that there

birth. The nature of the transition may be gathered from the authorities referred to below (*k*). See also § 1. B (1).

§ 1. *A.* (2) ADOPTED SONS.—*On failure of legitimate issue of the body, adopted sons inherit. If sons be born to the adopter after he has adopted a son, the latter inherits a fourth share* (*l*).

EXAMPLES.

1. A, B, C form a united family. A adopts A^1. On A's decease, A^1 or his descendant A^2 or A^3 takes A's share.

2. A, B, C form a united family. A has a legitimate son, A^1. The latter adopts a son, A^2. If A^2 survives A^1 and A, he inherits A's share. The same would be the case if A^2 were a legitimate son of the body of A^1, and adopted A^3, and the latter survived A^2, A^1, and A.

3. A, B, C form a united family. A adopts A^1, and a son, A^a, is born to him afterwards. On the death of A, A^1 will inherit a fourth of a share, and A^a the rest of A's share.

AUTHORITIES.

Digest of Vyavasthas, Chap. II., sec. 2, Q. 1, 3, and 15; and sec. 4, Q. 2.

is no co-parcenary in an impartible estate and consequently no one who cannot establish his claim by custom is entitled to maintenance. This latter view appears to be in conflict with the decision in *Raja Braja Sundar Deb* v. *Srimati Swarna Manjari Dei*, P. C. Oct. 29, 1917.

(*k*) Mit. Chap. I., sec. I., para 24, Chap. I., sec. II., para. 6; Vyav. May. Chap. IV., sec. I., paras. 4-10; Apast. II., VI., 10, 14; Gaut. Chap. XXVIII., paras. 5-16; Manu. Chap. IX. 105*ff*, 112*ff*; Vasishtha XVII.; Narada Chap. XIII., paras. 4, 5, cited Col. Dig. Book. V. T. 32; Vishnu Chap. XVII. 1, 2.

(*l*) In Western India an adopted son competing with a legitimate son born subsequent to the adoption is entitled only to a fifth share of the father's estate, both under the Mitakshara and the Maynkha—*Giriapa* v. *Ningapa*, I. L. R. 17 Bom. 100. In Bengal he is entitled to a third; in Madras he takes a fifth; while amongst those who are governed by the Hindu law of the Benares school his share would amount to a fourth. *Rukhal* v. *Chuni Lal*, I. L. R. 16 Bom. 347; *Taramohun* v. *Kripa Moyee*, 9 Suth. 423; *Ayyavu* v. *Niladatchi*, 1 Mad. H. C. 45; *Birbhadra* v. *Kalpataru*, 1 Cal. L. J. 388. In *Annapurnai Nachiar* v. *Forbes* (L. R. 26 I. A. 246) it was held that the adoptive mother would include other wives of the adoptive father, and in conformity with the same principle a dwyamushyayana would be succeeded by the heirs of his adoptive father unless there be an agreement to the contrary (*Behari Lal* v. *Shib Lal*, I. L. R. 26 All., 472). Among the Sudras an afterborn natural son excludes an

The position of an adopted son in point of inheritance has recently been considered by the Judicial Committee in *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (L. R. 43 I. A. 56, *per* Sir John Edge) on appeal from the Bombay High Court (I. L. R. 40 Bom. 270), which raised the point whether the principle of reduced share to an adopted son applied when he was adopted by the widow under an authority by her deceased husband who was a member of the joint family. After carefully considering all the authorities, their Lordships lay down the law as follows: "As early as 1833 this Board, in *Sumboochunder Chowdhry* v. *Naraini Dibeh and Another* (3 Knapp, 55), considered that according to Hindu Law an adopted son becomes for all purposes the son of the father by adoption. This Board in 1881, in *Pudma Coomari Debi* v. *The Court of Wards and Another* (L. R. 8 I. A. 229), approved of the decision of this Board in *Sumboochunder Chowdhry* v. *Naraini Dibeh,* and held that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relatives by adoption, and also that an adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. Those excepted instances relate to marriage and to competition between an adopted son and a subsequently-born legitimate son to the same father. To the same effect is the decision of this Board in *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (L. R. 10 I. A. 138). In the last-mentioned case, when it was before the full Bench of the High Court at Calcutta, Romesh Chunder Mitter, J., held that—'According to Hindu law an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter, as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it.' With that statement as to the Hindu law of adoption their Lordships agree. An adopted son thus in competition with him other than the legitimate son of his father takes exactly the same share as a legitimate son.

adopted son in succession to impartible property (*Ramasami Ramaya* v. *Sundralinga Sami,* I. L. R. 17 Mad., 435), but the latter inherits half the share in respect of other properties (Dattaka Chandrika).

(See also *Raghunandan Das* v. *Sadhu*, I. L. R. 4 Cal. 425.) He is entitled to succeed to all the sapindas of his adoptive father, whether through males or females, and so will be his male or female descendants. (*Taramohun* v. *Kripa Moyee*, 9 Suth. 423; *Lokenath* v. *Shamasoonduree*, S. D. of 1858, 1863; *Kishenath* v. *Hurreegobind*, S. D. of 1859, 18.) Consequently he would succeed to the Stridhan of his adoptive mother (*Teencowrie* v. *Dinonath*, 3 Suth. 49), and the adopted son of a daughter has been held to share equally with the natural-born son of another daughter, whatever was left by the maternal grandfather (*Surjokant Nundi* v. *Mohesh Chunder*, I. L. R. 9 Cal. 70). On the same principle he is succeeded by the adoptive mother in preference to the adoptive father (*Anandi* v. *Hari*, I. L. R. 33 Bom. 404)."

There are no special authorities mentioning the right of the adopted son of a son or grandson to inherit his adoptive grandfather's or great-grandfather's shares. But it may be inferred from the maxim that a person adopted occupies in every respect the position of a son of the body of the adopter. See Synopsis of the H. L. of Adopt., Head Fourth, Stokes's H. Law Books, p. 668. *Cf.* the *Pittapur Maintenance Súit* (P. C. May 2, 1918).

§ 1. *A.* (3) Illegitimate Sons, Grandsons, and Great-Grandsons. —*In the case of a Súdra, being an avibhakta, his share, on failure of the three legitimate descendants, is inherited by his illegitimate sons, grandsons, or great-grandsons. If legitimate descendants are living, the illegitimate inherit half a share.*

Authorities.

Digest of Vyavasthas, Chap. II., sec. 1, Q. 4; sec. 3, Q. 1; sec. 11, Q. 1, 2, 3; Vyav. May. Chap. IV., sec. IV., para. 32; 2 Strange H. L. 70.

The expression "half a share" must be interpreted in accordance with the principles laid down by Vijnanesvara, Mit. Chap. I., sec. 7, para. 7, regarding the "fourth of share" which a daughter inherits. Consequently, if A leaves a legitimate son, A^1, and an illegitimate son, A^a, A's property is divided first into two portions, and A^a receives one-half of such a portion, and A^1 the rest (*m*).

In the passage of the Mitakshara referring to the rights of the illegitimate son, it is stated that the latter inherits the whole

(*m*) This explanation is also expressly given in the Viramitrodaya.

estate of his father only on failure of daughter's sons. But this can only refer to cases wherein the father is separated (vibhakta), as daughters' sons do not inherit from a member of an undivided family. On the other hand, the text states that the illegitimate son inherits on failure of legitimate brothers. Here it must be assumed that the author omitted to mention the sons and grandsons of legitimate brothers, as these take their fathers' and grandfathers' place by the law of representation (see p. 62), and it would be plainly anomalous that a daughter's son, but not a son's son, should exclude the illegitimate son of the propositus. See further below, § 1. *B*. (3).

§ 1. *A*. (4) DESCENDANT OF EMIGRANT HEIR.—*In the case of coparceners who have emigrated, the descendants in the male line within six degrees inherit, on return, their forefather's share.*

AUTHORITIES.

Mayukha, Chap. IV., sec. 4, para. 24; so also the Viramitrodaya. See the case of *Moroji Vishvanath* v. *Ganesh Vithal,* 10 Bom. H. C. R. 444.

No difference in the rule as to representation arises from the parcener's residing abroad. Mere non-possession does not bar until the seventh from the common ancestor in a branch settled abroad; but the failure at the same time of three intermediate links prevents a right from vesting in the fourth so as to be further transmissible as a ground for claiming a share from those who have meanwhile come into possession of the property. When they have resided in the same province, such a claim can be set up by the descendants as far as the fourth only from a common ancestor, who was sole owner of the proprety. See Col., Dig. Book V. T. 396 Comm.; see, however, Book II., § 4 *D*. and Index, Limitation.

§ 1. *A*. (5) COPARCENERS OF THE DECEASED.—*The share of an undivided coparcener who leaves none of the above-mentioned descendants goes to his undivided coparceners.*

See Digest of Vyavasthas, Chap. I., sec. 2; Chap. II., sec. 10, Q. 5; and for Authorities, see Chap. I., sec. 2, Q. 3.

The Mitakshara (Chap. II., sec. 1, pp. 7 and 20) and Vyav. May. state distinctly that the rule, as given above, holds good in the case of brothers, but not that it touches the case of more

remote relations. The Sastris generally hold that the word "brothers" in the text in question is intended more remotely to include coparceners; in fact that it contains a "dikpradarsana," or indication of the principle to be followed. There can be no doubt that they are right. For the law of representation secures also to remote relations the succession to their coparcener's share. Thus if A, B, C, and their descendants B^1, B^2, and C^1, live as a united family, and at the death of A, B^2 and C^1 only are alive, these will be the sharers of A's property, as they represent their grandfather and father respectively, and the latter, according to the authorities cited, would have inherited A's share.

The rule of survivorship in an undivided family was recognised by the Privy Council in *Katama Natchiar* v. *Rajah of Shivaganga* (*t*), but in a subsequent case it has been made subordinate to that of nearness of kin to the late Raja (*v*). In another case (*w*) reference having been made in argument to Mit. Chap. II., s. iv. their Lordships seem (see Rep., p. 504) to have thought that the plaintiff, one of four brothers once co-existing as a united family, in claiming one-fourth only, instead of one-half, of a share in a joint estate, had made a needless concession to his nephews, who would be excluded by him and his brother from succession to a third brother their uncle deceased, but the Mitakshara in the place referred to is treating of separate property. So, too, the Viramitrodaya, Tr. p. 194. In the same treatise, p. 72, it is laid down that a son dying is replaced by his son or sons in a united family with reference to uncles or cousins, each group taking their own father's share. Vijnanesvara, Mit. Chap. I., s. v., insists on the equal rights of father and son to the ancestral estate; so also Vishnu, XVII., 17, quoted below; and by the exclusion of nephews in favour of brothers, the case would frequently arise of a united family, in which the whole of the property belonged to one member. The law of partition gives to the nephew the same right as his uncle, and requires that a division of the common property be deferred until the delivery of the pregnant widow of a deceased coparcener (*x*). The case of *Debi Parshad* v. *Thakur Dial* (*y*) supports the views just stated.

(*t*) 9 M. I. A. 539.

(*v*) See above, p. 66.

(*w*) *Ramprasad Tewarry* v. *Sheochurn* Doss, 10 M. I. A. 490.

(*x*) Mitrashara Chap. I., sec. VI., pl. 11, 12; Chap. II., sec. I., pl. 30; Vishnu, Chap. XVII., Sloka 23; Yajn. II., 120, 135.

(*y*) I. L. R. 1 All. 105.

In a Bengal case (*z*) the Privy Council have held that even in an undivided family the uterine brother inherits, to the exclusion of the half-brother, his deceased brother's share. After proving in opposition to Srikara that while Yajnavalkya's text (II., 135, 136), in favour of brothers, includes both those of the full blood and those of the half-blood, the subsequent texts, as to connection by blood and by association, give equal rights to the re-united half-brother and the separated whole-brother. Jimuta Vahana in the Daya Bhaga quotes Yama to show that the rule applies only to divided immovable property, since the undivided property appertains to all the brethren. This has apparently been understood by their Lordships as in the case of half-brothers, meaning only *re-united* brethren, so as to leave to the uterine brother a superiority in a family wherein no division has taken place; but the true sense seems to be that the divided half-brother has no rights of inheritance, if a whole brother survive, until he becomes re-associated, while the whole brother, on account of his connection by blood, retains a right of inheritance in spite of separation. The half-brother is restored to a place by re-union (*a*). The whole-brother has not quite forfeited his place by division; though in competition with another whole-brother, unseparated or re-united, his single connexion does not avail against the double connexion of the latter; and on his return, having a double connexion with his own whole-brothers, he succeeds to them.

However the case may be in Bengal, the Mitakshara says of the application of the Slokas (Yajn. II., 134, 139) that "partition had been premised (to the general text on succession) and re-union will be subsequently considered," so that in Bombay no preferential inheritance of brothers in a united family can arise from the texts. It is the same in Vishnu, Chap. XVII., Sut. 17. The joint property being traced back to the single original owner the rights of partition amongst descendants, and of inheritance, so far as inheritance can subsist, are derived from the same source *per stirpes* without distinction of mothers, these being now all of equal caste (*b*). In *Neelkisto Deb* v. *Beerchunder Thakur* (*c*)

(*z*) *Sheo Soondary* v. *Pirtha Singh*, L. R. 4 I. A. 147.

(*a*) See *Prankishen Paul Chowdry* v. *Mathooramohan Paul Chowdry*, 10 M. I. A. 403; and Manu IX. 212.

(*b*) See Mit. Chap. II., sec. 1, pl. 30; and Chap. I., sec. V., pl. 2; Yajn. II. 120, 121; *Moro Vishvanath* v. *Ganesh Vithal*, 10 Bom. H. C. R. 444.

(*c*) 12 M. I. A. 523.

title by survivorship is said to be a rule alternative to that founded on efficacy of oblations, and it is on this latter that the decision of the Calcutta High Court is founded (*d*), which has been followed by the Privy Council in *Sheo Soondary's Case*. The Bengal case indeed admits a difference of doctrine under the Mitakshara (*e*).

A grant to united brethren without discrimination of their shares constitutes a joint tenancy with the same consequences as in the case of a joint inheritance (*f*).

As to charges on the inheritance, undivided property is not generally in the hands of survivors answerable for the separate debt of a coparcener deceased (*g*). A son's obligation to pay his father's debt depends on the nature of the debt, not on the nature of the property that he has inherited (*h*). And the property, even where a son is liable, is not so hypothecated for the father's debts as to prevent a clear title from passing to a purchaser from the son in good faith and for value (*i*). Securities created by a father, unless they are of a profligate character, bind his sons as heirs (*k*). The widows of deceased co-sharers are entitled to maintenance and residence (*l*). See below § 1. *B*. (1).

§ 1. *B*.—HEIRS TO THE SEPARATE GRIHASTHA, UPAKURVANA BRAHMACHARI, AND TO THE SEPARATE PROPERTY OF AN UNDIVIDED COPARCENER.

The separated householder being father of a family becomes the origin of a new line of succession within that family (*m*). His sons are by their birth joint owners with him of the ancestral estate in his hands, but he has no other co-sharers in it, and in the absence of sons or after separation from them he is free to

(*d*) See *Rajkishore* v. *Govind Chunder*, L. R. 1 Calc. 27.

(*e*) *Loc. cit.*

(*f*) *Radhabai* v. *Nanarao*, I. L. R. 3 Bom. 151.

(*g*) *Udaram Sitaram* v. *Ranu Panduji et al.*, 11 Bom. H. C. R. 76, 85. *Goor Pershed* v. *Sheodin*, 4 N. W. P. R. 137.

(*h*) *Ibid.* and *Laljee Sahoy* v. *Fakeer Chand*, I. L. R. 6 Cal. 135.

(*i*) *Jamiyatram* v. *Parbhudas*, 9 Bom. H. C. R. 116.

(*k*) *Girdhari* v. *Kanto Lall*, L. R. 1 I. A. 321; *Suraj Bunsee Kooer* v. *Sheo Prasad*, L. R. 6 I. A. 104; *Jetha Naik* v. *Venktappa*, I. L. R. 5 Bom. at 21; *Ponnappa* v. *Pappuvayyangar*, I. L. R. 4 Mad. 1.

(*l*) Mit. Chap. II., § 1, para. 7, ss. Viram. p. 153 transl., *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353, referring to *Gauri* v. *Chaudramani*, I. L. R. 1 All. 262, and *Mangala Debi* v. *Dinanath Bose*, 4 B. L. R. 72 O. C. G.

(*m*) See *Rajah Ram Narain Singh* v. *Pertwin Singh*, 20 C. W. R. 189.

dispose of it (*n*). Should he fail to dispose of his estate, and die separated, his sons (*o*) take equally, and failing sons, others take in the order following:—

§ 1. *B*. (1) SONS, SON'S SONS, AND SON'S SON'S SONS.—*The three first descendants of a separate Grihastha in the male line inherit* per stirpes.

See Digest of Vyavasthas, Chap. II., secs. 1 and 4, and for Authorities, see above § 1. *A*. (1).

The householder, though unseparated generally, may have acquired property which ranks as his separate estate. The conditions of such an acquisition are discussed under the head of Partition. The succession to such property is governed generally by the same rules as if the acquisition had been wholly separate estate. When there has not been a general separation of interests, the presumption is in favour of acquisitions by the several members uniting with the joint estate, a presumption which has to be met by evidence directly proving a separate acquisition or from which it can be reasonably inferred (*p*). But under circumstances the usual presumption will not be raised as ruled by the Judicial Committee in *Musst. Bannoo* v. *Kasharam* (*q*).

Seniority in marriage of their mothers gives no advantage to the sons over their seniors in birth by another wife (*r*); and the wives being equal in class, seniority by birth gives superiority of right (*s*), where the property is impartible (*t*). See above pp. 65-66.

(*n*) *Bhika* v. *Bhana*, 9 Harr. 446; *Narottam Jagjivan* v. *Narsandas Harikisandas*, 3 Bom. H. C. R. 6 A. C. J.; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. at p. 39; *Tuljaram Morarji* v. *Mathuradas Dayaram*, Bom. H. C. P. J. for 1881 p. 260.

(*o*) *Mt. Anunda Koonwur* v. *Khedoo Lal*, 14 M. I. A. 412. (Mithila law agreeing here with that of the Mitakshara.)

(*p*) See *Dhurm Das Pandey* v. *Mussumat Shama Sundri Debea*, 3 M. I. A. 229, 240; *Vedavalli* v. *Narayan*, I. L. R. 2 Mad. 19.

Prankishen Paul Chowdhry v. *Mothooramohun Paul Chowdry*, 10 M. I. A. 403.

(*q*) *Musst. Bannoo* v. *Kasharam*, I. L. R. 3 Cal. 315 (P.C.).

(*r*) *Ramalaksmi* v. *Shivanantha*, 14 M. I. A. 570; *Jagdish Bahadur* v. *Sheo Pertab*, L. R. 28 I. A. 100.

(*s*) Manu Chap. IX., paras. 122, 125.

(*t*) *Ibid.* and *Bhujangrav* v. *Malojirav*, 5 Bom. H. C. R. 161, A. C. J.; *Pedda Ramappa Nayanivaru* v. *Bangari Seshamma Nayanivaru*, L. R. 8 I. A. 1.

The partition of lands in descent between all the sons, and failing them between the daughters, was the universal law of socage descents in England

The widow of the late owner is entitled to residence in the family house (*v*); so in a united family it is the widow's duty to reside in her late husband's house under the care of his brother (*w*); she may leave it for a just cause or may go to live with her father, but she cannot leave it for an improper purpose without losing her right to maintenance; and she cannot be deprived of this right by a sale of the house (*x*).

The widow has a right to an adequate maintenance (*y*) out of the estate and in proportion to it (*z*). She need not be maintained exactly as her husband would have maintained her (*a*); but she must be supported in the family (*b*). She cannot be deprived of her right by an agreement taken from her by her husband and a gift of all his property to his sons (*c*). A sum may be invested to produce the maintenance or other arrangements made to secure it (*d*). Purchasers from the successor are bound or not, as they have, or have not, had notice of the widow's claim according to *Srimati Bhagavati Dasi* v. *Kanailal et al.* and *Beharilalji* v. *Bai Rajbai* (*e*). As to the nature of the widow's right as an indefeasible charge on the estate, opinions have differed (*f*). In

until comparatively late times; nor was it peculiar to England, being found in the lands of the roturiers of France as well as in other parts of Europe. *Elton, Tenures of Kent*, 41. There are frequent instances in "Domesday" of males holding in coparcenery, or as it is there expressed, in paragio. *Ibid.* 58.

(*v*) *Prankoonwar et al.* v. *Deokoonwar*, 1 Borr. R. 404.

(*w*) *Kumla et al.* v. *Muneshankur*, 2 Borr. R. 746; *Naik* v. *Honama*, I. L. R. 15 Bom. 236; *Mulji Bhaishankar* v. *Bai Ujam*, I. L. R. 13 Bom. 218; *Parwatibai* v. *Limbaji*, I. L. R. 36 Bom. 131.

(*x*) *Mangala Debi et al.* v. *Dinanath Bose*, 4 B. L. R. 72 O. C. J.; *Gauri* v. *Chandramani*, I. L. R. 1 All. 262; *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353. See Dig. Vyav., Chap. I., § 2, Q. 9; *Yellawa* v. *Bhimangavda*, I. L. R. 18 Bom. 452.

(*y*) Macn. Cons. Hindu Law, 60.

(*z*) 2 Str. H. L. 290, 299; *Sakvarbai* v. *Bhavanji*, 1 Bom. H. C. R. at p. 198.

(*a*) *Kalleepersaud Singh* v. *Kupoor Koonwaree*, 4 C. W. R. 65.

(*b*) See Book II., § 7 A; *M. Venkata Kristna et al.* v. *M. Venkatarutnamah*, Mad. S. D. A. R. for 1849, p. 5; Vivada Chintamani, p. 261.

(*c*) *Narbadabai* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99.

(*d*) *Sakvarbai* v. *Bhavanji*, 1 Bom. H. C. R., at p. 198; *Vrandavandas* v. *Yamunabai*, 12 Bom. H. C. R. 229.

(*e*) 8 B. L. R. 225 A. C. J.; I. L. R. 23 Bom. 342. See *Adhiranee Narain Coomary et al.* v. *Shona Malee Pat Mahadai et al.*, I. L. R. 1 Cal. 365; *Baboo Goluck Chunder* v. *Ranee Ohilla Dayee*, 25 C. W. R. 100. See also *Ramlal Thakursidas* v. *Lakshmichand Muniram et al.*, 1 Bom. H. C. R. 71 App.; and *Johurra Bibee* v. *Sreegopal Misser et al.*, I. L. R. 1 Cal. 470.

(*f*) See *Ramchandra* v. *Savitribai*, 4 Bom. H. C. R. 73 A. C. J.; *Heeralall* v. *Musst. Konsillah*, 2 Agra R. 42; *Musst. Laltikuar* v. *Ganga Bishan et al.*,

Lakshman Ramchandra v. *Satyabhamabai* (*g*) it was held that notice was not conclusive against the purchaser of property held by a surviving coparcener subject to a widow's claim. The subject is in that case fully discussed. In *Mani Lal* v. *Bai Tara* it was held that an auction purchaser of a house, with notice that it was subject to the widow's right to reside therein, took free from her right of residence unless the debt for which it was sold was not for the benefit of the family or was in any way in fraud of her rights (*h*).

Even a concubine and her offspring are entitled to support. See below.

The son is bound to pay his father's debts and even those of his grandfather (*i*). The contracts and obligations of his father in connection with the estate pass to the heir taking it, except when improperly incurred (*k*). The Judicial Committee indeed have laid down in the case of an estate expressly held not to have been self-acquired by a father that "all the right and interest of the defendant in the zamindari which descended to him from his father, became assets in his hands" "liable for the debts due from his father" (*l*).

§ 1. *B*. (2) ADOPTED SONS.—*An adopted son and his descendants inherit in the same manner as natural sons and their descendants. In case, after an adoption has been made, of*

7 N. W. P. R. 261; *Baijun Doobey et al.* v. *Brij Bhookun Lall*, L. R. 2 I. A. 279; *Koomaree Debia* v. *Roy Luchmeeput Singh et al.*, 23 C. W. R. 33; *Adhiranee Narain Coomary et al.* v. *Shona Mallee Pat Mahadai et al.*, I. L. R. 1 Cal. 365; Mitakshara Chap. I. sec. VII. 1, 2; sec. I. 27.

(*g*) I. L. R. 1 Bom. 262; 2 *Ibid.* 494; I. L. R. 2 Mad. 339.

(*h*) I. L. R. 17 Bom. 398.

(*i*) The obligation is made dependent on his taking property from the ancestor, and limited by its amount by Bombay Act VII. of 1866. A similar limitation is provided by the same Act in the case of family debts incurred during the minority of a member afterwards sued for them. The protection extends to obligations incurred before a member attains twenty-one years of age. The general age of majority is now eighteen. See Act IX. of 1875.

(*k*) See Narada Pt. I. Chap. III., 2, 4, 18; *Ponnappa Pillai* v. *Pappuvayyangar*, I. L. R. 4 Mad. 1. *Gopal Kristna Sastri* v. *Ramayyangar*, I. L. R. 4 Mad. 236. As to the contract of tenancy see *Venkatesh Narayan Pai* v. *Krishnaji Arjun*, Bom. H. C. Print. Judg. 1875, p. 361; *Balaji Sitaram Naik* v. *Bhikaji Soyare Prabhu*, Bom. H. C. P. J. 1881, p. 181.

(*l*) *Muttayan Chettiar* v. *Sangili Vira Pandia*, L. R. 9 I. A. 127, reversing I. L. R. 3 Mad. 370.

the adopter having a legitimate son of his body, the adopted son receives a fourth of a share.

See Digest of Vyavasthas, Chap. II., sec. 2, and sec. 4, Q. 2, and for Authorities, see above § 1. *A.* (2) (3).

If a widow adopts a son in her husband's name, the adopted son immediately inherits the deceased's property. See Digest of Vyavasthas, Chap. II., sec. 2, Q. 8, ss.

Regarding the interpretation of the expression "a fourth of a share," see § 1. *A.* (3), page 69.

Adopted sons of son's sons, or son's son's sons, likewise, take the places of their adoptive fathers. See above, § 1. *A.* (2), page 67.

§ 1. *B.* (3) SUDRAS' ILLEGITIMATE SONS.—*On failure of legitimate sons of the body, son's sons, or son's son's sons, the illegitimate son of a Sudra and his descendants in the male line inherit the ancestor's property. If legitimate children be living, the illegitimate son takes half a share.*

See Digest of Vyavasthas, Chap. II., sec. 3, and for Authorities, see above, § 1. *A.* (3).

See § 1. *A.* (3) above, page 69. That illegitimates of the higher castes can claim maintenance only, while those of the Sudra caste are not outcastes but inherit, is laid down in *Pandaiya* v. *Puli et al.* (*m*). See also *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* and *Roshan Singh* v. *Balwant Singh* (*n*).

(*m*) 1 M. H. C. R. 478.

(*n*) 7 M. I. A. 48, 50; L. R. 27 I. A. 51.

The Viramitrodaya, following the Mitakshara Chap. I., sec. X., paras. 40-43, in contemplating unequal marriages as possible though reprehensible, assigns to the sons born from them a one-third or a half-share of the paternal property, admitting of augmentation, except in the case of a Brahman's son by a Sudra wife, to a full share at the father's discretion. Viram., Tr. 98, 129. An exception is, in the case of Brahmans, made of land; that a son by a Brahmani wife may take back from the donee, his half-brother of inferior grade. *Ibid.* 98.

According to the Celtic laws of Ireland and Wales bastards might inherit, taking with the legitimate sons a share regulated by the will of the head of the clan. See Co. Lit. 176*a* and Hargrave's Note. The laws were connected as amongst the Sudras with the general looseness of the marriage tie, which the husband could dissolve at will. See Ancient Laws of Wales, p. 46 § 54. According to the Lombard law the illegitimate was excluded from succession, but the legitimate son had to give him a provision in money.

According to Digest of Vyavasthas, Chap. II., sec. 5, Q. 1, the legitimate son of an illegitimate son inherits his father's share, though the latter has died before his grandfather. There is no express authority for this opinion. But still it appears to be in accordance with the general principles of the law of inheritance. For the claim of the Sudra's illegitimate son to his father's property, or, at least, to a part of it, is not contingent, but absolute, since, even if he has legitimate half-brothers or half-sisters, half a share must be given to him. The Sudra's illegitimate son is therefore in a position more analogous to that of a legitimate son, than to that of relations who inherit by a right liable to obstruction. Hence it would seem a correct doctrine that those laws which apply to the succession of sons and grandsons of legitimate sons, should also be applied to his sons—that is, that his sons should be considered to represent him, and to take, in case he dies before his father, the share which would have fallen to him.

In favour of this view we may adduce also the fact, that the rules treating of the rights of the illegitimate son are given by Vijnanesvara at the end of the chapter on the "apratibandha daya," inheritance by indefeasible right, and form as it were an appendix to it. Hence it may be inferred that Vijnanesvara intended all the rules, previously given, regarding sons in general, to apply also to him, except as far as they were apparently modified by the text of Yajnavalkya. According to this, the failure of daughters and their sons is necessary before the illegitimate son can inherit the whole property (o). See Mit. Chap. I., sec. 12, and Chap. II., sec. 2, pl. 6; and also above, § 1. *A.* (3), page 69.

The illegitimate offspring of a casual connection may inherit, if duly recognised (*p*), but a son born in sin (adultery or incest) is not entitled to a share of the inheritance (*q*). He can claim only maintenance (*r*).

Illegitimates inherit collaterally only by caste custom. See Digest of Vyavasthas, Chap. II., sec. 13, Q. 9; 2 Macn. H. L. 15;

(*o*) See *Muttuswamy Jagavera* v. *Venkataswara*, 12 M. I. A. 220.

(*p*) *Thukoo Baee* v. *Ruma Baee*, 2 Borr. R. 499; *Rahi* v. *Govind*, I. L. R. 1 Bom. 97.

(*q*) S. A. No. 124 of 1877, *Narayanbharthi* v. *Lavingbharthi*; Bom. H. C. P. J. F. for 1877, p. 173; S. C. I. L. R. 2 Bom. 141.

(*r*) *Ibid.* and 2 Str. H. L. 68.

Mit. Chap. I., sec. 11, pl. 31 (s). *Inter se* the sons of the same concubine are regarded as brothers of the whole blood. See Digest of Vyavasthas, Chap. II., sec. 11, Q. 4. They may form a united family with their legitimate half-brothers. See Digest of Vyavasthas, Chap. II., sec. 3, Q. 12.

The rule given by Yajnavalkya in favour of the illegitimate son of a Sudra, though separated in the Mitakshara by a long commentary on the preceding slokas, yet in the original immediately follows them as part of a complete statement of the succession of sons according to their rank. Next follows the statement of heirs to one who leaves no male issue—that is, none of the sons just enumerated (*t*). What Yajnavalkya obviously meant, therefore, was that in the absence of an auras son and of a daughter's son, a Sudra's son by his slave should succeed. The daughter's son is the one just before specified as equal to a son, though there is a slight variance of expression owing to the term putrika suta first used not being in strictness applicable to the offspring of a Sudra (*v*). Hence the word duhitra suta is substituted. By Yajnavalkya the daughter as well as the wife is brought in after the sons of all classes (*w*). It is only by interpretation on the part of the commentators that the daughter herself, having been first allowed to be an appointed son, has been placed before her son under texts probably intended to meet the case of no son of the enumerated classes surviving, nor any son or grandson of such a son (*x*). If Yajnavalkya had intended to give to the Sudra's daughter a place before his illegitimate son, he would not in the next line have placed the widow below that son and the daughter below the widow. The texts quoted in the Mitakshara, Chap. II., sec. II., para. 6 from Manu and Vishnu (apart from Balambhatta's gloss) show that on failure of descendants in the male line both the Rishis prescribed the succession of the daughter's son and not without appointment (*y*) of the daughter herself, who came in at a later stage (*z*). This

(*s*) *Nissar Murtojah* v. *Kowar Dhunwunt* Roy, I. Marsh. R. 609.

(*t*) Mitakshara Chap. II., sec. I., paras. 2, 39. The term is aputra = sonless.

(*v*) See Viramitrodaya, p. 121. *Infra*, Digest of Vyavasthas, Chap. II., sec. 3, Q. 12, 13.

(*w*) See, too, Mitakshara Chap. II., sec. I., para. 17.

(*x*) See Mitakshara Chap. II., sec. II., paras. 2, 6.

(*y*) Viramitrodaya, Transl., p. 121.

(*z*) *Bhau Nanaji* v. *Sundrabi*, 11 Bom. H. C. R. 274. See *infra*, Dig. Vyas. Chap. II., sec. 3, Q. 10.

makes it the more probable that the daughter's son, but not the daughter, was intended to precede the illegitimate son, though the precedence assigned to him by some commentators over his own mother in ordinary cases is to be rejected, as Mitramisra says, on account of the specification by Yajnavalkya of the daughter and not of her son, as an heir (*a*). In the case below, Digest of Vyavasthas, Chap. II., sec. 3, Q. 8, the illegitimate son of a Mali is preferred to the widow. The widow could claim recognition, but she is postponed by the Sastri to the illegitimate son through the operation of Yajnavalkya's text (*b*) and Vijnanesvara's comment (*c*), which provides for the daughter's son and daughter, but not for the widow (*d*).

It seems anomalous that the widow should be thus postponed to the illegitimate son, and her own daughter and the daughter's son. But according to the recognised rule of construction (*e*) the text of Yajnavalkya can be controlled only by another not reconcilable with its literal sense. Then the passages from Vishnu and Manu, quoted Mit. Chap. II., sec. II., para. 6, show that at one stage of the development of the Hindu Law, the daughter's son and even the daughter were made equal to a man's own son, while the widow was still unprovided for, or reduced to a lower place (*f*). Yajnavalkya's text belongs to this stage: so little progress had been made that the Rishi does not even name the daughter's son except in this place; but this mention is enough.

It is to the patni only that the sacred texts assign a right of inheritance (*g*). The English translation "wife" fails to indicate the distinction between the wife sharing her husband's sacrifices and the wife of an inferior order (*h*). The Sudra having no sacrifices to celebrate like the twice-born has no "patni" to share them. The Asura marriage being a purchase gave to

(*a*) Viramitrodaya, Transl., p. 184.

(*b*) Mitakshara Chap. I., sec. XII., para. 1.

(*c*) Mitakshara Chap. I., sec. XII., para. 2.

(*d*) So too the Viramitrodaya, Transl. pp. 130, 176.

(*e*) See Viramitrodaya, Transl. p. 236.

(*f*) See Manu Chap. IX., 130, 146, 147. Vishnu Chap. XV., 4, 47. Compared with Gautama XXVI., 18, ss., and Apastamba II. VI., 14; Narada XIII., 50, 51.

(*g*) See below Dig. Vyav., Chap. II., sec. 6 A, Q. 6 and above Book I. See too Viramitrodaya, Transl. p. 173.

(*h*) Mit. Chap. I., sec. XI. 2. Da Bhag. Chap. XI., sec. I., 48. Viramitrodaya, Transl. p. 132.

the wife no higher status than that of a "dasi" or concubine (*i*). But this or some even lower form was the appropriate one for Sudras (*k*): the higher forms were not allowable until custom in some measure made them so (*l*), and the different consequences of marriage according to the different forms (*m*) are traceable to a time and a custom in which community of property between the married pair was not recognised (*n*). Under such a system it is not at all surprising that the wife's right of inheritance should not be admitted. Nor is it strange that the development of the purely Brahminical law by which widows in the higher castes benefited should not have embraced in its full extent the degraded Sudras. As to the wives in this caste the expanding law left them as it found them, while it readily adopted an existing custom in favour of illegitimate sons, which appeared reasonable to those whose own heirs might be sons irregularly contributed to their families, and who looked on the Sudra marriages as virtually no more than licensed concubinage (*o*).

The express provision in Yajnavalkya's text in favour of the daughter's son may not improperly be traced in reality to a time when this kind of descent afforded the better assurance of a real connexion of blood. But it may be really an adoption for the Sudras of a rule much repeated, though not intended for that caste. The advantageous position assigned to the daughter's son is traced by Jimuta Vahana to his identification with the son of the appointed daughter (*p*), in whose favour only, Jimuta Vahana says, the texts expressly pronounce. He cites Baudhayana's text (*q*) that the "Putrika Sutam" is to offer the pindas and

(*i*) Smriti Chand, 150; Viramitrodaya, *loc. cit.*

(*k*) Baudhayana makes mere sexual connexion a lawful form of union for Vaisyas and Sudras, "for," he says, "Vaisyas and Sudras are not particular about their wives." Shortly afterwards he says: "A female who has been bought for money is not a wife. She cannot assist at sacrifice offered to the gods or the manes. Kasyappa has pronounced her a slave." Baudh., Tr. p. 207.

(*l*) Cf. *Vijiyarangam* v. *Lukshuman*, 8 B. H. C. R. 255-56 O. C. J.

(*m*) Mitak. Chap. II., sec. XI., 11.

(*n*) See the chapter on Stridhan.

(*o*) See Gautama Chap. XIX.; Baudhayana, II., 2.

The Roman law furnishes an analogy in the case of slaves: "quas vilitates vitae dignas observatione legum non credidit," and whose unions, even under the Christian system, remained mere concubinage in law until late in the ninth century. See Milman Hist. of Latin Christianity, vol. II., p. 15; Lecky, History of European Morals, II., 67.

(*p*) Daya Bhaga Chap. XI., sec. II., 21.

(*q*) At 1 W. & B. (1st ed.), 310, 315.

apparently excludes the mere " duahitra " from this right, which is assigned to him also, however, by Manu (*r*). The introduction of the daughter as well as her son may be due to a similar course of thought. The daughter appointed *as* a son being once recognised as a regular heir (*s*), the daughter not appointed gained a place (*t*), and in the passages cited as well as in Brahaspati (*v*) is mentioned without any mention of the wife. The texts were so far admitted as to the Sudras, but those texts specially favouring the wife as an heir, bearing only on the " patni," were not (*w*).

§ 1. *B* (4) WIDOWS.—*On the failure of the three first descendants in the male line, of adopted sons, and in the case of Sudras of illegitimate sons, a faithful widow inherits the estate of a separate householder, and the separate estate of a united coparcener.*

See Digest of Vyavasthas, Chap. II., sec. 6; and for Authorities, see Digest of Vyavasthas, Chap. I., sec. 2, Q. 4; Chap. II., sec. 6 A, Q. 11; Vyav. May. Chap. IV., sec. VIII., pp. 1 *seq*.

Under the strict Hindu law only such a widow inherited who was a dharmapatni, " a wife taken for the fulfilment of the law," who was lawfully wedded, and able to assist in the performance of the sacrificial rites (*x*). As only a female married as a virgin could occupy such a position, the females who had been widowed

(*r*) Cf. also Sankha and Likhita. Stokes's H. L. B. 411.

(*s*) Mit. Chap. I., sec. XI., para. 3.

(*t*) Manu Chap. IX., 130; Narada Chap. XIII., 50.

(*v*) Daya Bhaga Chap. XI., sec. II., 8.

(*w*) See Digest of Vyavasthas, Chap. II., sec. 6, A. Q. 6, and the instance at Chap. V., sec. II., Q. 1 and 2.

The Salic and Burgundian laws excluded women from inheritance to land. The Wisigoths more influenced by the Roman law admitted the daughter's succession, and this was in part adopted by the Franks. In England boc-land was heritable by females, but in the folc-land they could take no share. Hence possibly their exclusion by custom in some manors, see below.

(*x*) " A wife of the same class is indicated by the term ' patni ' itself, which signifies union through sacrifice." Viramit., Transl. p. 152. A wife of a rank below a " patni " would be entitled only to maintenance according to the Smriti Chandrika, Chap. XI., and comments in Viramit., Tr., pp. 133, 153; to succession only on failure of the wife of equal class, and that by analogy only, the texts giving the right only to the " patni," to whom the Smriti Chandrika, *loc. cit.*, paras. 11, 25, confines it. As to the relative rank of wives the first married has precedence. See Steele, L. C. 170.

and remarried (by Pat) were excluded from the succession to their second husband's property. By Act XV. of 1856 this disability has been removed, and the legal relation of a wife to a husband, whether she be technically a patni or not, is recognised as giving a right of inheritance to the woman and legitimacy to her children (*y*).

If a householder leave more than one widow they share the estate equally. See Digest of Vyavasthas, Chap. II., sec. 6A, Q. 35 and 36.

Two or more widows take a joint estate with the right of survivorship and partition (*z*). A co-widow can alienate her life estate, whole or in part; but the joint estate cannot be divested of the characteristics of the right of survivorship unless alienation is for necessity (*a*).

Proved adultery followed by conception and birth of a child bars the succession of a widow to her deceased husband's estate, unless condoned by the husband, her other rights, however, remaining unaffected. But if she has once obtained it, subsequent unchastity does not afford a reason for depriving her of it. See Digest of Vyavasthas, Chap. VI., sec. 3, Q. 6, Remark (*b*).

Remarriage of a widow results in divesting her of the property inherited from her first husband, even though such remarriage be in accordance with the custom of the caste. The High Court of Allahabad has adopted a more reasonable view, and held that

(*y*) See Vyav. May. Chap. IV., sec. VIII., para 3; Steele, Law of Castes, 168, 169, 175, and the answers of the Sastris below, Dig. Vyav., Chap. II., sec. 6A. *Balkrishna* v. *Savitribai*, I. L. R. 3 Bom. 51; *Ramappa* v. *Sithammal*, I. L. R. 2 Mad. 182.

(*z*) *Bhagwandeen's Case*, 11 M. I. A. 487; *Tanjore Case*, L. R. 4 I. A. 212; *Jijoyiamba* v. *Kamakshi*, 3 Mad. H. C. 424; *cf. Sunder* v. *Parbati*, L. R. 16 I. A. 186; *Rindamma* v. *Venkataramappa*, 3 Mad. H. C. 286; *Sellam* v. *Chinammal*, I. L. R. 24 Mad. 441; *Chhittar* v. *Goura*, I. L. R. 34 All. 189.

(*a*) *Ramakkal* v. *Ramasami*, I. L. R. 22 Mad. 522; *Gajapati Radhamani* v. *Pusapati Alakarajeswar*, L. R. 19 I. A. 184; *Thakurmani* v. *Doi Rani*, I. L. R. 33 Cal. 1079; *Janokinath* v. *Mothmanath*, I. L. R. 9 Cal. 580, F. B.; *Vadali* v. *Kotipalli*, I. L. R. 26 Mad. 334; *Hari Narayan* v. *Vitai*, I. L. R. 31 Bom. 560, both according to the Mitakshara and the Mayukha; *Durga Dat* v. *Gita*, I. L. R. 33 All. 443; *Ganpat* v. *Tulsiram*, I. L. R. 36 Bom. 88.

(*b*) *Gangadhur* v. *Yellu*, I. L. R. 36 Bom. 138; *Kerry Kolitany* v. *Moneeram Kolita*, L. R. 7 I. A. 115, on appeal from Bengal, 13 B. L. R. 1; *Parvati* v. *Bhiku*, 4 B. H. C. (A. C. J.) 25; *Bhawani* v. *Mahtab*, I. L. R. 2 All. 171; *Sellam* v. *Chinnammal*, L. R. 24 Mad. 441; *cf. Vishnu Shambhoy* v. *Mangamma*, I. L. R. 9 Bom. 108; *Keshare* v. *Gobind*, I. L. R. 9 Bom. 94 (her right to adopt).

among those Hindus who allow remarriage of a widow her remarriage would not affect her right in the property inherited from her former husband. She does not, however, lose her right in the property inherited in her capacity other than that of a widow, although the Bombay High Court has laid down the law to the contrary in *Vithu* v. *Govinda* (*bb*) on the basis of sec. 2 of Act 15 of 1856.

During the widow's survival no right vests in her husband's brothers or the other heirs. Her life with respect to the subsequent inheritance of heirs sought amongst her husband's relatives is as a prolongation of his (*c*). Succession on the widow's death opens to the husband's qualified heirs then in existence (*d*).

The duties and rights attached to the married state are governed by the customary law of the class or caste (*e*) which regulates the form of the ceremony as well as the relations arising from it (*f*). The law of the caste has been more or less subordinated in cases of disagreement to the general Hindu law (*g*), and private agreements are not allowed to control the customary law so as essentially to modify the obligations which it imposes (*h*), as by making the union dissoluble which the law regards as indissoluble.

The heritable rights of the widow are mainly derived from a moral unity existing between her and her deceased husband (*i*).

(*bb*) I. L. R. 22 Bom. 321, F. B.

(*c*) *Rooder Chunder* v. *Sumbhoo Chunder*, 3 Cal. S. D. A. R. 106; *Musst. Jymunee Dibiah* v. *Ramjoy Chowdree*, *Ibid.* 289.

(*d*) *Laxmi Narayan Singh et al.* v. *Tulsee Narayan Singh et al.*, 5 Sel. S. D. A. R. 282 (Calc.); *Nobin Chunder* v. *Issur Chunder et al.*, 9 C. W. R. 508 C. R.; *Bhaskar Trimbak* v. *Mahadev Ramjee at al*, 6 Bom. H. C. R. 14, O. C. J.; P. C. in *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee*, 10 M. I. A. 279.

(*e*) *Ardaser Cursetjee* v. *Perozebai*, 6 M. I. A. 348, 390; *Moonshee Buzloor Ruheem* v. *Shumsoonissa*, 11 *Ib.* 551, 611; *Skinner* v. *Orde*, 14 M. I. A. 309, 323; *Rahi* v. *Govind valad Teja*, I. L. R. 1 Bom. 97, 116; *Reg.* v. *Sambhu Raghu*, *Ibid.* 347; *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom. 545, at 565 ss.

(*f*) *Gatha Ram Mistree* v. *Moohita Kochin Atteah Domoonee*, 14 Beng. Law Rep. 298; *Rajkumar Nobodip Chundro Deb Burmun* v. *Rajah Bir Chundra Manikya*, 25 C. W. R. 404, 414.

(*g*) *Reg.* v. *Karsan Goja*, 2 Bom. H. C. R. 117, 125; Comp. Gaut. XI. 20; Manu II., 12, 18.

(*h*) *Seetaram* alias *Kerra Heerah* v. *Mussamut Aheeree Heeranee*, 20 C. W. R. 49.

(*i*) Katyayana cited in M. Williams' In. Wis. 160; Brihaspati in the Smriti Chandrika, Chap. XI., sec. 1, para. 4; Manu. IX., 45; *Hurkoonwar* v. *Ruttun*, 1 Bor. 475; *Treekumjee* v. *Laros*, 2 Bor. 397; *Koduthi* v. *Madu*, I. L. R.

The domestic fire must be maintained as a primary duty, and in its maintenance and the performance of the household rites the Hindu wife must take part with her husband (*k*). Thus, as the Mahabharat says (*l*):—"A wife is necessary to the man who would celebrate the family sacrifices effectually." Hence the husband comes for some purposes to be regarded as "even one person with his wife" (*m*). As under the Roman Law, "*Nuptiæ sunt divini juris et humani communicatio.*" The wife's gotra becomes that of her husband (*n*); her complete initiation is effected by her marriage; she renounces the protection of her paternal manes and passes into the family of her husband (*o*). The connexion being thus intimate there should be no litigation between the married pair (*p*), and according to Apastamba (*q*) there can be no division between them. Any property which the married woman may acquire is usually her husband's (*r*). A thing delivered to her is effectually delivered to the husband,

7 Mad. 321; *Rasul Jehan* v. *Ram Surum*, I. L. R. 22 Cal. 589; *Matangivi Gupta v. Ram Rutton Roy*, I. L. R. 19 Cal. 289; *Mula* v. *Partab*, I. L. R. 32 All. 489; *Chamar Haree* v. *Kashi*, I. L. R. 26 Bom. 388, approving *Akora* v. *Boreani*, 2 B. L. R. 199; *Basappa* v. *Rayava*, I. L. R. 29 Bom. 91; *Vithu* v. *Govinda*, I L. R. 22 Bom. 321 (F. B.).

(*k*) Manu III., 18; Baudhayan, Transl., p. 193.

(*l*) Manu III., 67; II., 67; IX., 86, 87, 96; Apast. 99, 125, 126; Col. Dig. Book IV., T. 414; Smriti Chandrika, Chap. XI., sec. 1, para. 9.

(*m*) Manu IX., 45; Brihaspati, quoted by Kulluka on M. IX., 187.

(*n*) Steele 27 (*n*); *infra* Dig. Vyav., Chap. IV. B., sec. 6, II. (b), Q. 3; *Lallubhoy* v. *Cassibai*, L. R. 7 1 A., at p. 231.

Under the Teutonic laws which recognised the birth-law of each as permanently adhering to him, there were exceptions (1) in the case of a married woman whose coverture brought her under the birth-law of her husband, and (2) in that of a priest who came under the Roman law. See Savigny's History of the Roman Law, Chap. III.

(*o*) 2 Str. H. L. 61; *Sri Raghunadha* v. *Sri Brozokishore*, L. R. 3 I. A. 191. So amongst the Romans. Dio. Halic. II., 25.

(*p*) 2 Str. H. L. 58. Col. Dig. Book III. Chap. I., T. 10. Conjugal rights were refused to the husband where the lower courts thought that compelling the wife to go to his house would be dangerous to her personal safety. *Uka Bhagvan* v. *Bai Heta*, Bom. H. C. P. J. File for 1880, p. 322.

(*q*) See Harita in Smriti Chan., Chap. II., sec. 1, para. 39. Viramit., Trans. p. 59. Apastamba, Trans. p. 135.

(*r*) Vyav. May., Chap. IV., sec. 10, para. 7, Col. Dig. Book III., Chap. I., T. 10; Narada II., XII. 89; Apast. 156; Manu VIII. 416; 1, Str. H. L. 26. Katyayana quoted in Smriti Chandrika, Chap. IX., sec. 1, para. 16. But see also Mit. Chap. II., sec. 11. *Ramasami Padeiyatchi* v. *Virasami Padeiyatchi*, 3 Mad. H. C. R. 272. She is liable in her stridhan only for a contract made jointly with her husband, while a woman contracting as a widow remains subject

and what is received from her is as if received from him (*s*). Her full ownership of her stridhan is subject to the qualification that her husband may dispose of it in case of distress, and that her own power to alienate it is subject to control by him with the exception of the so-called Saudayakam, the gifts of affectionate kinsmen (*t*). See the Chapter on Stridhan.

The identity between the married pair being thus complete, Jagannatha cites Datta (*v*) to the effect that "wealth is common to the married pair"; but this he explains as constituting in the wife only a secondary or subordinate property. Her right in the husband's estate is not mutual like the co-extensive rights of united brethren. It is dependent on the husband's and ceases with its extinction (*w*). Her legal existence is thus, in some measure, absorbed during her coverture in that of her husband (*x*). His assent is specially necessary to her dealings with land according to Narada, Part I., Chap. III., pp. 27-29 (*y*). In case of unauthorised transactions she is liable in her stridhan, but not in her person (*z*). On her decease she shares in the benefit of her husband's sacred fire (*a*), her exequial ceremonies according to the Mitakshara and the Nirnayasindu, are to be performed by her husband, and in his absence by the members of his family, not by those of her own family of birth. Surviving her husband,

generally to the liability after her remarriage. *Narotam* v. *Nanka*, I. L. R. 6 Bom. 473. *Nahalchand* v. *Bai Shiva*, *Ibid.* 470. S. A. 261 of 1861; S. A. 467 of 1869. When living separate without necessity she is fully liable for her debts. *Nathubhai Bhailal* v. *Javher Raiji*, I. L. R. 1 Bom. 121.

(*s*) Col. Dig. Book V. Chap. VII., T. 399 Comm. Her authority would, however, be revoked perhaps by adultery as under the English law. (See *R.* v. *Kenny*, L. R. 2 Q. B. D. 307), and the Indian Penal Code § 378, illus. (o) assumes that her authority is limited by the extent of delegation from her husband. Comp. *R.* v. *Hanmanta*, I. L. R. 1 Bom., at p. 622. As to household expenses see Apast., Tr., p. 135.

(*t*) *Reg.* v. *Natha Kalyan et al.*, 8 Bom. H. C. R. 11 Cr. Ca.; *Tukaram* v. *Gunajee*, *Ibid.* 129 A. C. J.; Vyav. May., Chap. IV., sec. 10, pl. 8 and 10; Col. Dig., Book II., Chap. IV., T. 55; Book V., T. 478; Viramitrodaya, quoted below; Manu II., 199; Smriti Chandrika, Chap. IX., sec. 2, para. 12; 2 Macn. H L. 35.

(*v*) Col. Dig. Book V. T. 415. See also the Smriti Chandrika, Chap. IX., sec. 2, para. 14.

(*w*) Viramit., Transl. 165.

(*x*) See Manu IX., 199, as construed by the Mayukha and Viramitrodaya.

(*y*) See also *D. Rayapparaz* v. *Mallapudi Rayudu et al.*, 2 M. H. C. R. 360.

(*z*) *Nathubhai* v. *Javher Raiji et al.* I. L. R. 1 Bom. 121.

(*a*) Viramit., Transl. 133.

and thus in a manner continuing his existence (*b*), she procures benefits for his manes and those of his ancestors (*c*). It is on her competence in this respect that, according to the Smriti Chandrika (Trans. p. 151), her right to inherit depends. Devanda Bhatt therefore restricts the right to the "patni," refusing it to the wives of an inferior order (*d*), and in the Viramitrodaya (*e*) it is said that a wife espoused in the asura or the like form has no right to the property when there is another espoused in an approved form," because "a woman purchased is not to be deemed a patni, since she cannot take part in a sacrifice to the gods or the manes; she is regarded as a slave," and "a sonless wife other than a patni is entitled only to maintenance even where the husband was separated" (*f*).

The Mitakshara also, Chap. II., sec. 1, pl. 29, 6 (*g*), restricts the heritable right to the "patni," the "wedded wife who is chaste." Vijnanesvara allows this right to operate in favour of the widow only of a divided coparcener (*Ibid.* pl. 30), but thus inheriting she obtains an ownership of the property (*Ibid.* Chap. I., sec. 1, pl. 12), notwithstanding her general dependence (Chap. II., sec. 1, pl. 25) (*h*), extending even to a reversion vested in her husband (*i*) which enables her, as contended in the Vyav. May., above quoted, to deal with the estate for some purposes by way of alienation or incumbrance (*k*). She has an estate in her late husband's property, not a mere usufruct (*l*), and not the less by

(*b*) P. C. in *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee*, 10 M. I. A. 279, 312. *Moneeram Kolita* v. *Kerry Kolitany*, I. L. R. 5 Cal. 776.

(*c*) Manu IX., 28. Viramit., Tr. p. 133. Katyayana quoted in M. Williams In. Wis. p. 169. Manu and Brihaspati, quoted in Smriti Chandrika, Chap. XI., sec. 1, paras. 14, 15.

(*d*) So Varadraja (Burnell's Trans. p. 55) says, inheritance is prescribed by the texts in which "patni" is used; maintenance only by those in which words of inferior dignity are employed. See Daya Bhaga, Chap. XI., sec. 1, p. 49 (Stokes's H. L. B. 318); Vyav. May., Chap. IV., sec. 8, p. 2.

(*e*) Trans. p. 132.

(*f*) Trans. p. 193.

(*g*) Col. Dig. Book V., T. 399; and see Smriti Chandrika, Chap. XI., sec. 1, para. 4.

(*h*) See also Viramitr., Trans., p. 136, and Smriti Chandrika, Chap. XI., sec. 1, paras. 19, 28.

(*i*) See *Hurrosoondery Debea* v. *Rajessuri Debea*, 2 C. W. R. 321.

(*k*) Steele's Law of Caste, 174, ss. Viramitr. *loc. cit.*

(*l*) "Assuming her (the widow) to be entitled to the zamindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though in some respects for a qualified interest; and until her death it would

reason of her being authorised to adopt (*m*). Her husband's estate completely vests in her by way of inheritance (*n*), not as a trust (*o*). Her position has been assimilated to that of a tenant-in-tail (*p*); though for the purposes of alienation it has been said that she "has only a life interest in immoveable property whether ancestral or not" (*q*). She represents the estate so that under a decree against her for arrears of rent due by her husband (*r*)

not be ascertained who would be entitled to succeed." P. C. in *Katama Natchiar* v. *Rajah of Shivaganga*, 9 M. I. A., at p. 604.

In *Moneeram Kolita* v. *Kerry Kolitany* (I. L. R. 5 Cal. 776; *Chandhri Risal Singh et al.* v. *Balwant Singh et al.*, P. C. June 3, 1918; S. C. L. R. 7 I. A. 115) the Privy Council say at p. 789 : "According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the *Shivaganga Case* (9 M. I. A. 604) does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. (*Ibid.* 604.) The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death." The case was one under the Bengal law.

(*m*) *Umasunduri Dabee* v. *Sourobinee Dabee*, I. L. R. 7 Cal. 288.

(*n*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67. Viramitr., Trans. p. 134; *Lalchand Ramadayal* v. *Gumtibai*, 8 Bom. H. C. R., 156, O. C. J.

(*o*) *Bhaiji Girdhur et al.* v. *Bai Khushal*, S. A. No. 334 of 1872 (Bom. H. C. P. J. F. for 1873, No. 63); *Hurrydoss Dutt* v. *Shreemutty Uppoornah Dossee et al.*, 6 M. I. A. 433.

(*p*) *Katama Natchiar* v. *The Rajah of Shivaganga*, 9 M. I. A. 569. See *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah*, 8 M. I. A. at p. 550. A widow retains without security proceeds of land taken by a railway company, *Bindoo Bassinee* v. *Bolie Chund*, 1 C. W. R. 125 C. R. She may claim a definition of her share (*Jhunna Kuar* v. *Chain Sukh*, I. L. R. 3 All. 400) when her husband has been separate, but not when she has been assigned his portion by way of maintenance in an undivided family. *Bhoop Singh* v. *Phool Kooer*, N. W. P. H. C. R. for 1867, p. 368.

(*q*) *Vishnu Ganesh* v. *Narayan Pandurang* (Bom. H. C. P. J. F. for 1875, p. 212); *Bamundoss Mookerjea et al.*, v. *Musst. Tarinee* (7 M. I. A. 169). See also, however, *Lakshmibai* v. *Gunpat Moroba*, 5 Bom. H. C. R. 128 O. C. J.; and *Doe Dem Goluckmoney Dabee* v. *Digambar Day*, 2 Bouln. 193; *Girdharee Singh* v. *Kolahut*, 2 M. I. A. 397.

(*r*) *Kamavadhani Venkata Subbaiya* v. *Joysa Narasingappa*, 3 M. H. C. R. 116; *Natha Hari* v. *Jamni*, 8 Bom. H. C. R. 37 A. C. J. But see L. R. 2 I. A. 281 below, (*t*).

and a sale in execution the whole interest passes, though, as is afterwards said (*s*), the widow was in the particular case sued as representative of her son, and it was intended that the son's interest should be sold (*t*). "In a suit brought by a third person, the object of which is to recover or to charge an estate of which a Hindu widow is proprietress, she will as defendant represent and protect the estate as well in respect of her own as of the reversionary interest" (*v*). "She would," as is said in another case, "completely represent the estate, and under certain circumstances, the statute of limitations might run against the heirs to the estate, whoever they might be" (*w*). Those "heirs," as pointed out in *Musst. Bhagbutti Dall* v. *Chowdry Bholanath Thakoor et al.* (*x*), have not, during the widow's life, "a vested remainder" according to the language of the English law, "but merely a contingent one." The "reversioner," therefore, as he is in some places called, cannot, during a widow's life, obtain a declaration that he is entitled next in succession (*y*). Nor can his contingent right be sold in execution. But the widow may, with the consent of first reversioners, relinquish her right in favour of second (*z*). He may, however, protect the estate

(*s*) *The General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaputsing*, 14 M. I. A. 605.

(*t*) *Baijun Doobey et al.* v. *Brij. Bhookun Lall*, L. R. 2 I. A. 281. The extent of the interest of the widow sold in execution thus depends on the nature of the action. *Jotendro Mohun Tagore* v. *Jogul Kishore*, I. L. R. 7 Cal. 357.

(*v*) *Seetul Pershad* v. *Musst. Doolkin Badam Konwur et al.*, 11 M. I. A. 268. "The rule that a decree against a widow binds the reversioner is subject to this qualification that there has been a fair trial in the former suit." Markby, J., in *Brammoye Dossee* v. *Kristo Mohun Mookerjee*, I. L. R. 2 Cal., at p. 224. The widow must protect the estate as well as represent it. *Nogender Chunder Ghose* v. *Sreemutty Kaminee Dossee*, 11 M. I. A. 241; cf. *Jenkins* v. *Robertson*, L. R. 1 Sc. App., at 122.

(*w*) *Tarinee Churn Gangooly et al.* v. *Watson & Co.*, 12 C. W. R. 413; *Nobinchunder et al.* v. *Guru Persad Doss*, B. L. R. 1008 F. B.; *Nand Kumar et al.* v. *Radha Kuari*, I. L. R. 1 All. 282; *Raj. Bullubhsen* v. *Oomesh Chunder*, I. L. R. 5 Cal. 44; *Noferdos Roy* v. *Modhusoondari*, I. L. R. 5 Cal. 732 referring to *Shama Soonduri* v. *Surut Chunder Dutt*, 8 C. W. R. 500, and *Gunga Pershad Kur* v. *Shumbhoo Nath Burmon*, 22 C. W. R. 393.

(*x*) L. R. 2 I. A. 261; see also *Amritolal Bhose* v. *Rajonee Kant Mitter*, *Ibid.* 113; and *Doe Dem Goluckmoney Dabee* v. *Diggumber Day*, 2 Bouln. 193; *Rooder Chunder* v. *Sumbhoo Chunder*, 3 C. S. D. A. R. 106; *Musst. Jymunee Dibiah* v. *Ramjoy Chowdree*, *Ibid.* 289; 2 Tayl. and Bell, 279.

(*y*) *Pranputty Kooer* v. *Lalla Futteh Bahadur Singh*, 2 Hay, 608; *Shama Soonduree et al.* v. *Jumoona*, 24 C. W. R. 86.

(*z*) *Protap Chunder Roy* v. *S. Joymonee Dabee Chowdhrain et al.*, 1 C. W. R. 98; *Behari Lal* v. *Madho Lal*, L. R. 19 I. A. 30.

against an improper alienation or waste (*a*). That the widow and the "immediate reversionary heir" together may deal as they please with the property, is a proposition (*b*) that must now be read as qualified by the language of the Privy Council, "a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such a case must be understood to be all those who are likely to be interested in disputing the transaction" (*c*). A suit against the widow is not open indiscriminately to every one in the line of succession. The nearest heir is the proper person to sue; remoter heirs must assign a sufficient reason for their claim to sue (*d*).

The Hindu law does not, it would seem, recognise vested or contingent remainders or executory devises (*e*) in the exact sense of the English law (*f*). It assigns to the widow either an owner-

(*a*) *Bhikaji Apaji* v. *Jagannath Vithal*, 10 Bom. H. C. R. 351. *Chottoo Misser* v. *Jemah Misser*, I. L. R. 6 Cal. 198; *Rani Anund Kunwar* v. *The Court of Wards*, I. L. R. 6 Cal. 764, 772. "The mere concurrence of a female relation," it was said, "albeit the nearest in succession, cannot be regarded as affording the slightest presumption that the alienation was a proper one." *Varjivan* v. *Ghelji Gokaldas*, I. L. R. 5 Bom. 563. The concurrence was that of the daughter, who failing the widow, would take absolutely whether as heir to her mother or to her father. *Infra*, Dig. Vyav., Chap. II., § 14, I. A. 3. See article on Stridhan. In *Sia Dasi* v. *Gur Sahai*, I. L. R. 3 All. 362, it was held that a remoter reversioner who had assented to a particular disposal by a widow and the heir next interested could not afterwards question the transaction. See also *Raj Bullubh Sen* v. *Oomesh Chunder Rooz*, I. L. R. 5 Cal. 44.

(*b*) *S. Jadomoney Dabee* v. *Saroda Prosono Mookerjee et al.*, 1 Bouln. 120; *Mohunt Kishen Geer* v. *Busgeet Roy and others*, 14 C. W. R. 379.

(*c*) *Raj Lukhee Debia* v. *Gokool Chandra Chowdhry*, 13 M. I. A. 228. See also *Koover Goolab Sing* v. *Rao Kuran Singh*, 14 M. I. A. 176; S. C. I. L. R. 2 All. 141; *Jiwan Singh* v. *Misri Lal*, L. R. 23 I. A. 1; *Hari Kishan Bhagat* v. *Kashi Pershad*, L. R. 42 I. A. 64.

(*d*) *Rani Anand Koer* v. *The Court of Wards*, L. R. 8 I. A. 14.

(*e*) See *Musst. Bhoobun Moyee Debia* v. *Ram Kishore Acharjee Chowdhry*, 10 M. I. A. 279.

(*f*) See Col. Dig. Book V. T. 76, Com. *ad fin.* A devise to several sons with cross remainders in favour of the survivors is good under Hindu law, but the testamentary power as to "contingent remainders and executory devises is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindus in India." Willes, J., in the *Tagore Case*, L. R. S. I. A., at p. 70, quoting *Bhoobun Moyee Debia* v. *Ram Kishore Chowdry*, 10 M. I. A. 279. In the case in question the interest of the heir expectant is a mere contingency not saleable. *Ramchandra Tantra Das* v. *Dharma Narayan Chuckerbutty*, 7 Beng. L. R. 34.

ship of the property merely for use, as in Bengal (*g*), with a special power in case of absolute necessity to mortgage or sell it for her subsistence or other approved purposes (*h*); or else, as under the Mitakshara law, an ownership fully vested subject only to restrictions on alienation (*i*), at least of immovables (*k*), arising from her dependence or the recognition of interests that the estate must provide for. The analogy of the law of partition is applied by the Mitakshara, Chap. II., sec. 1, and by the Subodhini, to the determination of her estate (*l*). She may sell or incumber the property principally, besides payment of her husband's debts, even though time barred, and her own necessary subsistence (*m*), for two objects, the fulfilment of religious duties and the grant of charitable donations (*n*). Gifts in Krishnarpan have been looked on with much favour by the Bombay Sastris,

(*g*) Daya Bhaga, Chap. XI., sec. 1, pl. 56. Thus it is, perhaps, that in Bengal, the limited character of her right being emphasised, a surrender by a widow to the then next heirs immediately vests the property in them in possession, as if she had then died. *Noferdoss Roy* v. *Modhu Soonduri Burmonia*, I. L. R. 5 Cal. 732.

(*h*) Daya Bhaga, Chap. XI., sec. 1, pl. 62; *Chundrabulee Debia* v. *Brody*, 9 C. W. R. 584; *Lakshman Ramchandra Joshi and another* v. *Satyabhamabai*, I. L. R. 2 Bom., at p. 503 et ss. See the opinion of Sir W. Macnaghten in *Doe Dem Gunganarain* v. *Bulram Bonnerjee*, East's Notes No. 85, 2 Morley's Dig., at p. 155, but also the judgment of East, C.J., in *Cossinaut Bysack et al.* v. *Hurroosoondry Dossee et al.*, No. 124, at p. 198 of the same volume, with which may be compared the remarks of H. H. Wilson in Vol. V. of his works, pp. 1 ss.

(*i*) See the judgment of Sir M. Westropp, C.J., in *Bhala Nahana* v. *Parbhu Hari*, above quoted; Vyav. May. Chap. IV., sec. 10, pl. 8; Mit. Chap. II., sec. 1, pl. 8; Mit. Chap. II., sec. 1, pl. 31, 32; Colebrooke, in 2 Str. H. L. 272, 407; and Ellis, *ibid.*, 208.

(*k*) Viramit., Transl. p. 138 ss. *Bhaiji Girdhur et al.* v. *Bai Khushal*, Bom. H. C. P. J. F. 1873, No. 63; *Ram Kishen Singh* v. *Cheet Bannoo*, C. W. R. Sp. No. 101; *Doorga Dayee* v. *Poorun Dayee*, 5 C. W. R. 141; *Mussamut Thakoor Dayhee* v. *Rai Balack Ram*, 10 C. W. R. 3, P. C.

(*l*) See below Partition; Col. Dig. Book V. T. 87, Comm.; 2 Str. H. L. 383.

(*m*) *Sakharam* v. *Jankibai*, Bom. H. C. P. J. File for 1878, p. 139; *Lala Awarnath Shah* v. *Rani Achan Kuar*, L. R. 19 I. A. 196; *Ch. Govind* v. *Godhole*, I. L. R. 11 Bom. 320; *Bhan Babaji* v. *Mahipati*, I. L. R. 11 Bom. 325; *Antaji* v. *Dattaji*, I. L. R. 11 Bom. 36; *Murari* v. *Tayana*, I. L. R. 19 Bom. 286; *Venayek* v. *Govind*, I. L. R. 25 Bom. 129; *Tika Ram* v. *Deputy Commissioner of Bara Banki*, L. R. 26 I. A. 97.

(*n*) Narada, Pt. I., Chap. III., Slokas 29, 30, 36, 44; *Raj. Lukhee Debia* v. *Gokool Chandra Chowdhry*, 13 M. I. A. 209; Vyav. May. Chap. IV., sec. 8, p. 14; *Ganpat* v. *Tulsiram*, I. L. R. 36 Bom. 88.

The separation of the estates of spouses contemplated by the Teutonic Codes was sometimes prevented by mutual donation which they allowed, and by which the survivor took the usufruct of the whole for life. This was accompanied by a

who say that the property may be disposed of for necessaries, for charity, and for the maintenance of the husband's business (*o*). A pilgrimage may be undertaken at the cost of the estate (*p*), and a daughter may be portioned out of it (*q*). The gift of one-half of the property in "Krishnarpan" (*r*) would now hardly be sanctioned, and the right assumed in some instances by a mother to fulfil in this way a supposed duty to the deceased, would certainly be disallowed (*s*). Nor can the mother strip the widow of the estate by an adoption to the deceased's father (*t*). In Bengal, the Courts have given effect to a widow's resignation of the succession in exchange for an annuity (*v*), and to her relinquishment with consent of first "reversioner" in favour of second (*w*).

A widow may borrow money on the estate for its effectual cultivation (*x*). But she has no authority to waste the property.

right to alienate for an urgent necessity or for pious uses according to the Ripuarian Laws Tit. 48, 49.

(*o*) See below, Chap. II., S. 14, I. A. 4, Q. 10; and *Kupoor Bhuwanee* v. *Sevukram Seoshunker*, 1 Borr. 448.

(*p*) *Mutteeram Kowar* v. *Gopaul Sahoo*, 11 B. L. R. 416.

(*q*) Nort. L. C. 638; Steele L. C. 176.

(*r*) As in Chap. II., sec. 14, I. A. 4, Q. 10; see Ellis in 2 Str. H. L. 408, 410; *Kartick Chunder* v. *Gour Mohun Roy*, 1 C. W. R. 48 (a Bengal case).

(*s*) Q. 726, 727 MSS. Surat, A. D. 1847. Custom seems in many instances to have assigned to the surviving mother a position superior to that of her son's widow. Examples are to be found in Borradaile's Caste Rules, and see Steele L. C. 175. Narada, Transl. p. 19. The very early age at which a Hindu wife joins her husband enables the mother-in-law to assert a supremacy which in many cases is retained for life, even after the husband's death. Inheritance by the mother does not under such circumstances appear unreasonable, especially when the widow is still very young. "Sharpe remarks of ancient Egypt that 'here as in Persia and Judaea the king's mother often held rank above his wife.' In China . . . there exists the supremacy of the female parent second only to that of the male parent, and the same thing occurs in Japan." H. Spencer in *Fortnightly Review* No. 172 N. S., p. 528.

(*t*) *Bhoobun Moyee Debia* v. *Ram Kishore Acharjee*, 10 M. I. A. 279; *Ramkrishna* v. *Shamrao*, I. L. R. 26 Bom. 526; *Pratapgiri Adoption Suit*, P. C. April 26, 1918. If a widow and a mother adopt different boys, the one adopted by the widow takes the estate, Q. 1761, MSS. See below Chap. II., sec. 6 A., Q. 22.

(*v*) *Shama Soonduree et al.* v. *Shurut Chunder Dutt et al.*, 8 C. W. R. 500; *Lalla Koondu Lall et al.* v. *Lalla Kalee Pershad et al.*, 22 *Ibid.* 307; *Gunga Pershad Kur* v. *Shumbhoonath Burmun et al.*, 22 *Ibid.* 393.

(*w*) *Protap Chunder Roy* v. *S. Joymonee Dabee Chowdhrain et al.*, 1 C. W. R. 98.

(*x*) *Koor Oodey Singh* v. *Phool Chund et al.*, 5 N. W. P. R. 197.

"Although according to the law of the Western Schools (*y*) (Mitakshara, Mithita, and others) the widow may have a power of disposing of movable property inherited from her husband (*z*), which she has not under the law of Bengal, she is by the one law as by the other restricted from alienating any immovable property which she has so inherited" (*a*), alienating, that is, without a special justification. Thus she cannot, as against the collateral heirs, alienate by a mere deed of gift (*b*). A sale made by her without authority may, according to several decisions, endure for her own life, but any one proposing to take a greater interest is bound to prove a necessity for the sale, or at least a *primâ-facie* case of necessity (*c*). If, however, the purchaser acts in good faith, the transaction is not wholly vitiated by

(*y*) *Munsookram* v. *Pranjeevandas et al.*, 9 Harr. 396; *Oojulmoney Dossee et al.* v. *Sagormoney Dossee*, 1 Taylor and Bell, 370; *Hurrydoss Dutt* v. *Rungunmoney Dossee et al.*, 2 *Ibid.* 279; *Goluckmoney Dabee* v. *Diggumber Day*, 2 Bouln. 201; *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67; Clarke's Notes of Decided Cases, p. 99; *Musammat Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A. 139; *Motilal* v. *Ratilal*, I. L. R. 21 Bom. 170.

(*z*) See Narada I., III., 30; *Pranjeevandas et al* v. *Dewcoorbai et al.*, 1 Bom. H. C. R. 130; *Sheo Shankar* v. *Debi Sahai*, L. R. 30 I. A. 202; *Gadadhar Bhat* v. *Chandrabhagbai*, I. L. R. 17, Bom. 690 (F. B.); *Hari Dayal* v. *Grish Chunder*, I L. R. 17 Cal. 916; *Motilal* v. *Ratilal*, I. L. R. 21 Bom. 170.

(*a*) *Musst. Thakoor Deyhee* v. *Rai Baluk Ram* 11 M. I. A. 176, cited in *Brij Indar Bahadur Singh* v. *Rani Janki Koer*, L. R. 5 I. A. 15. Colebrooke and Ellis in 2 Str. H. L. 407 ss.; and *Bai Amba* v. *Damodar Lalbhai et al.*, S. A. No. 217 of 1871, decided 11th August 1871 (see Bom. H. C. P. J. F. for 1871). Steele L. C. 175. *Bhugwandeen Doobey* v. *Myna Bai*, 11 M. I. A. 487; *Raja Chelikani's Case*, L. R. 29 I. A. 156; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739. In Bombay female heirs (for example, widow, mother, daughter-in-law, grandmother, widow of a gotraja sapinda) who by marriage come into the gotra of the malet whom they succeed take only a widow's estate, subject to restrictions, in the property they inherit from the last male owner, while daughters and sisters take absolute estates.

(*b*) *Keerut Sing* v. *Koolakul Sing et al.*, 2 M. I. A. 331.

(*c*) *Gorya Halya* v. *Undri et al.*, S. A. No. 455 of 1873 (Bom. H. C. P. J. F. for 1874, p. 125); *Bhau Venkoba* v. *Govind Yeswant*, Bom. H. C. P. J. for 1878, p. 60; *Kamesvar Prasad* v. *Run Bahadur Singh*, I. L. R. 6 Cal. 843 (P. C.); *Mayaram* v. *Motaram*, 2 Bom. H. C. R. 313; *Melgirappa* v. *Sihvappa*, 6 Bom. H. C. R. 270, A. C. J.; *Musst. Bhagbutti Daee* v. *Chowdry Bholanath Thakoor et al.*, L. R. 2 I. A. 261; *Govind Monee Dossee* v. *Sham Lal Bysack et al.*, C. W. R., F. B. R. 165; *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah*, 8 M. I. A. 529; *Cavaly Vencata Narrainappah* v. *The Collector of Masulipatam*, 11 M. I. A. 619; *Raj Lukhee Debia v. Gokool Chandra Chowdhry*, 13 M. I. A. 209; *Kooer Goolab Singh et al.* v. *Rao Kurun Sing*, 14 M. I. A. 176; *Bhaiji Girdhur et al* v. *Bai Khushal*, Bom. H. C. P. J. F., 1873 No. 63. A

some excess of the widow's powers as rigorously construed, and he is not bound to see to the application of the purchase-money (*d*).

One of the causes justifying an alienation of the estate is payment of the husband's debts. The widow is bound to discharge them (*e*). Not, however, if barred by limitation, according to a *dictum* of the Bombay High Court (*f*), though she is not bound to avail herself of that plea (*g*), unlike a managing member in the case of an ancestral debt, when he must act with the consent express or implied of the coparceners. Yet *his* acknowledgment would not, it has been said, revive the barred debt, except as against himself (*h*). A restriction of the power to pay debts out of the estate might, however, be regarded perhaps as trenching in some degree upon the religious law of the Hindus. How strong the obligation is which that imposes may be seen from Digest of Vyavasthas, Chap. II., sec. 6 A., Q. 7, and Narada, Pt. I., Chap. III., 18. The mere recital in a widow's deed of sale of the object is not enough to prove it. There should be a concurrence of the relatives interested (*i*). For her own debts the estate after her death is not answerable (*k*).

The widow's powers of alienation are not enlarged by there being no heirs to take on her death. The State then succeeds; and the restrictions are inseparable from her estate (*l*). The rule

widow can dispose only of her widow's estate in her deceased husband's property, "and that estate would determine either upon her death or upon her second marriage," *per* Westropp C.J., in *Gurunath Nilkanth* v. *Krishnaji Govind*, I. L. R. 4 Bom. 462, 464, S. C. Bom. H. C. P. J. for 1880, p. 59.

(*d*) *Phoolchund Lall* v. *Rughoobun Subaye*, 9 C. W. R. 108. Compare *Hunoomanpersaud Panday* v. *Musst. Baboyee Munraj Koonweree*, 6 M. I. A. 393. See also *Kamikhaprasad et al.* v. *Srimati Jagadamba Dasi et al.*, 5 B. L. R. 508. The creditor must enquire as to the purpose and must explain the instrument to the widow. *Baboo Kameswar Prasad* v. *Run Bahadur Singh*, L. R. 8 I. A. at pp. 10, 11.

(*e*) *Gopeymohun* v. *Sebun Cower et al.*, East's Notes, case No. 64.

(*f*) *Melgirappa* v. *Shivappa*, 6 Bom. H. C. R. 270 A. C. J., *supra*.

(*g*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67 *supra; Ch. Govind* v. *Godbole*, I. L. R. 11 Bom. 320.

(*h*) *Gopalnarain Mozoomdar* v. *Muddomutty Guptee*, 14 B. L. R. 49.

(*i*) *Raj Lukhee Debia* v. *Gokool Chandra Chowdhry*, 3 B. L. R. 57, P. C.; *Jiwan Singh* v. *Misri Lal*, L. R. 23 I. A. 1; *Hari Kishen Bhagat* v. *Kashi Pershad*, L. R. 42 I. A. 64.

(*k*) *Chundrabulee Debia* v. *Brody*, 9 C. W. R. 584; *Chottoo Misser* v. *Jeniah Misser*, I. L. R. 6 Cal. 198.

(*l*) *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah*, 8 M. I. A. 500. For the grounds which have been deemed to justify a widow's alienation of property see *Umrootram* v. *Narayandas*, 2 Borr. R. 223; *Gopal Chunder* v.

applies to the widow of a collateral succeeding in default of nearer heirs (*m*). It will be seen below, Digest of Vyavasthas, Chap. II., sec. 9, Q. 7, that the restriction is applied to a mother inheriting from a son, though such property is commonly reckoned as stridhan (*n*). On this point see further in the chapter on Stridhan.

Two or more Hindu widows of the same man, according to the general doctrine, inherit from him a joint estate (*o*); and though they enjoy separately, the estate still remains joint according to the later decisions (*p*), so that grandsons, through a daughter of one widow, who had been awarded a separate enjoyment of a moiety, were excluded by the co-widow (*q*). On partition the Vyavahara Mayukha (Chap. IV., sec. 8, pl. 9) says, "If more than one, they are to divide" (*r*). So, too, the Viramitrodaya, Transl., p. 153: "Wives of the same class with the husband shall take the estate dividing it amongst them." This, which is the doctrine of the Mitakshara also, Chap. II., sec. 1, para. 5, though omitted by Colebrooke, seems to have been recognised as the law in Bombay and elsewhere (*s*), and the right

Gour Monee Dossee et al., 6 C. W. R. 52; *Raj Chunder Deb* v. *Sheeshoo Ram Deb et al.*, 7 *Ibid.* 146; *Runjeet Ram* v. *Mohamed Waris*, 21 *Ibid.* 49; as to the burden of proof, *Munsookram Munkisordas* v. *Pranjeevandas et al.*, 9 Harr. R. 396. Ratification of a lease by a widow, *Mohesh Chunder Bose et al.* v. *Ugrakant Banerjee et al.*, 24 C. W. R. 127 C. R.

(*m*) *Bharmangavda* v. *Rudrapgavda*, I. L. R. 4 Bom. 181.

(*n*) *Vinayek Anandrao et al.* v. *Lukshmibai et al.*, 1 Bom. H. C. R. 117.

(*o*) *Bhugwandeen Doobey* v. *Myna Bai*, 11 M. I. A. 487; each an equal share according to *Thakurain Ramanund Koer* v. *Thakurain Raghunath Koer and another*, L. R. 9 I. A. 41. See p. 83.

(*p*) *Shri Gajapathi Nila Mani Patta Mahadevi Garu* v. *Shri Gajapathi Radhamani Patta Maha Devi Garu*, L. R. 4 I. A. 212; S. C. I. R. 1 Mad. 290. See p. 83.

(*q*) *Rindamma* v. *Venkataramappa et al.*, 3 M. H. C. R. 268; see Dig. Vyav., Chap. II., sec. 6 A., Q. 39, 40.

(*r*) See Stokes's H. L. B. 86, 52 and note (*a*). To the same effect is the Smriti Chandrika, Chap. XI., sec. 1, pl. 57. So 2 Str. H. L. 90.

(*s*) *Rumea* (applicant) v. *Bhagee* (caveatrix), 1 Bom. H. C. R. 66, where cases are cited from Bengal and the N. W. Provinces. See below, Dig. Vyav., Chap. II., sec. 14, I. A. 1, Q. 3, where the answer implies a succession to separate interests by the two widows, and above, p. 83. The equal widows not having an independent joint-ownership along with their husbands as in the case of undivided sons would not be subjects of unobstructed inheritance according to Vijnanesvara's idea, but rather of an ownership descending on each as to her own portion, which implies at least a mental partition. *Sunder* v. *Parbati*, L. R. 16 I. A. 186.

by survivorship of one or two widows was not, apparently, recognised in the case of *Raj Lukhee Debia* v. *Gokool Chandra Chowdhry* (*t*), see Digest of Vyavasthas, Chap. II., sec. 6 A., Q. 35, 36. In *Hari* v. *Vitai* it has been held that both according to the Mitakshara and the Mayukha the widows succeed to each other's share by survivorship. This is the law in Bengal as well as in Madras (*v*).

On the death of a widow, the Bengal law gives the inherited property to the then existing next heir of the last male owner. In Bombay the succession varies, as it is governed by the law of the Mitakshara or of the Vyavahara Mayukha. These authorities agree to a certain point and then diverge widely. See below, Digest of Vyavasthas, Chap. IV., and the chapter on Stridhan. The widow of the nearest male sapinda of a predeceased husband, there being no male lineal descendant in the nearest collateral line, was, in *Bai Amba* v. *Damodar Lalbhai* (*w*), pronounced on that ground to be the heiress of a Hindu widow deceased.

§ 1. *B*. (5) Daughters.—*On failure of the first three descendants in the male line, of adopted sons, and of a widow, a daughter inherits the estate of a separate householder, and the separate property of a united coparcener. An unmarried daughter has the preference over a married one, and a poor married one over a rich married one.*

See Digest of Vyavasthas, Chap. II., sec. 7; and for Authorities, see Digest of Vyavasthas, Chap. I., sec. 2, Q. 4; Chap. II., sec. 7, Q. 19. Mit. Chap. II., sec. 2, pp. 1 to 4; sec. XI. para 13; and Vyav. May., Chap. IV., sec. 8, p. 10 ss.

If there are several daughters—which term does not include illegitimate daughters (*x*)—living in the same condition—that is, being all unmarried, or all married and poor, or all married and rich—they share the estate of their father equally. See Digest of Vyavasthas, Chap. II., sec. 7, Q. 19. The circumstance of

(*t*) 13 M. I. A. 209.

(*v*) I. L. R. 31 Bom. 560; *Janoki Nath* v. *Mathina Nath*, I. L. R. 9 Cal. 580; *Sri Pusapati Radhamani Garu* v. *Pusapati Alkarajeswari*, L. R. 19 I. A. 184.

(*w*) See Bom. H. C. P. J. F. 1871, S. A. No. 217 of 1871.

(*x*) *Bhikya* v. *Babu*, I. L. R. 32 Bom. 562.

having or not having a son is in Bombay indifferent (*y*). In competition the poorest daughters inherit the whole estate.

In *Srimati Uma Devi* v. *Gokulanand Das Mahapatra* (*z*) the Judicial Committee adopted the statement of the Benares law given in 1 Macn. H. L. 22, "that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that, in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren or a childless widow." According to the law of Mithila, an unmarried daughter is preferred to one who is married; failing her, married daughters without distinction are entitled to succeed. In Bengal, the order is, first, maiden daughters, then those who have, and are likely to have, male issue, and then others. The daughters who are barren or widows without male issue are totally excluded. (*Ibid.* 1 Macn. H. L. 22.)

The preference of the unmarried daughters over the married ones seems to be founded on the principle that, before all, a suitable provision for the marriage of daughters must be made. For the historical origin of the daughter's right of succession, see *Bhau Nanaji Utpat* v. *Sundrabai* (*a*), *Simmani Ammal* v. *Mutammal* (*b*), and above p. 79 (*a*).

Regarding the case where a Sudra leaves a daughter and an illegitimate son, see § 1. *B*. (3), above p. 77 ss.

In the case of *Amritolal Bose* v. *Rajoneekant Mitter* (*d*), the Privy Council say, "There is a great analogy between the case of widows and that of daughters, though the pretension of

(*y*) *Bakubai* v. *Manchabai*, 2 Bom. H. C. R. 5; *Poli* v. *Narotum Bapu et al.*, 6 Bom. H. C. R. 183, A. C. J.; *Jamnabai* v. *Khimji*, I. L. R. 14 Bom. 12; *Totawa* v. *Basawa*, I. L. R. 23 Bom. 229.

(*z*) L. R. 5. I. A. 40; *Audh Kumarai* v. *Chandra*, I. L. R. 2 All. 56.

(*a*) 11 Bom. H. C. R. 249, 273.

(*b*) I. L. R. 3 Mad. 265, 267.

(*c*) The very gradual establishment of daughter's rights of succession in Ireland and other countries in Europe is shown in O'Curry's Lectures, Introd. by Dr. Sullivan, p. 170 ss.

(*d*) L. R. 2 I. A. 113; *Sheo Shankar Lal* v. *Debi Sahai*, L. R. 30 I. A. 202; *Lal Sheo Pertab Bahadur Singh* v. *Allahabad Bank*, L. R. 30 I. A. 209; *Gulappa* v. *Tayawa*, I. L. A. 31 Bom. 453.

daughters is inferior to that of widows." Two or more daughters in parts of India other than Bombay take a joint estate with survivorship. Although each can alienate her life-estate to be determined by partition, as in the case of two or more widows succeeding jointly all over India, she cannot create an estate of severalty (*e*). Daughters in Bombay, however, occupy a position superior to widows, according to the prevailing doctrine as to the restrictions on a widow's estate, as they may freely dispose of the property of their fathers, which they have taken by inheritance, their estate being regarded as absolute (*f*). They take, moreover, in the Bombay Presidency, separate interests excluding the right of survivorship (*g*), contrary to the rule applied in Bengal (*h*) and Madras (*i*). Nor have they, in Bombay, been regarded hitherto as mere life-tenants (*k*), as to some extent they appear to be in Madras (*l*) and Bengal (*m*). Barrenness is

(*e*) *Kattama Nachiar* v. *Dorasinga Tevar*, 6 Mad. H. C. 310; *Amritolal* v. *Rajonee Kanta*, L. R. 2 I. A. 113; *Raja Chelikani's Case*, L. R. 29 I. A. 165; *Kailash* v. *Kasti*, I. L. R. 24 Cal. 839; *Gobind v. Qayyam*, I. L. R. 25 All. 546; *Kanni* v. *Ammakannu*, I. L. R. 23 Mad. 504; and *Bai Mangal* v. *Bai Rukhmini*, I. L. R. 23 Bom. 291.

(*f*) See *Haribhat* v. *Damodarbhat*, I. L. R. 3 Bom. 171, and the cases there cited, and *Babaji* v. *Balaji*, I. L. R. 5 Bom. 660; *Strimuttu Muttu Vizia Ragunada Rani* v. *Dorasinga Tevar*, 6 Mad. H. C. R. p. 310. See, however, *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar*, L. R. 8 I. A. 99, 108; a Madras case; *Jankibai* v. *Sundra*, I. L. R. 14 Bom. 612; *Maganlal* v. *Bai Jadab*, I. L. R. 24 Bom. 192; *Manilal* v. *Bai Rewa*, I. L. R. 17 Bom. 758; *Gulappa* v. *Tayawa*, I. L. R. 31 Bom. 453.

(*g*) *Bulakidas* v. *Keshavlal*, I. L. R. 6 Bom. 85, referring to I. L. R. 3 Bom. 171 *supra; Vithappa* v. *Savitri*, I. L. R. 34 Bom. 510; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739, sisters and daughters take absolute estates.

(*h*) *Amritolal Bose* v. *Rajoneekant Mitter*, L. R. 2 I. A. 113.

(*i*) 6 Mad. H. C. R. 310 *supra* (*e*).

(*k*) See I. L. R. 3 Bom. 171, and the cases there cited.

(*l*) *Simmani Ammal* v. *Muttammal*, I. L. R. 3 Mad. at p. 268.

(*m*) *Dev Pershad* v. *Lujoo Roy*, 20 C. W. R. 102; *Dowlut Kooer v. Burma Deo Sahoy*, 22 C. W. R. 55, C. R. quoting *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah*, 8 M. I. A. 551, and *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A. 172. But in 1 Str. H. L. 139, 2nd ed. (pp. 160-161, 1st ed.) it is said : "According to one opinion, not only the sons of daughters, but the daughters of daughters also inherit, in default of sons, but this does not appear to have been sustained; on the other hand, where there are sons, their right of succession is postponed to that of other daughters of the deceased; and, where such sons are numerous, when they do take, they take *per stirpes* and not *per capita*. Authorities postponing still further their right have been denied; but the succession in the descending line from the daughter proceeds no further, the funeral cake stopping with the son; which is an

not, as in Bengal, a cause of exclusion (*n*), the theory on which the daughter is admitted in Bombay being essentially different. Unchastity is no ground for exclusion either of a daughter or a mother from inheritance; but the High Court of Bengal has held that unchastity would operate as a bar. The Dayabhag, however, does not support the conclusion arrived at by the High Court, and the cases are distinguishable on the ground that the women in question were outcasts. Even in Bengal unchastity subsequent to inheritance will be of no effect (*o*).

§ 1. *B*. (6) DAUGHTER'S SONS.—*On failure of the three first descendants in the male line, of adopted sons, of widows, and of daughters, a daughter's son inherits the estate of a separate grihastha, and the separate property of a united coparcener.*

See Digest of Vyavasthas, Chap. II., sec. 8; and for Authorities, see Digest of Vyavasthas, Chap. II., sec. 8, Q. 1 and 5.

Regarding the case where a Sudra leaves an illegitimate son, and a daughter's son, see above, § 1. *B*. (3), pp. 80, 81.

answer to the claim of the son's son, grounded on the property having belonged to his father. Neither, according to Jimuta Vahana, on failure of issue, does the inheritance, so descending on the daughter, go, like her stridhana, to her husband surviving her, but to those who would have succeeded, had it never vested in such daughter; but by the Southern authorities, it classes as stridhana, and descends accordingly. And, upon the same principle, the husband is precluded during her life from appropriating it, unless for the performance of some indispensable duty, or under circumstances of extreme distress. Whereas the daughter's own power over it is greater than that of the widow of the deceased, whose condition is essentially one of considerable restraint." And the Privy Council recognise a possible difference in favour of the daughter [*Hurrydoss Dutt* v. *Sreemutty Uppoornah Dossee*, 6 M. I. A. 445], though this is now superseded by what is said in *Muttu Vaduganadha Trevar's Case* [L. R. 8 I. A. 99, 109] against women's transmitting to their own heirs property which they take by inheritance.

(*n*) *Simmani Ammal* v. *Muttamal*, I. L. R. 3 Mad. 265.

(*o*) *Adoyapa* v. *Rudrava*, I. L. R. 4 Bom. 104; *Basappa* v. *Rayava*, I. L. R. 29 Bom. 91; *Tara* v. *Krishna*, I. L. R. 31 Bom. 490; *Kojiyadu* v. *Lakshmi*, I. L. R. 5 Mad. 149; *Vedammal* v. *Vedanayaga*, I. L. R. 31 Mad. 100; *Ganga* v. *Ghasita*, I. L. R. 1 All. 46; *Dalsingh* v. *Dani*, I. L. R. 32 All. 155; *Baldeo Singh* v. *Mattura Kunwar*, I. L. R. 33 All. 702; *Ramananda* v. *Raikishori*, I. L. R. 22 Cal. 347 (daughter); *Ramnath* v. *Durga*, I. L. R. 4 Cal. 550 (mother); *Kerry Kolitany* v. *Moneeram*, 13 B. L. R. 48; S. C. L. R. 7 I. A. 115.

If a separate householder leaves two daughters, one of whom dies after her father, but before the division of his estate has been effected, leaving at the same time a son, this son, according to the doctrine of the Bombay Sastris, will inherit the share which would have fallen to her. See Remarks to Digest of Vyavasthas, Chap. II., sec. 7, Q. 1 and 3. This view is supported by the analogous case of the "brother and the brother's sons," regarding which the Mitakshara, Chap. II., sec. 4, para. 8, states as follows:—

"In case of competition between brothers and nephews, the nephews have no title to the succession, for their right of inheritance is declared to be on failure of brothers (see sec. 1, p. 2). However, when a brother has died leaving no male issue (nor other nearer heir), and the estate has consequently devolved on his brothers indifferently, if any of them die before a partition of their brother's estate takes place, his sons do in that case acquire a title through their father" (*p*).

That the principle laid down in this passage is applicable also to the case of the daughters and daughters' sons follows from the maxim of interpretation, according to which a rule given for a special case is applicable to all analogous cases, though no indication to that effect may have been given. For, the Hindu law-books often give, as the Sastris express it, only the "dik-pradarsana," the indication of the direction, not exhaustive rules. Examples showing that the authors of the Mitakshara and Mayukha and other works interpreted the ancient Smritis in this manner are frequently met with. Thus, the rule that unmarried daughters inherit before married ones [see above § 1. *B*. (5)] is given by Gautama with respect to the succession to their mother's stidhana, (see Gautama 28, su. 21). But both Vijnanesvara and Nilakantha apply it also to the daughters' succession to their father's property. From the analogy of the case of "brothers and brothers' sons," it follows also that in no other case, than the one just considered, do daughters' sons share the inheritance with daughters.

Such is the doctrine prevailing in Bombay where each daughter, taking a present right by inheritance, is thought on her death to transmit it to her own proper heirs subject in this case to the

(*p*) See *Ramprasad Tewarry* v. *Sheochurn Doss*, 10 M. I. A. 504.

qualification founded on special texts (*q*). See Digest of Vyavasthas, Chap. IV., B. § 1, 4; Chap. II., sec. 8, Q. 1. Where daughters are regarded as taking, as a class, with survivorship as in Madras or Mithila and elsewhere where the Mitakshara prevails except in the Bombay Presidency (*r*) [see above § 1. *B.* (5)] a different rule prevails. The son is not such a co-owner with his mother, according to that doctrine, as to replace her in the group of successors to her father (*s*). It is consistent with this that daughter's sons take *per capita* (*t*) not *per stirpes* as they would by identification in rights with their mothers. But in the case of two sons of an only daughter of a Hindu succeeding on her death to his estate, in *Chelikani Venkayyamma* v. *Ch. Venkataramanayamma* (*v*), it was held by the Judicial Committee that they took jointly with survivorship. In *Bai Parson* v. *Bai Somli* (*w*), however, the Bombay High Court has held that the property inherited by sons from their mother is, according to both the Mitakshara and the Mayukha, a tenancy in common. The Madras High Court seem to favour the same view (*x*). See Digest of Vyavasthas, Chap. II., sec. 8, Q. 1, 2; but a brother's sons too are excluded by brothers, yet succeed to an interest, which, to use an English expression, had become vested in possession in their father before his death.

The text of Yajnavalkya on which the different doctrines are based is not in itself sufficiently explicit to make either of them untenable. The former is the one more consonant to Vijnanesvara's general principle of a woman's capacity to take and transmit complete ownership by inheritance: the variation from the general scheme of succession to females by bringing in the daughter's sons in this particular case before the daughter's daughters gives a liberal, though not indisputable, effect to the text, instead of reducing the daughter's right to a mere life estate

(*q*) See Mit. Chap. II., sec. II., para. 6; Chap. 1. sec. XII.

(*r*) *Surja Kumari* v. *Gandharp*, 6 S. D. 140, 168; *Chelikani Venkayyamma* v. *Ch. Venkataramanayamma*, L. R. 29 I. A. 160.

(*s*) *Amritolal* v. *Rajoneekant*, L. R. 2 I. A. 113.

(*t*) *Nagesh* v. *Gururao*, I. L. R. 17 Bom. 305.

(*v*) L. R. 29 I. A. 156, overruling *Jasoda* v. *Sheo*, I. L. R. 17 Cal. 33, and *Saminadha* v. *Thangathanai*, I. L. R. 19 Mad. 70, referred to in *Sheo Shankar* v. *Debi Sabai*, L. R. 30 I. A. 202.

(*w*) I. L. R. 36 Bom. 424.

(*x*) *Karuppai Nachiar* v. *Sankara*, I. L. R. 27 Mad. 300.

interpolated in the regular series of successions. The succession of the daughter's son to the interest inherited by his mother but not entered on by her in actual separate enjoyment agrees exactly with the rule given by Nilakantha in the Vyav. Mayukha for the further succession to property which has passed to a female by inheritance. It goes, he says, to heirs according to such relations as if she were a man (*y*), and the first in this series is the son or group of sons of the last owner. Daughters, according to him, take separate interests (*z*) separately heritable. The daughter's sons take as full owners, and each becomes a fresh stock of descent on whose death his own heirs succeed. (*Muttuvaduganatha* v. *Periasami*, L. R. 23 I. A. 128.) Daughter's daughters do not succeed anywhere except in Bombay and Madras. (*Narasimma* v. *Mangammal*, I. L. R. 13 Mad. 10; *Nallanna* v. *Pounal*, I. L. R. 14 Mad. 149; *Venkatasubramaniam* v. *Thayarammal*, I. L. R. 21 Mad. 263; *Narasimha v. Surenami*, I. L. R. 31 Mad. 321.)

§ 1. *B.* (7) THE MOTHER.—*On failure of daughters' sons, the mother* (*except in Gujerat*) *inherits the estate of a separate householder, the separate estate of a united coparcener, as also the estate of a paying student* (*upakurvana Brahmachari*).

See Digest of Vyavasthas, Chap. II., sec. 9; and for Authorities, see Digest of Vyavasthas, Chap. I., sec. 2, Q. 4; and Chap. II., sec. 9, Q. 1.

A mother who remarries or is guilty of adultery does not lose her right to the succession to the estate of the son by her first husband, as she certainly would under the strict Hindu law, by forming a connection inconsistent with her retaining a place in the family of her first husband or even in the caste. In the case of *Akorah Sooth* v. *Boreeanee* (*a*) it was ruled that a widow remarrying forfeits only the right she has then actually inherited, not her right of inheritance to her son then living, and this has been approved of by the Bombay High Court in *Chamar Haree* v. *Kashi* I. L. R. 26 Bom. 388, and *Basappa* v. *Rayava*, I. L. R. 29 Bom. 91. See p. 99 (Daughter's and mother's unchastity).

(*y*) Vyav. Mayukha, Chap. IV., sec. X., para. 26.
(*z*) Vyav. Mayukha, Chap. IV., sec. VIII., para. 10.
(*a*) 10 C. W. R. 35 II. *Id.* 82

Stepmothers are not included in the term "mother." Regarding the rights of a stepmother, see Vyavasthas, Chap. II., sec. 14, I. A. 2, Remark to Q. 1; and *Russobai* v. *Zulekhabai* (*b*). The same is the rule in Bengal, Madras, and Mithila (*c*).

The Vyav. May. Chap. IV., sec. 8, para. 15, and the Dayabhaga place the father first, and next the mother, and the High Court of Bombay pronounced in favour of this order of succession for Gujarat in *Khodabhai Mahiji* v. *Bahdhur Dalu et al.* (*d*).

An adoptive mother is included in the word "mother," and therefore succeeds before the adoptive father (*e*).

The estate taken by a mother succeeding to her son is said to be like that taken by a widow from her husband (*f*).

§ 1. *B*. (8) THE FATHER.—*On failure of the mother, the father inherits the estate of a separate householder, of a paying student, and the separate estate of a united coparcener. In Gujarat the father has precedence of the mother as heir to their sons.*

See Digest of Vyavasthas, Chap. II., sec. 10; and for Authorities, see Digest of Vyavasthas, Chap. II., sec. 9, Q. 1; and Chap. I., sec. 2, Q. 4.

§ 1. *B*. (9) BROTHER OF THE WHOLE BLOOD.—*On failure of the father, full brothers succeed to the estate of a separate Grihasta, &c.*

See Digest of Vyavasthas, Chap. II., sec. II.; and for Authorities see Digest of Vyavasthas, Chap. I., sec. 2, Q. 4; and Chap. II., sec. 11, Q. 4; Vyav. May. Chap. IV., sec. 8, p. 16.

(*b*) I. L. R. 19 Bom. 707, where she succeeded in preference to the stepson's paternal uncle's son, on the ground of being a gotraja sapinda.

(*c*) *Lakhi* v. *Bhairah*, 5 S. D. 315, 369; *Alhadmoni* v. *Gokulmoni*, S. D. of 1852, 563; *Tahaldai* v. *Gaya Pershad*, I. L. R. 37 Cal. 214; *Kesserbai* v. *Valab*, I. L. R. 4 Bom. 188; *Mari* v. *Chinnammal*, I. L. R. 8 Mad. 107; *Punga Seethai* v. *Nachiyar*, I. L. R. 14 Mad. L. T. 596.

(*d*) I. L. R. 6 Bom. 541; *Balkrishna* v. *Lakshman*, I. L. R. 14 Bom. 605; *Hembuta* v. *Coluck Chunder*, 7 S. D. 108, 127 (Dayabhag).

(*e*) *Anandi* v. *Hari Suba*, I. L. R. 33 Bom. 401.

(*f*) *Narsappa Lingappa* v. *Sakharam*, 6 B. H. C. R. 215; *Tuljaram Morariji* v. *Mathuradas et al.*, I. L. R. 5 Bom. 662. See also the chapter on Stridhana, and the references given above, pp. 87, 88; *Sheo Shankar* v. *Debi Sahai*, L. R. 30 I. A. 202, where the law is fully discussed; *Chenava* v. *Basangavda*, I. L. R. 21 Bom. 105.

In case a brother dies leaving more than one brother as heirs, and one of these also dies after him, but before the partition of the estate of the first deceased brother has taken place, and if this second brother, in whom his right had actually vested, leaves a son, then this son will take the share of the estate which should have fallen to his father. See above § 1. *B*. (6) Mit. Chap. II., sec. 4, p. 9; Viramit., Transl. p. 195 (*g*).

Representation is not recognised in the case of a pre-deceased brother who has left sons. These nephews are excluded by their surviving uncles. It is only on the complete failure of brothers of the deceased that brothers' sons succeed to him. Mit. Chap. II., sec. 4., paras. 1, 5, 7. Viramit. Tr. p. 195. See below, Vyavasthas, Chap. II., sec. 11, Q. 6; and Digest of Vyavasthas, Chap. II., sec. 13, Q. 4, 5. The doctrine may indeed be confined to those who by birth become, actually or potentially, sharers with their fathers forthwith, or immediately on the fathers becoming owners of property, and those who by analogy take through a mother from the maternal grandfather (*h*), when their mother has died between the decease of their grandfather and the actual partition of his property.

§ 1. *B*. (10) HALF-BROTHERS.—*On failure of brothers of the full-blood, half-brothers inherit the estate of a separate householder, &c.*

See Digest of Vyavasthas, Chap. II., sec. 12; and for Authority, see Digest of Vyavasthas, Chap. II., sec. 11, Q. 4.

The Vyav. May. includes the half-brother among the Gotraja Sapindas, and places him after the son of the brother of the full-blood. This may be taken as the prevailing law in the town of Bombay according to the preference accorded to the Mayukha

(*g*) Some surprise may be felt that this rule should have seemed necessary. But according to Hindu notions as possession is generally necessary to the completion of ownership, so separate possession is essential in theory to the completion of a separate ownership of a share derived from a prior joint ownership of the aggregate. The father, however, having once become a coparcener, his son has acquired a concurrent interest which is but expanded by the father's death. *Burham* v. *Punchoo*, 2 Suth. 123; *Chandrika Bakhsh* v. *Muna Koer*, L. R. 29 I. A. 70.

(*h*) See Vyav. May. Chap. IV., sec. 2, para. 1; sec. X., para. 26; above § 1. B. (6); Sarasvati Vilasa § 7, 21, 335.

by the High Court for cases arising within its Original Jurisdiction. The full-sister, too, takes precedence of the half-brother according to the same authority, on the construction of the word "brethren," which makes it extend to females (*i*). But beyond these limits the Mitakshara is generally preferred and regulates the succession as here indicated (*k*). In this construction the Viramitrodaya, Transl. p. 194, and the Dhaya Bhaga agree, see Daya Bhaga, Chap. XI., sec. 5, pl. 10-12. So also the Smriti Chandrika, Transl. p. 183.

§ 1. *B.* (11) Sons of Brothers of the Full Blood.—*On failure of half-brothers, sons of brothers of the full-blood inherit the estate of a separate householder, &c.*

They take *per capita.* The word "son" includes an adopted son (*l*). According to the interpretation put by the Madras High Court of the word "putra" in the Mitakshara, Chap. II., sec. 4, sub-sec. 7; sec. 5, sub-secs. 1, 4, 5, has a restricted meaning, and does not include grandsons (*m*), but the Allahabad High Court has held it to include grandsons (*n*), and the same view is held by the Bombay High Court (*o*).

See Digest of Vyavasthas, Chap. II., sec. 13; and for Authorities, see Digest of Vyasvasthas, Chap. I., sec. 2, Q. 5; and Chap. II., sec. 11, Q. 4.

§ 1. *B.* (12) Sons of Half-Brothers.—*On failure of sons of full-brothers, sons of half-brothers inherit the estate of a separate householder, &c.*

Authorities.

See Digest of Vyavasthas, Chap. II., sec. 11, Q. 4.

Regarding the case in which brothers' sons inherit together with grothers, see above, Remark to § 1. *B.* (9). The deceased

(*i*) *Sakharam Sadashiv* v. *Sitabai*, I. L. R. 3 Bom. 353, referring to *Vinayak Anandrao* v. *Lukshmibai*, 9 M. I. A. 516.

(*k*) See *Krishnaji* v. *Pandurang*, 12 Bom. H. C. R. 65.

(*l*) *Brojo* v. *Gouree*, 15 Suth. 70; *Brojo* v. *Sreenath Bose.*, 9 Suth. 463; *Gooroo* v. *Kylas*, 6 Suth. 93.

(*m*) *Suraya Bhukta* v. *Lakshminarasamma*, I. L. R. 5 Mad. 291, followed in *Chinnasami* v. *Kunja Pillai*, I. L. R. 35 Mad. 152

(*n*) *Kabain Rai* v. *Ramchander*, I. L. R. 24 All. 128; *Buddha Singh* v. *Laltu* I. L. R. 34 All. 663, affirmed in L. R. 42 I. A. 208.

(*o*) *Kashibai* v. *Sitabai*, 13 Bom. L. R. 552.

brother is represented by his son, his right having become vested in possession, to use the English phrase, before his death.

The Vyav. May. places half-brothers' sons amongst the Sapindas. A brother's son who is a Sapinda excludes a sister who comes in as a Gotraja Sapinda. This is both according to the Mitakshara and the Mayukha (*p*).

§ 1. *B*. (13) THE PATERNAL GRANDMOTHER.—*On failure of sons of half-brothers, the paternal grandmother inherits the estate of a separate householder, &c.*

AUTHORITIES.

See Digest of Vyavasthas, Chap. II., sec. 13, Q. 7; Mit. Chap. II., sec. 5, p. 2.

The place assigned to the paternal grandmother is a special one, due partly to her entrance into the family and moral unity with the grandfather, but partly also to the particular mention of her as an heir by Manu (*q*) next after the mother (*r*). The Mitakshara does not follow Manu in this, but uses the text to support the place assigned to her as the first of the jnatis or gentiles. The postponement of her to the father, brother, and nephew is grounded on the principle that these are specified in Yajnavalkya's text, while she is not. The fact is that the two Smritis as they stand are inconsistent. The passage in Manu was probably uttered originally with some context (such as in case there should be none but female claimants), which has now been lost, and the isolated fragment preserved has thus become misleading (*s*), but the mention of the grandmother shows a capacity on her part to inherit which Vijnanesvara makes specific in his comment on Yajnavalkya's text, which does not itself mention her as an heir (*t*). She takes a limited estate for life only (*v*).

(*p*) *Mulji* v. *Cursando*, I. L. R. 24 Bom. 568.

(*q*) Chap. IX. 217.

(*r*) Mit. Chap. II., sec. 1, p. 7.

(*s*) This has occurred in the Roman law as Savigny shows, System, Vol. III. App. VIII. § VIII., and Text § 115.

(*t*) See *Lullubhai* v. *Mankuvarbai*, I. L. R. 2 Bom. at p. 438 ss. Vijanesvara, in commenting on Yajnavalkya, was constrained to give his own Rishi precedence and to construe other smritis in accordance with it. See above pp. 14 and 16 notes.

(*v*) *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739; *Dondi* v. *Radhabai*, I. L. R. 36 Bom. 546.

§ 1. *B.* (14) GOTRAJA SAPINDAS.—*On failure of the paternal grandmother, the Gotraja Sapindas—that is, all the males of the deceased's family (gotra) related to him within six degrees downwards and upwards, together with their respective wives—are entitled to inherit the estate of a separate householder. It would seem that the Gotraja Sapindas inherit according to the nearness of their line to the deceased—that is, that the fourth, fifth, and sixth descendants in the deceased's own line (santana) should be placed first, next the father's line—namely, the deceased's brother's second, third, fourth, fifth, and sixth descendants, next the grandfather and his descendants to the sixth degree, and so on. In Gujarat the sister is placed at the head of the Gotraja Sapindas.*

AUTHORITIES.

See Digest of Vyavasthas, Chap. I., sec. 2, Q. 4; Chap. II., sec. 14, I. A. 3, Q. 1; Chap. II., sec. 14, I. A. 1, Q. 1; Chap. II., sec. 14, I. B. b. 1, Q. 1; Vasishtha IV. 17.

The collateral succession to property on failure of the heirs individually specified has given rise to many controversies amongst the Hindu lawyers. The rule that a jnati succeeds, or that a gotraja sapinda succeeds, gives no information as to who and who only are to be regarded as jnatis (paternal kinsmen) or as gotrajas (of the family or born in the family), and the kind of connection intended by these terms has been differently understood by different commentators. The nearer relatives of the propositus, as his son, his father and his brother, are obviously jnatis and gotraja sapindas, but being expressly named in the Smriti they have not to rely on their inclusion under any more general term for their right of succession. When we come to such a relative as the *sister*, the fact of her passing into another family gives her in one sense a new "gotrajatva," or family connection, and in the same sense deprives her of connection with her family of birth. Vijnanesvara accordingly passes her by in favour of the male gotraja sapindas; but it has now been held that she is an heir, according to the Mitakshara, and comes in immediately after the grandmother (*w*). Nilakantha, on the other hand, influenced no doubt by the growing strength of natural affections, as opposed to a strictly logical development

(*w*) *Bhagwan* v. *Warubai*, I. L. R. 32 Bom. 300.

of the religious agnatic system (x), gives her a place next to the grandmother as having a gotrajatva (= family connection) through birth, even though she has since passed out of the gotra. The extent to which each collateral line is to be followed before the right passes to the one next entitled, the interpolation of the "bandhus" or cognates between the nearer and remoter lines of agnates (y); the possibility and the extent of the transmission of hereditary right through daughters of collaterals; the rights of such daughters, and the rights of widows of collaterals to succeed in place of their husbands in preference to a remoter line, possibly even in preference to lower descendants in the same line; all these are questions to which various writers have given inconsistent though almost equally ingenious answers. The Vyavahara Mayukha's scheme differs essentially from that propounded in the Mitakshara and followed by the Viramitrodya (z), which, however, has itself been understood in different ways by subsequent authors and by the Sastris. The nicer points of the subject have been treated in the principal authorities, not only on discordant principles, but in a fragmentary way, which leaves room for much doubt. Under these circumstances it is hardly to be expected that any system, however carefully deduced from the authorities, will gain universal assent. We will, however, state the principles which seem the most in harmony with those involved in the authoritative text, so far as these go, and which have been generally followed by the Sastris of the Bombay Presidency. These have in some instances received judicial confirmation since the first edition of this work was published, and the decisions of the High Courts and of the Judicial Committee have thus established fixed points by reference to which the correctness of the views set forth on other cognate questions can readily be tested.

(x) A similar exception in favour of sisters occurred under the Roman law while women generally were thought unfit for inheritance.

(y) In Bengal, the Bandhus come next after the nearer Sapindas—that is, before descendants from ascendants beyond the great grandfather. *Roopchurn Mohapater* v. *Anundlal Khan*, 2 C. S. D. A. R. 35; *Deyanath Roy et al.* v. *Muthoor Nath*, 6 C. S. D. A. R. 27. In Madras, according to the Smriti Chandrika Chap. XI., the male gotrajas only come in next after brother's sons, and after them the samanodakas limited to two descendants from each ascendant above the propositus.

(z) See also the Sarasvati Vilasa, § 581, 586 ss.

In dealing with the materials now embraced under Digest of Vyavasthas, Chap. II., sec. 14, it became necessary to determine on what principles the several questions and answers should be arranged, and this opened up the whole question of the sapinda and gotraja relationship as conceived by Vijnanesvara and by Nilakantha. We propose to state their views in connection with the distribution of the answers referrible to the one and to the other authority.

The term "Gotraja" designates, according to the Mitakshara, Mayukha, and Manu IX. 217—1, the paternal grandmother; 2, the Gotraja-Sapindas; and 3, the Gotraja-Samanodakas. As there were no cases referring to the paternal grandmother (*a*), the Gotraja-Sapindas have been given the first place. Amongst these have been placed, first (A), those whose right to inherit is expressly mentioned in the Mitakshara, the Viramitrodaya, and the Mayukha. The Mitakshara (with which the Viramitrodaya agrees perfectly) names the following Gotrajas as entitled to inherit, after the paternal grandmother, the property of a separated male. (Colebrooke, Mit. p. 350; Stokes, H. L. B. 446.)

1, The paternal grandfather; 2, the father's brothers; 3, the father's brothers' sons (*b*); 4, the paternal great-grandmother; 5, the paternal great-grandfather; 6, the paternal grandfather's brothers; 7, the paternal grandfather's brother's sons; and this order of heirs is to be repeated up to the seventh ancestor. A paternal uncle's son excludes the widow of another paternal uncle of the deceased on the ground that females in each line of the gotrajas are excluded by any males existing in that line within the limits to which the gotraja-sapinda relationship extends (*c*). For the same reason a paternal unele's grandson excludes another paternal uncle's widow (*d*).

The Mayukha lays down the following order:—

1, The uterine sister; 2, the paternal grandfather and the half-brothers, as joint heirs; 3, the paternal great-grandfather, the father's brother, and the sons of half-brothers, as joint heirs; and so on, all the Gotrajas up to the seventh ancestor, according to the nearness of their relationship. But, as Mr. Colebrooke

(*a*) See Digest of Vyavasthas, Chap. II., sec. 13, Q. 7.

(*b*) "Sons" includes grandsons. *Budha Singh* v. *Laltu Singh*, L. R. 42 I. A. 208, 112 and 119.

(*c*) *Rachava* v. *Kalingapa*, I. L. R. 16 Bom. 716; *Nahalchand* v. *Hemchand*, I. L. R., 9 Bom. 31.

(*d*) *Kashibai* v. *Raghunath*, I. L. R. 35 Bom. 389.

remarks (Mit. p. 350. Note), it is by no means clear how the remoter heirs are to follow one another (*e*).

Though in general the Mitakshara possesses the greatest authority, and it would therefore seem necessary to follow its order, it was impossible altogether to neglect the Mayukha, since in Gujerat and in the island of Bombay the Mayukha partially prevails over the Mitakshara (*f*), and the sister is there allowed to inherit immediately after the paternal grandmother (*g*). Consequently the first place has been generally assigned to her by the Sastris. They have in several cases even from the Deccan and Konkan decided in her favour, and in Vyavasthas, Chap. II., sec. 14, these have been subjoined to those from Gujarat, though, according to the Mitakshara, they would more properly be included in sec. 15.

The cases which refer to the right of the Gotrajas, not mentioned in the Mitakshara and Mayukha, form the second division (B), and have been classed under two headings; *a*, males; *b*, females; because the rights of the latter depend on principles less generally accepted than those recognised as applicable to the former.

The questions whether the Gotraja-Sapindas who are not expressly mentioned in the law books have any right to inherit, and if they have, in what order they succeed, are not easy to decide. As regards the males, the Sastris have confidently asserted their rights (see Digest of Vyavasthas, Chap. II., sec. 14, I., B. *a*. 1 and 2) and quoted as authority for their opinions the passage of the Mitakshara (Vyav. *f*. 55, p. 2, l. 1; see Chap. I., sec. 2, Q. 4; and Stokes, H. L. B. 427), which names the *Gotrajas* as heirs. It appears, therefore, that they considered the series of Gotraja-Sapinda heirs, given by Vijnanesvara (Colebrooke, Mit. *l. c.*) as not exhaustive, nor intended to exclude others than

(*e*) Nilakantha probably aimed at governing succession subject to the express provisions of the Sastris in favour of specified relatives by a principle of proximity of degree, counting as in the Roman law every step up and down, and making all at an equal distance equal sharers in the estate of the propositus. See *Lalubhai* v. *Mankoovarbai*, I. L. R. 2 Bom. 388. The other authorities follow the principle of the Teutonic and the English laws in going up to the nearest point of the ascendant stock that will afford an heir, and then following the line of descendants springing from it and choosing the nearest in that line.

(*f*) See *Lalloobhoy* v. *Cassibai*, L. R. 7 I. A. 212; and, above, Book I.

(*g*) *Vinayekrao Anandrao* v. *Lakshmibai*, &c., 1 Bom. H. C. R. 117; S. C. 9 M. I. A. 517.

those named, but only as an exemplification of the general doctrine. The same opinion has also been advocated by the Sastris in other parts of India, where the Mitakshara is the ruling authority (*h*), as well as by Mr. Vinayak Sastri, the late Law Officer of the High Court of Bombay. Moreover, this view was adopted by Mr. Harrington in the case of *Dutt Zabho Lannauth Tha and others* v. *Rajunder Narain Rae and Coower Mohinder Narain Rae* (*i*), and the Privy Council, on appeal, confirmed his judgment. Mr. Harrington, after having proved that the word putra, "son," is used in the Mitakshara and Subodhini as a general term for descendant or male issue, says in his review of the opinions of the Sastris (p. 157):—

"The same construction must, I think, be put on the words 'sons' and 'issue' (putra and sunavah) in the fourth and fifth paragraphs of the fifth section and second chapter of the Mitakshara (*k*), and this interpretation is indeed indicated by other expressions of the same paragraphs, viz., on failure of the father's and on failure of the paternal grandfather's *line* (Santana). To adopt the construction proposed by the appellant would be to cut off all the descendants below the grandson of the father, grandfather, and every other ancestor, and would render nugatory the provisions in the Mitakshara (*l*), as well as

(*h*) See *R. Sreekaunth Deybee* v. *Sahib Perlhad Sein*, Morley, Digest, New Series, p. 187, No. 14; *Rutcheputty Dutt et al.* v. *Rajunder Narain Rae et al.*, 2 M. I. A. 132, 168.

(*i*) Moore, Indian Appeals, *l.c.* This view is confirmed in *Bhyah Rama Singh* v. *Bhyah Ugur Singh*, 13 M. I. A. 373. So in *Thakur Jibnath Singh* v. *The Court of Wards*, 5 Beng. L.R. 442, and *Parasara Bhattar* v. *Rangaraya Bhattar*, I. L. R. 2 Mad. 202.

(*k*) Colebrooke, Mit. p. 350; Stokes's H. L. B. 446-7 :—

"4. Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles, and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same general family, and connected by funeral oblations."

In *Budha Singh* v. *Laltu Singh*, L. R. 42 I. A. 208, it has been held that the word "putra" in sections 4 and 5 Chap. II. of the Mitakshara, as interpreted by the Benares School, must be understood in a generic sense in the case of lineal descendants of the deceased, and the descendants in each ascending line up to the fixed limit should be exhausted at any rate to the third degree before making the ascent to the next in order of succession. In consequence a great grandson of the grandfather of a deceased person is preferred to the grandson of the great-grandfather.

(*l*) Colebrooke, Mit. p. 351; Stokes's H. L. B. 447.

other books of law, which expressly state the succession of kindred belonging to the same family, as far as the limits of knowledge as to birth and name extend " (*m*).

But the opinion that Vijnanesvara's series of heirs is not intended to be exhaustive may be strengthened by some further arguments. Firstly, if it were intended to be exhaustive, not only would the provision that the Gotraja-Samanodakas may inherit as far as name and knowledge of birth extend, as Mr. Harrington observes be rendered nugatory, but virtually all the Samanodakas and one line of the Sapindas would be excluded from the succession. For it is hardly possible that the seventh ancestor and his sons and grandsons could be alive at the time of the death of the seventh descendant; and this improbability increases with every grade among the Samanodakas, who extend to the fourteenth ancestor and are to inherit in the same order as the Gotraja-Sapindas—that is, 1, female ancestor; 2, male ancestor; 3, their sons; 4, and grandsons. But, secondly, the definition of the word Sapinda, which Vijnanesvara gives in the first chapter of the Mitakshara, clearly shows that all the unmentioned descendants of the lines of the various ancestors, down to the seventh degree, as well as the descendants of the deceased person down to the seventh, inherit. For Vijnanesvara says (Acharakanda *f*. 6, p. 1, l. 15) (*n*). when he explains the verse I. 52, of Yajnavalkya, in which it is declared that a man shall marry a girl who is not his Sapinda :—

" He should marry a girl, who is non-Sapinda (with himself). She is called his Sapinda who has (particles of) the body (of some ancestor, &c.) in common (with him). Non-Sapinda means not his Sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus the son stands in Sapinda-relationship to his father because of particles of his father's body having entered (his). In like (manner stands the grandson in Sapinda-relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have

(*m*) Compare also *Shoodyan* v. *Mohun Pandey et al.* Reports of S. D. A., N. W. P. 1863, II. p. 134; and *Duroo Singh* v. *Rai Singh et al*, *ibid.* 1864, p. 523.

(*n*) The Samskaramayukha adopts this theory. The Dharmasindhu states merely the two theories, leaf 63 (Bombay Edition), Part I. (p. 353, Marathi, Samvat 1931). It is glanced at in Vyav. May. Chap. IV. sec. 5, p. 22, and supported in the Datt. Mim. sec. 6, para. 9, by a reference to Manu.

entered into (his own). Just so is (the son of a Sapinda-relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in Sapinda-relationship) to his maternal grandfather and the rest through his mother. So also (is the nephew) a Sapinda-relation of his maternal aunts and uncles, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in Sapinda-relationship) with paternal uncles and aunts, and the rest. So also the wife and the husband (are Sapinda-relations to each other), because they together beget one body (the son). In like manner brothers' wives also are (Sapinda-relations to each other), because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.* because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them). Therefore one ought to know that wherever the word Sapinda is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent" (*o*).

After refuting some objections which might be raised against this definition, and after discussing the latter part of Yajn. I. 52, and the first half of Yajn. I. 53, Vijnanesvara again recurs to the question, who the Gotraja-Sapindas are. Mitakshara, *f.* 7, p. 1, l. 7:—

"In the explanation of the word 'asapindam' (non-Sapinda, verse 52), it has been said that Sapinda-relation arises from the circumstance that particles of one body have entered into (the bodies of the persons thus related) either immediately or through (transmission by) descent. But inasmuch as (this definition) would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore the author (Yajnavalkya) says:—

Vs. 53: "After the fifth ancestor on the mother's and after the seventh on the father's side."—On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor), the Sapinda-relationship ceases; these latter two words must be understood; and therefore the word Sapinda, which on account of its (etymological) import, "(connected by having in common) particles (of one body)"

(*o*) In *Amrita Kumari Debi* v. *Lakhinarayan*, 2 Beng. L. R. 33, is a passage to the same effect from Parasara Madhava, at page 34.

would apply to all men, is restricted in its signification, just as the word *pankaja* (which etymologically means "growing in the mud," and therefore would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six ascendants, beginning with the father, and the six descendants, beginning with the son, the one's self (counted) as the seventh (in each case), are Sapinda-relations. In case of a division of the line also, one ought to count up to the seventh (ancestor), including him with whom the division of the line begins (for example, two collaterals, *A* and *B* are Sapindas, if the common ancestor is not further removed from either of them than six degrees), and thus must the counting of the (Sapinda-relationship) be made in every case." See Dattakamimamsa, sec. VI. pl. 27, 28 and notes; Stokes's H. L. B. 605-6, and *Bhyah Ram Sing* v. *Bhyah Ugur Sing* (*p*).

From this passage the following conclusion may be drawn (*q*):

1. Vijnanesvara supposes the Sapinda-relationship to be based, not on the presentation of funeral oblations, but on descent from a common ancestor, and in the case of females also on marriage with descendants from a common ancestor.

2. That all blood relations within six degrees, together with the wives of the males amongst them, are Sapinda-relations to each other (*r*).

The bearing of these points on the definition of the "Gotraja-Sapindas," as well as on the interpretation of the passage referring to their rights of inheritance, is obvious. It appears that the series of heirs given there is not exhaustive, and that the term "Gotraja-Sapindas" designates, if applied to males only, all those who are blood relations within the sixth degree,

(*p*) 13 M. I. A., p. 380.

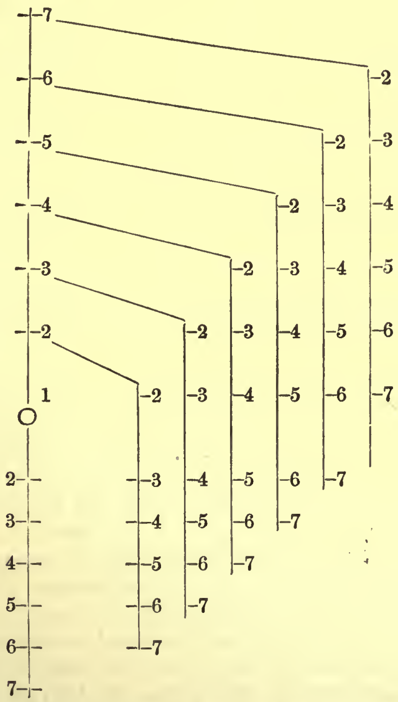
(*q*) See *Amrita Kumari Debi* v. *Lakhinarayan*, 2 Beng. L. R. 33 F. B. R. See also Coulanges La Cité Antique, 64. Mitramisra says the capacity to present oblations is not the sole source of a right to inherit, otherwise younger sons would be excluded by the eldest. It gives only a preference, he says, to those who have the right amongst the Gotrajas. Viram, Tr. p. 91. At p. 196 ff. he adopts Vijnanesvara's order of succession amongst the Gotrajas, though he admits a difficulty as arising from the Vedic text referred to below. As to impurity arising from the death of Sapindas, and the extent of the Sapinda connexion, see Baudhayana, Pr. 1, Adhy. 5, Kand. 11, Sutra 1-27.

(*r*) See *Lakshmibai* v. *Jayaram Hari et al.*, 6 Bom. H. C. R. 152 A. C. J.; and *Lullubhai* v. *Mankuverbai*, I. L. R. 2 Bom. 388.

and who belong to one family—that is, bear one name. If this inference is accepted, all these persons are entitled to inherit according to the passage of the Mitakshara given above (*s*).

The only remaining question is, in which order the Gotraja-Sapindas, who are not mentioned in the Mitakshara, are to be placed. The principle suggested by Mr. Harrington—namely, to continue each line of heirs down to the seventh person, and thus to allow, first the brother's descendants to inherit, next the paternal uncle's descendants, and so on—can easily be carried out in the case of the paternal uncle's line and those descended from the sons of remoter ancestors. But it is impossible to allow the brother's grandsons (*t*), great-grandsons, and remoter descendants to inherit before the paternal grandmother, since the right of the latter to succeed immediately after the brother's sons is clearly settled, not only in the Mitakshara, but in all

(*s*) The following table will serve to show the extent of the Gotraja-Sapinda relationship, as far as the males are concerned :—



(*t*) *Chinnasami* v. *Kunju Pillai*, I. L. R. 35 Mad. 152; *cf.* *Kabian Rai* v. *Ramchander*, I. L. R. 24 All. 128.

the law books of the Benares Schools and in the Mayukha (*v*). Besides, under this arrangement, the remoter descendants of the deceased himself, as great-great-grandsons, who possibly might be in existence at the great-great-grandfather's death, would be lost sight of altogether. In order to provide for the rights of these persons, who undeniably have a right to inherit, they might either be considered as co-heirs with the descendants of the paternal uncle, who are equally distant from the deceased, according to the principle apparently approved by the Vyavahara Mayukha, or placed after the paternal grandmother, and before the paternal grandfather—namely, 1, paternal grandmother; 2, deceased's great-great-grandsons, or remoter descendants to No. 7, if living; 3, brother's grandsons, brother's great-grandsons, brother's great-great-grandsons and their sons; 4, paternal grandfather. The second arrangement seems to be the more satisfactory, as it follows the principle indicated by the Mitakshara, that the succession is to go to the direct and to the several collateral lines, after providing for the grandmother conformably to Manu's text in her favour, in the order in which they branch from the common stem. That the ascending line should thus be resorted to in the person of the grandmother, then immediately abandoned for remote lineal descendants of the propositus and his brothers, and afterwards recurred to in the person of the grandfather, may seem a rather arbitrary arrangement. It arises from Vijnanesvara's endeavour, consistently with the recognised principle of the Mimansa philosophy of giving some effect, if possible, to every sacred text, to work the rule of Manu into the scheme of Yajnavalkya, if not according to its obvious sense, yet in some sense, though an entirely forced one (*w*).

(*v*) See Colebrooke, Mit. p. 349; Stokes's H. L. B., p. 446; Vyav. May. p. 106; Stokes's H. L. B. 88. So also Visvesvara in the Subodhini adds to the words "on failure of the father's line," the following comment, "the line of the father (must be understood to) end with the brothers and their sons." In Madras the collateral succession of Gotrajas stops with the grandson : in Bengal, with the great-grandson of the ascendant. See Nort. L. C. 581. But the doctrine above set forth is recognised as that of the Mitakshara, *T. Jibnath Sing* v. *The Court of Wards*, 5 B. L. R. 443; *Bhyah Ramsing* v. *Bhyah Ugur Singh et al.*, 13 M. I. A. 373. The Smriti Chandrika, Chap. XI. sec. 5, para 9 ss, limits the succession to the (collateral) descendants, excluding the ascendants, except as themselves descendants, from those still higher in the line.

(*w*) See Index, Interpretation; Muir's Sans. T. III.; 98 Weber's Hist. In. Lit. 239; M. Müller's Sans. Lit. 78; Burnell's Varadraja, Pref. p. xiv.; Manu II. 10, 14; IV. 30; and XII. 108. The scriptures were to be literally

The distinction between the whole-blood and the half-blood observed in the case of brothers and their sons extends to the descendants of the grandfather and remoter ascendants. This question, which is now set at rest by the decision of the Judicial Committee in *Ganga Sahai* v. *Kesri* (*x*), an appeal from the Allahabad High Court, gave rise to a conflict of decisions between the latter and the Bombay High Court. In *Samat* v. *Amra* (*y*) the Bombay High Court laid down that there was no distinction of the whole and the half-blood in case of uncles. Then came the decision of the Allahabad High Court in *Suba* v. *Sarfraz* (*z*), which did not follow *Samat* v. *Amra* (*y*), and laid down just the opposite doctrine. In *Vithalrao* v. *Ramrao* (*a*) the point again came up for decision before the Bombay High Court, which did not follow *Suba* v. *Sarfraz* (*z*) and confirmed its own decision in *Samat* v. *Amra* (*y*). At last the question was once more raised in Allahabad in *Ganga Sahai* v. *Kesri* (*b*), and the High Court, after reviewing the various cases, decided in favour of the distinction between uncles of the whole-blood and the half-blood. This view was confirmed on appeal to the Privy Council. I had to consider this point before the appeal was argued at the Board, and the view of their Lordships is based upon the text of Madana Parijata.

As regards the female Gotraja-Sapindas, who occupy the next division (I. B. *b*.), their right to inherit is still less generally recognised than that of the males.

a. According to the doctrines of the Bengal and the Madras school of lawyers, as represented by Jimutavahana (*c*) and the Smriti Chandrika, females are in general incapable of inheriting, and this disability can be removed only by special texts of the Dharmasastras. The authority for this view is Baudhayana, the reputed founder of one of the schools of the Black Yajurveda, who, in his turn, quotes a passage of his Veda to support his opinion. He says, Prasna II. k. 2:—

"A woman is not entitled to inherit; for thus says the Veda,

accepted and yet to be construed by learned Brahmans according to the philosophy in vogue at the time of the compilation of the last-named work.

(*x*) L. R. 42 I. A. 177.

(*y*) I. L. R. 6 Bom. 394.

(*z*) I. L. R. 19 All. 215.

(*a*) I. L. R. 24 Bom. 317.

(*b*) I. L. R. 32 All. 541 (F. B.).

(*c*) Colebrooke, Daya Bhaga, p. 215; Stokes's H. L. B., pp. 345, 346.

females and persons deficient in an organ of sense (or a member) are deemed incompetent to inherit."

The meaning assigned by Baudhayana to the Veda passage is by no means the only one in which it can be taken. Vidyaranya, in his commentary on the Taittiriyaveda, explained it, as Mitramisra (Viram. *f.* 209, p. 1, l. 10, p. 671, Calc. Edn. of 1875) says, in a different way, so that it would have no reference to inheritance (*d*).

But whatever may be the respective philological value of these different comments, Baudhayana's explanation has long ago become law in the East and South of India, and there accordingly those females only inherit who are specially mentioned in the texts of the law books (*e*).

(*d*) It may be translated thus :—" Women are considered disqualified to drink the Soma juice, and receive no portion (of it at the sacrifice)." See the Madhavya, p. 33, Burnell's Translation; Viram. Tr. pp. 174, 175. Jagannatha says (Col. Dig. Book V. T. 397, Comm.) that " daya "=oblation and " dayada " =a sharer of an oblation offered to him in common with others. He points out also that Kulluka's Commentary on Manu IX. 186, 187, shows that the latter text would be inoperative if restricted to males, and with reference to the text of Baudhayana, that " a wife must be considered a Sapinda, because she assisted her husband in the performance of religious duties." Jagannatha admits the paternal great-grandmother by analogy, notwithstanding Baudhayana's excluding text. Col. Dig. Book V. T. 434, Comm. " According to the received doctrine of the Bengal and Madras Schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of Baudhayana, which declares that ' women are devoid of the senses, and incompetent to inherit.' The same doctrine prevails in Benares; the author of the Viramitrodaya yields, though apparently with reluctance, to this text (Chap. III., part 7). The principle of the general incapacity of women for inheritance, founded on the text just referred to, has not been adopted in Western India, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case." Privy Council in *Lulloobhoy Bappoobhoy* v. *Kassibai*, L. R. 7 I. A. at p. 231.

(*e*) The Viramitrodaya, after showing that the objections raised to Vijnanesvara's doctrine by the Smriti Chandrika (Chap. XI., sec. 5) are unsustainable upon the grounds taken by Devanda Bhatta, and charging Jimutavahana with inconsistency in contending that Yajnavalkya's text is meant to exclude female Sapindas (as wives or daughters-in-law of ascendants and collaterals sprung from them), while he employs it to determine the right of the paternal grandmother (Daya Bhaga, Chap. XI., sec. 4, paras. 4-6, compared with sec. 6, para. 10), finally itself pronounces Vidaranya's explanation of the Vedic text an insufficient basis for female inheritance as not affording room for a proper application, by way of disparagement of woman's capacity, of the word " adayada," " shareless." See the Viram, p. 671, Calc. Edn. of 1875, Transl. p. 198, and

b. The question is, however, whether this doctrine prevails also in the Bombay Presidency, where the Mitakshara and the Mayukha are the ruling authorities. The following considerations seem to furnish an answer to it:—

First, the text of Baudhayana, or the principle that women are in general incapable of inheriting, is adopted neither in the Mitakshara nor in the Mayukha.

Secondly, the Mitakshara mentions the great-grandmother's right to inherit, and indicates that the wives of the other ancestors in the direct line, up to the seventh degree, likewise succeed to the estate of their descendants, though *none* of them is provided for by special texts (*f*). They inherit, therefore, merely by virtue of their relationship as Gotraja-Sapindas. Hence it follows that the Mitakshara does not recognise the doctrine of the Bengal and Southern schools, and there is consequently no reason why, according to its doctrine, the female Gotraja-Sapindas, whom it does not mention, should be excluded from inheriting, if the males, who stand in the same position, are allowed to do so. Moreover, one of the commentators on the Mitakshara, Balambhatta, expressly mentions the right of a pre-deceased son's widow (*g*), whom he places immediately after the paternal grandmother, and says that the word Sapinda must be everywhere interpreted as including the males and females (*h*). Nilakantha likewise adopts

as to Jimuta's meaning, Col. Dig. Book V. T. 434, Comm.; Smriti Chandrika, Chap. XI. sec. 5, para. 15.

(*f*) See *Lakshmibai* v. *Jayram Hari et al.*, 6 Bom. H. C. R. 152 A. C. J. See also Col. Dig. Book V. T. 397, Comm. *ad fin.*, and T. 434, 370; also Comm. on T. 434.

(*g*) A case at 2 Borr. 670 (*Roopchund* v. *Phoolchund et al.*) places a daughter-in-law before a divided brother, but this seems wrong. She is excluded by a daughter, 2 Macn. 43. In *Bai Gunga* v. *Bai Sheokoovur*, Sel. Cases at p. 85, the Sastri, after pronouncing against the validity of the adoption of a daughter's son, prefers the daughter-in-law to the daughter as heir, with a restriction on the power of alienation during the daughter's life. This opinion was acted on by the Zilla Judge and the Saddar Court. It is questioned in *Lulloobhoy* v. *Kassibai*, L. R. 7 I. A. at p. 220; *Gadadharhbat* v. *Chandrabhagpai*, I. L. R. 17 Bom. 690 (F. B.); *Yamunabai* v. *Manubai*, I. L. R. 23 Bom. 608; *cf. Bai Paravati* v. *Dolatram*, I. L. R. 25 Bom. 263.

(*h*) Visvesvara, in his discussion on the rights of the paternal grandmother, says that there is no objection to understand the word "Gotrajas" in the sense of "male and female Gotrajas." The Vaijayanti also, a Commentary on Vishnu, referred to by Colebrooke, 2 Str. H. L. 234, recognises a right of representation in the son's widow. In *Rany Pudmavati* v. *Baboo Doolar Sing*, 4 M. I. A. 259, grandsons of a common ancestor were held, under the Mithila

in this respect the same view as the Mitakshara, as he makes the sister inherit as *the first and nearest amongst the Gotraja-Sapindas* unaided by special texts (*i*).

c. But though both the principal authorities thus repudiate the doctrine of Baudhayana, and allow females to inherit as Gotraja-Sapindas, they differ on the question as to what females fall under this designation.

The Mitakshara and its followers seem to interpret the term "Gotraja" (= "of" or "born in the family") as "belonging to the family." For we read, Mitakshara Vyav. *f*. 58, p. 2, l. 13:—

"The kinsmen sprung from the same family as the deceased (Gotraja-Sapindas), namely, the grandfather, and the rest inherit the estate. For the Bhinnagotra-Sapindas are included by the term (Bandhus)" (*k*).

The word "samanagotra," "belonging to the same family," is substituted for "gotraja." See *infra*, quotation in Digest of Vyavasthas, Chap. II., sec. 14, I. A. 3, Q. 1.

The substitution of samanagotra for gotraja, as well as the employment of bhinnagotra to designate the opposite of the term, both show that Vijnanesvara took gotraja in the sense of "belonging to the same family." If the term has this meaning, it would follow that no *married daughters* of ascendants, descendants, or collaterals can inherit under the text which prescribes the succession of the Gotrajas. For the daughters by their marriage pass into another family, or, as the Hindu lawyers say in their expressive language, "are born again in the family of their husbands." But it seems improbable that even unmarried daughters of Gotraja-Sapindas can inherit under the text

law, entitled to succeed before the widow of deceased's brother, his nieces, or their sons; but this would not be so in Bombay, where the widow, being the last representative of a line, takes before a remoter line is resorted to. See below and comp. Tupper's Panj. Cust. Law, Vol. II., p. 148, where the widow of a collateral ending a branch or sub-branch takes the share that would have fallen to her husband had he been alive. The widow of a pre-deceased grandson takes before the daughter of a pre-deceased son, *Musst. Brijimalee* v. *Musst. Pran Piaree et al.*, 7 C. S. D. A. R. 59.

(*i*) Vyav. May. Chap. IV. sec. 8, p. 20; Borradaile, p. 106; Stokes's H. L. B. 89. In a Madras case, the Privy Council say, "His sisters, if they had a remote right to succeed as Bandhus . . . could only so succeed after the Sapindas . . . had been exhausted." See *V. Venkata Krishna Rao* v. *Venkatrama Lakshmi et al.*, I. L. R. 1 Mad. 185; S. C. L. R. 4 I. A. at p. 8.

(*k*) Stokes's H. L. B. 446; and Mit. *ibid.* 1, 15 (Stokes's H. L. B. 447).

mentioned (*l*). For, though they belong to their father's gotra up to the time of marriage, they *must* leave it, under the Hindu law, before the age of puberty; and, consequently, by their succeeding to the estate of Sapindas belonging to their fathers' families, the object of the law, in placing Sagotra-Sapindas before the Bhinnagotra-Sapindas—namely, the protection of the family property—would be defeated, since such property, through them, would pass into their husbands' families. The quitting of the paternal family by a girl is looked upon as so inevitable that it is made a ground for exempting her from sharing her father's loss of caste with her brothers, because she goes to another family (*m*). It seems, therefore, more in harmony with the principles on which the doctrines of the Mitakshara are based, to exclude even unmarried daughters of Gotrajas (*n*). The only females, who can be understood by the term Gotraja-Sapinda, are the wives and widows of the male Gotraja-Sapindas.

Nilakantha, on the other hand, takes "Gotraja" in the sense of "born in the family," and declares expressly that the

(*l*) Compare Manu II. 67, 68. Compare also Coulanges La Cité Antique, 51. Col. Dig. Book V. T. 183, speaks of a second birth by investiture and other ceremonies.

(*m*) Viramit., Transl. p. 254.

(*n*) Balambhatta admits the rights of inheritance of sisters, sisters' daughters, and daughter's daughters. But he does not consider them to be included by the term Gotraja-Sapinda, but by the words "bhratarah," "brother," and "dauhitra," "daughter's son," and "tatputra," his (her) sons, in Yajnavalkya's text. Stokes's H. L. B. 443. *Thakoorain Sahiba et al.* v. *Mohun Lall et al.*, 11 M. I. A. 402. Sisters' inheritance does not follow the analogy of daughters'. If any analogy is to be recognised it is to the case of brothers, *Bhagirthibai* v. *Baya*, I. L. R. 5 Bom. 264. See, however, the chapter on Stridhana. The Smriti Chandrika excludes the daughter of the grandfather and of other ascendants from amongst Gotrajas on the ground that the form of the word, as derived from a combination of masculine terms, must primarily be taken to indicate only males. Smriti Chandrika, Chap. XI., sec. 5, p. 2. On a similar construction sisters and their sons are excluded. See Smriti Chandrika, p. 191. Devanda takes "Gotrajah" as meaning sprung from the family, p. 192, and hence as a reason for excluding the grandmother from succession after nephews, except under the special texts in her favour, p. 184 ss. See Dig. Vyav., Chap. II., sec. 15. At 2 Str. H. L. 243, Colebrooke says that commentators on the Mitakshara admits sisters, but that this view is controverted. Sutherland says that he inclines to the view that the sister is excluded. Remarking on Manu IX. 185, Collett, J., says, in a Madras case, that the plural *bhratara* is used, and that Prof. Wilson allows the plural masculine to include only males, though the dual *bhratarau* may include females.

"sister" inherits for this reason (*o*). He does not mention the paternal great-grandmother, nor the widows of other Gotrajas in his list of heirs. But it is not clear whether he intends to exclude them, as, according to Hindu ideas, a wife may be said to have been born again in the family of her husband, and he, as we have seen, admits the theory of a sapinda connection by particles. He would, consistently with the principle on which he assigns her place to the sister, place the daughters of male Gotraja-Sapindas amongst the heirs bearing this name; but this logical extension of his doctrine does not seem to have been generally accepted into the local law. Except for sisters, it may be taken that the Mitakshara law prevails (*p*).

The Sastris have in their answers, except in the Gujarat cases relating to the sister, generally followed the Mitakshara. They prefer the sister-in-law to the sister's son (Bhinnagotra-Sapinda) and to a male cousin and more distant male Sagotra-Sapindas (*q*), the paternal uncle's widow to the sister, the maternal uncle, and the paternal grandfather's brother; and they allow a daughter-in-law (see Chap. IV. B., sec. 6, II. *f*.) and a distant Gotraja-Sapinda's widow to inherit. It is, however, sometimes impossible to bring the authorities which they quote into harmony with their answers.

From their answers, as well as on account of the general principle that "the nearest Sapinda inherits" (*r*), it would appear that the place of the widows of descendants and collaterals in the order of heirs is immediately after their husbands (*s*), at least where the particular branch to which they belong is not lineally represented by a surviving male (*t*).

(*o*) See Vyav. May., Borradaile, p. 106; Stokes's H. L. B., p. 88.

(*p*) See *Lallubhai* v. *Mankuvarbai* above, p. 114 (r), *Daya Bechur et al.* v. *Bai Ladoo*, S. A. No. 158 of 1870, decided on March 27, 1871, Bom. H. C. P. J. F. for 1871; also Dig. Vyav. sec. 15 B. II. (2) below. In S. A. No. 158 of 1870, it was held that the paternal aunt could not, even in Gujarat, be recognised as a Gotraja-Sapinda, though she was entitled to a place as a Bandhu.

(*q*) See Dig. Vyav., sec. 14, I. B. *b*. 2.

(*r*) See Vyav. May. p. 106. See *Lakshmibai* v. *Jayram Hari et al.*, 6 Bom. H. C. R. 152 A. C. J.

(*s*) See Dig. Vyav., Chap. II., sec. 8 Q. 2. The widow of a brother's son was preferred to another brother's great-grandson in succession to a widow as to property inherited by her from her husband. *Dhoolabh Bhaee et al.* v. *Jeevee*, 1 Borr. 75.

(*t*) See *Lallubhai* v. *Mankuvarbai*, above p. 114 (*r*).

It is on this analogy probably that the Sastri has grounded his erroneous answer to Chap. II., sec. 7, Q. 16.

Regarding the Samanodakas, who occupy the next division, it may suffice to remark that, according to the principles of interpretation adopted by Vijnanesvara in regard to the passage on Sapinda-relationship, they must be understood to comprise the male ascendants, descendants, and collaterals, beyond the sixth and within the thirteenth degrees, together with their wives or widows, or all those persons who can furnish a satisfactory proof of their descent from a common ancestor. The order of their succession also must be regulated by the same principles as that of the Sapindas.

§ 1. *B* (15) GOTRAJA-SAMANODAKAS.—*On failure of Gotraja-Sapindas, the Gotraja-Samanodakas inherit the estate of a separate householder. Gotraja-Samanodakas are all the male descendants, ascendants, and collaterals, within* 13 *degrees, together with their respective wives; or, according to some, all persons descended from a common male ancestor, and bearing the same family name. The Samanodakas inherit, like the Sapindas, according to the nearness of their line to the deceased.*

AUTHORITIES.

See Digest of Vyavasthas, Chap. II., sec. 14, II., Q. 1.

"Samanodaka" means literally participating in the same oblation of water. Another form of the name for these kinsmen is "*Sodaka.*"

§ 1. *B.* (16) BANDHUS.—*On failure of Samanodakas, the estate of a separate householder descends to the Bandhus or Bhinna-gotra-Sapindas (Sapinda-relations, not belonging to the same family as the deceased). The latter term includes—*

Atma Bandhus
1. *The father's sister's sons,*
2. *The mother's sister's sons,*
3. *The maternal uncle's sons,*

Pitri Bandhus
4. *The father's paternal aunt's sons,*
5. *The father's maternal aunt's sons,*
6. *The father's maternal uncle's sons,*

Matri Bandhus
7. *The mother's paternal aunt's sons,*
8. *The mother's maternal aunt's sons,*
9. *The mother's maternal uncle's sons,*

10. *All other Sapinda-relations who are not Gotrajas, according to the definition given above—these take in the order of their nearness to the deceased.*

AUTHORITIES.

See Digest of Vyavasthas, Chap. II., sec. 15, A. 1, Q. 1; and B. 2, Q. 1; Vasishtha IV. 18.

The rule as to the nine specified bandhus may be expressed thus:—A man's own bandhus, or atma bandhus, are the sons of his paternal aunt and of his maternal aunt and uncle. The same relatives of his father are *his* bandhus, or pitri bandhus. The same relatives of his mother are *her* bandhus, or matri bandhus (*v*). They succeed in the order in which they have been enumerated. See Vyav. May. Chap. IV., sec. VII., pl. 22; Mitakshara, Chap. II., sec. 6.

The chief reason for which we hold that all the Bhinnagotra-Sapindas inherit under the law of the Mitakshara is that Vijnanesvara declares "the Bhinnagotra-Sapindas (or Sapindas who are not Gotrajas—that is, who do not bear the same family name) *to be understood by the term Bandhu* (bhinnagotranam sapindanam bandhusabdagrahanat). Against this it must not be urged that the opinion stands in contradiction to the enumeration given in Mit. Chap. II., sec. 6 (Colebrooke), as this enumeration is most likely only intended to secure a preference for the nine Bandhus named there (*w*). For Hindu lawyers are by no means so accurate that they would hesitate to divide an explanation which ought to stand in one particular place, and to give it in two passages.

But a further proof that it is correct to combine the two passages, Mit. Chap. II., sec. 5, paras. 3 and 6, is contained in the circumstance that Vijnanesvara takes the words "bandhu" and "bandhava" in all the passages of Yajnavalkya, where they occur, in a general sense—namely, of relations in general,

(*v*) It will be observed that "aunt" and "uncle" in the list mean aunt and uncle by blood, not merely an uncle or aunt by marriage.

(*w*) It was perhaps originally, by counting five steps, intended to mark the extreme limits of the bandhu relationship, confining rights of inheritance. See note (*y*) next page.

or relations on the mother's and father's side, or relations on the mother's side only.

Finally, Vijnanesvara himself states, in the passage *on the succession to a deceased partner in business*, that the Bandhavas include the *maternal uncle*, one of those Bhinnagotra-Sapindas who had not been named by him in Chap. II., sec. 6. As this passage is of great importance for other questions also, connected with the law of inheritance, we give it here in full:—

Yajn.—If (a partner in business) proceeded to a foreign country and died (there), his (nearest) heirs (sons, &c.), his relations on his mother's side (bandhavah), or his Sapinda relations, or those (partners of his) who have returned (from their journey) shall take his estate; on failure of (all) these, the king.

Mitakshara—

When amongst partners one proceeded to a foreign country and died, then near heirs (*x*) (dayada), the sons and other descendants; the cognates (bandhavah) the relations of his mother, the *maternal uncle* and the rest; or the gentiles (jnatayah) the blood relations (sapindah) not included among the descendants (*y*) or those who have come (agatah), the partners in business who have returned from the foreign country; or also these may take his property.

On failure of them—that is, on failure of the near heirs and the rest (dayadadi), the king shall take it.

And by the word "or" he (Yajn.) indicates that the right of the near heirs and the rest is contingent (that is, that not all inherit together). The rule, however, regarding the order of succession, which has been given above (Chap. II., sec. 1, para. 2) in the text, as to the wife, daughter, &c., applies also here. The object for which this rule (regarding the succession to a deceased partner in business) has been given, is to forbid (the succession) of pupils, of fellow-students, and of the Brahmin community, and to establish (in their stead the succession of) merchants (partners). Amongst the merchants, he who is able to perform the funeral oblations, to pay the debts (of the deceased), &c., shall take (the estate). But if all are equally able (to fulfil the

(*x*) Regarding the use of dayada in the sense of son and nearest relations, see the Petersburg Dictionary, s. v.

(*y*) Here, as in other passages, Vijnanesvara uses the word Sapinda in the sense of Sagotra-Sapinda, blood relations bearing the same family name. As to the order of succession amongst the Bandhus see Digest of Vyavasthas Chap. II. § 15, Introductory Remarks 5 and notes.

conditions mentioned), all the merchants who are partners shall have it. On failure of them the king himself shall take it, after having waited ten years for the arrival of the (near) heirs and the rest. Just this has been distinctly declared by Narada (Sambhuyasamutthana), vs. :—

"15*b*. But on failure of such (partners), the king shall protect it well for ten years."

"16. After it has remained without owner for ten years and if no heir has appeared (within that time), the king shall take it for himself. By acting thus the law is not violated."

"7. If (among partners) one die, an heir (dayada) shall take his (estate), or some other (partner) on failure of heirs, if he be able (to perform the funeral oblations, &c.), (or) all of them (shall share it)."

According to Vijnanesvara, the meaning of this verse of Yajnavalkya is, that the sons, sons' sons, and the rest of the heirs, specially enumerated in Mit. Chap. II., sec. 1, para. 2, the Gotraja-Sapindas, the Bandhavas or Bandhus, partners in business, or, on failure of all these the king, shall inherit the estate of a partner in business deceased in a foreign country, and *he states distinctly, that* the *maternal uncle*, who had *not been named in section* 6, *inherits as Bandhu*. The irresistible conclusion to be drawn from this statement, as well as from the words quoted above from Mit. Chap II., sec. 5, para. 3, is that the enumeration of the Bandhus given in section 6 is not intended to be exhaustive, any more than in the case of the Gotraja-Sapindas. But if this enumeration is not exhaustive, then clearly all those Sapindas must be understood by this term who were not included among the Gotrajas. This view has been adopted by the Privy Council in *Gridhari Lall Roy* v. *The Bengal Government* (*z*), reversing the decision in *Government* v. *Gridhari Lall Roy* (*a*). In *Mudaliyar* v. *Mudaliyar* (*b*) it was again held that the enumeration of bandhus in the Mitakshara, Chap. II., sec. 6, was not exhaustive, and that the maternal uncle who was not specifically mentioned in the Mitakshara was an heir on the ground that it would be absurd to exclude him while admitting his son as an heir. The principle of classification was also

(*z*) 12 M. I. A. 448. *Amrita* v. *Lakhinarayan*, 10 Suth. 76 (F. B.); *Srinivasa* v. *Rengasami*, I. L. R. 2 Mad. 304; *Bholanath* v. *Dass*, I. L. R. 11 Cal. 69; *Raghunath* v. *Munnan*, I. L. R. 20 All. 191.

(*a*) 4 C. W. R. 13.

(*b*) L. R. 23 I. A. 83.

recognised, as it was held on that principle that the maternal uncle could not be ousted by the sons and grandsons of a father's paternal aunt. The mother's uterine brother was held to succeed before her consanguine half-brother. In *Ramchandra Martanda Waikar* v. *Vinayak Venkatesh* (*c*), the question of succession among the bandhu was again raised; but their Lordships of the Privy Council did not consider it necessary to determine the question whether the class could be extended, and after dealing with the point under consideration exhaustively, held that "(a) the sapinda-relationship, on which the heritable right of collaterals is founded, ceases in the case of the bhinna-gotra sapinda with the fifth degree from the propositus; (b) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other, which is only a paraphrase of Manu's rule." A sister's son, a son of a daughter's son, and of a daughter's (*d*), though not mentioned in the Mitakshara, have been held to be bandhus and entitled to succeed.

See on the same subject the Introductory Remarks to Digest of Vyavasthas, Chap. II., sec. 15.

According to the definition of the word Sapinda, and according to that of Gotraja-Sapinda, given above pp. 114-15, the following persons are Bhinnagotra-Sapindas:—

1. Daughters of descendants of collaterals within six degrees.
2. Descendants through a female of a person and of those persons expressly mentioned to four degrees of such persons respectively—for example, a grand-daughter's grandson, but not the great-grandson, since Sapinda-relationship through females is restricted to four degrees.
3. Maternal relations within four degrees, see table, Digest of Vyavasthas, Chap. II., sec. 15.

[On failure of sons and brothers united and separated, the succession goes to the parents separated, and then to the wife, according to the Viramitrodaya, Transl. p. 204, which assigns the next place to the sister and then brings in the Sapindas and Samanodakas, p. 216.] (*e*).

(*c*) L. R. 41 I. A. 290; S. C. 27 Mad. L. J. 333; *Chamantlal* v. *Ganesh*, I. L. R. 28 Bom. 453.

(*d*) *Tirumalachariar* v. *Andal Ammal*, I. L. R. 30 Mad. 406; *Ajudhia* v. *Ram Sumer*, I. L. R. 31 All. 454; *Rampal Thakur* v. *Pan Mati Padani*, I. L. R. 32 All. 640.

(*e*) See the Viramitrodaya, Transl. p. 206 ss.

§ 1. *B.* (17) SPIRITUAL RELATIONS.—*On the failure of Bandhus a preceptor, on failure of him a pupil, and on failure of him a fellow-student, inherit the property of a separate householder of the Brahman caste.*

AUTHORITIES.

Mit. Chap. II., sec. 7, paras. 1 and 2; Vyav. May. Chap. IV., sec. 7, paras. 24 and 25.

§ 1. *B.* (18) THE BRAHMAN COMMUNITY.—*On the failure of a fellow-student, learned Brahmans (Srotriyas), on failure of them other Brahmans, take the estate of a separate householder of the Brahman caste.*

AUTHORITIES.

Mit. Chap. II., sec. 7, paras. 4 and 5; Vyav. May. Chap. IV., sec. 8, paras. 25 and 26.

For the point that this succession is restricted to the property of a Brahman, see the passage from Vijnanesvara, translated above p. 125, where no mention is made of the Brahman community by Yajnavalkya, and the Mitakshara expressly excludes it from succession to a trader.

This succession has been disallowed by the English Courts. See Stokes's Hindu Law Books, p. 449, note *a*, and *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappa* (*f*).

(*f*) 8 M. I. A. 520. The succession of the caste on failure of other heirs is not provided for except in the case of Brahmans. In their case it rests perhaps on an idea of dedication in grants to a Brahman, so that resumption would be a kind of sacrilege, and property once given must in case of need *çy près* to other Brahmans who have moreover a kind of spiritual title to the world and all that it contains (Col. Dig., Book II., Chap. II., T. 24; Manu. VIII. 37, VII. 33). But tribal succession is found in many districts on the Northern frontier of India where any tribal organisation has been preserved, and was probably at one time general amongst the indigenous tribes (see Panj. Cust. Law. vol. II., p. 240, etc.). It may be traced to tribal distribution of the whole or of part of the tribal lands to individual members, of which many instances occur; *ibid.* pp. 254, 214, and vol. I., pp. 93, 94. See also Mr. Chaplin's Report on the Dekkhan, Rev. and Jud. Sel. vol. IV., pp. 474, 475; and comp. Arist. Pol. IV. (VII.) Chap. X., and Bolland and Lang's Edn. Introd. Chaps. IV. and XIII.

§ 1. *B*. (19) THE PARTNERS IN BUSINESS OF A BANYA.—*On failure of Bandhus, partners in business take the estate of a Banya.*

AUTHORITY.

Mitakshara quoted above, p. 125.

§ 1. *B*. (20) THE KING.—*On failure of a fellow-student, the king takes the estate of a separate householder or temporary student of the non-Brahminical castes, with the exception of that of a merchant, which escheats on failure of partners only, and after a lapse of ten years.*

AUTHORITIES.

Mit. Chap. II., sec. 7, p. 6, and Mit. quoted above.

Failing other heirs, the State takes the property even of a Brahman by escheat, subject to the existing trusts and charges (*g*).

The Crown desiring to take an estate by escheat must show an entire failure of heirs (*h*).

As only his own offspring become joint-owners with a man by their birth, the title of a remote heir cannot prevail against his bequest of his separate property (*i*) though acquired by a partition, and so held as under the former title, contrary to 1 Strange, H. L. 26, 2 *ibid*. 12, 13, but agreeing with Colebrooke, *ibid*. 15; see Book II., Chap. I., sec. 2, Q. 8; *infra* Book II., Chap. I., sec. 2, Q. 8.

§ 1. *C*.—SUCCESSION TO A SAMSRISHTI.
(*Re-united Coparcener.*)

(1) SONS, SONS' SONS, &c.—*Sons, sons' sons, and their sons inherit the estate of a Samsrishti or re-united coparcener,* per stirpes, *provided they live united with their fathers, or have been born during the time that their fathers were re-united. The rules regarding adopted sons (p. 67) and a*

(*g*) *The Collector of Masulipatam* v. *C. Vencata Narrainappah*, 8 M. I. A. 500.

(*h*) *Gridhari Lall Roy* v. *The Bengal Government*, 12 M. I. A. at pp. 454, 469.

(*i*) *Bhika* v. *Bhana*, 9 Harr. R. 446; *Narottam* v. *Narsandas*, 3 Bom. H. C. R. 6 A. C. J.; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1; *Tuljaram Morarji* v. *Mathuradas and others*, I. L. R. 5 Bom. at p. 668.

Sudra's illegitimate son (p. 69) apply likewise in the case of a united coparcener. Posthumous sons also inherit.

AUTHORITIES.

Mit. Chap. II., sec. 9, paras. 1 and 4; Stokes's H. L. B. 452.

Re-union may take place, according to the Mitakshara, with a father, a brother, and a paternal uncle (Chap. II., sec. 9, para. 2), by their again mixing up their effects after a division between them has taken place. The Vyav. May. allows re-union between all such persons as at some time or other have been coparceners (avibhakta). (Vyav. May. Chap. IV., sec. 9, para. 1.) See also the Viramitrodaya, Transl. p. 205.

As the Mitakshara states that the rules of section 9 form exceptions to those given in Chap. II., sec. 1, regarding the succession of the wife, &c., it follows that all the rules on the apratibandhadaya, the unobstructed inheritance, remain in force, and that consequently re-united sons, sons' sons, sons' sons' sons, adopted sons, and the Sudra's illegitimate son, inherit the estate of their ancestors, if they are united or re-united with them. A new family, in a general sense, is set on foot, and the rules applicable to a joint family apply amongst its members, though with some exceptions arising from the consanguinity of those excluded from the re-union, which will be presently noticed.

According to the Subodhini, sons who are not re-united with their fathers, nevertheless receive a share of the estates of the latter. (Mit. Chap. II., sec. 9, para. 9, *note*.)

According to the Mayukha also, unre-united sons take the estates of their father, except in the case where some sons are re-united with him. Then the latter have the preference. (Vyav. May. Chap. IV., sec. 9, para. 16.)

§ 1. *C.* (2.) RE-UNITED COPARCENERS.—*On failure of his issue, the re-united coparceners inherit the estate of their coparcener. But if amongst those thus re-united there be brothers born from different mothers the re-united brothers of the whole blood take the whole of their re-united full brother's estate. If among full brothers one is re-united with a half-brother and another not, on the death of the re-united brother the re-united half-brother and the unre-united full-brother share his estate equally.*

Authorities.

Mit. Chap. II., sec. 9, paras. 2, 5, *seq*. and 11.

According to the Subodhini, a father, whether re-united or not, shares the estate of his son (see Mit. 1. c. para. 9, *note*), and a son, though not re-united, shares the estate of the father with a son united or re-united, but this seems inconsistent with Mit. Chap. I., sec. 6, p. 4.

According to the Vyav. May. :—

1. The parents have a preference before other re-united coparceners, excepting sons (Vyav. May. Chap. IV., sec. 9, paras. 17, 18.
2. Other coparceners standing in an equal relation share the estate of a childless coparcener equally (Vyav. May. 1. c. para. 19); but the whole-brother takes in preference to the half-brother. (*Ibid*. para. 8.)
3. Unre-united full brothers share the estate of a full-brother who has re-united with half-brothers or remoter relations, together with the re-united relations. (Vyav. May. 1. c. para. 20.)
4. In case of the re-union of a wife alone—there being no other coparceners — she takes the inheritance of her re-united husband; on failure of her, a daughter and a sister; on failure of them, the nearest Sapinda. (Vyav. May. 1. c. paras. 21-25.)

It is difficult to understand how a re-union with a wife can take place, since, according to Apastamba II., 6, 14, 16 *seq*., no division can take place between a husband and wife. No such partition is known in actual practice at the present day, and Nilakantha's rule may be regarded as merely speculative, resting perhaps on an analogy to the passage of Apastamba (*k*) which calls a woman's own property her share in an inheritance. The rules as to inheritance after partial or complete re-union are complicated through the endeavours of the commentators to give effect to two rules, one in favour of re-united brethren and one in favour of whole-brothers, which, in some cases, clash or overlap (*l*). The favour shown in a re-united family to the brother of the whole blood rests on rather artificial reasoning, but it may perhaps be traced back to the institution of marriage with wives

(*k*) Transl. p. 134. Comp. Col. Dig., Book V. T. 515. Comm.

(*l*) See Viramit. Transl. p. 209.

of different castes and of a patnibhag or a division in which the shares of each group of sons varied according to the mother's class. The general rule of equal rights on a second partition would deprive the favoured sons of their larger portions, unless thus qualified. But the rule of unequal inheritance does not seem really reconcilable with that of equal partition amongst whole and half-brothers re-united, unless the inherited shares taken by the former are to be regarded as separately acquired property; for which in a united family there seems to be no authority. The contradiction would be most easily avoided by regarding the qualification by whole blood as one not extended in its operation by its happening to coincide in the same person with the capacity arising from re-union. Otherwise, Manu's text, IX. 210, might be taken, as proposed by some, only to limit the eldest brother to equality, as opposed to any special right arising from his eldership, while the general rule of partition, instead of absolute equality, would be that of shares proportional to those brought in by the several coparceners at the time of their re-union. (See Vyav. May. Chap. IV., sec. 9, pl. 2, 3. Viramitrodaya, Transl. p. 205.) Regard being thus had to the comparative value of the different elements of the re-united estate, it might be extended to supervening inequalities, arising from inheritance *inter se* or acquisitions from without, in the shares of the several members (*m*).

The practical difficulties in the way of thus dealing with re-united property may be the reason why the people in this part of India (*n*) have been content in practice to abide by the rule in a re-united, as in an unseparated family, of partition giving equal shares to the descendants of each son of the former owner in whom the different lines of ascent coincide, and of survivorship rather than of inheritance, in the English sense, amongst the members of the re-united family down to the moment of defining their rights according to the several branches in making a partition (*o*).

(*m*) In the Multan District a member of a united family even, who has joined his separate acquisition to the common stock, is allowed to withdraw it before partition. See Panj. Cust. Law, Vol. II., p. 275.

(*n*) See too *Huro Doss Dosteedar* v. *Sreemutty Huro Pria*, 21 C. W. R. 30.

(*o*) See Chap. II. sec. 11, Q. 5; *Mohabeer Parshad* v. *Ramyad Singh et al.*, 20 C. W. R. 192, 194; *Gavuri Devamma Garu* v. *Raman Dora Garu*, 6 M. H. C. R. 93; and below Book II. Introd. "*The family living in union*," and *Moro Vishavanath* v. *Ganesh Vithal*, 10 Bom. H. C. R. at p. 461.

The Privy Council say that "a member who has separated from a Hindu family and subsequently rejoins it, is remitted to his former status" (*p*). And so, too, where a brother had brought his separate gains into the common stock (*q*).

In *Balabux v. Rukmabai* (*r*) the Judicial Committee has held that a re-union in estate properly so-called can only take place between persons who were parties to the original partition. In *Akhay* v. *Hari* (*s*), a case under the Dhayabhaga, this law does not appear to have been followed, and a nephew who was a son of a re-united brother, who, after his father's death, lived jointly with his father's re-united brother, was preferred to another nephew who was the son of a separated brother.

According to Brihaspati, the acquirer in a re-united family of what in a united family would be his separate property obtains only a double share as compared with the other members. See Viramit., Transl. 205. This exaltation of the common right in a re-united family is not recognised in practice.

The Viramitrodaya (*t*) quotes the Dayatattwa to the effect that in the case of the re-union of coheirs the extinction of rights over portions and the production of rights over the entire estate are acknowledged; and says of a coparcener that "if re-united, then although his share had been specified, it was lost by the accrual of a common right over again" (*v*).

The widow of a re-united coparcener deceased must be maintained while chaste by the survivors, and also his daughter until provided for in marriage (*w*).

(*p*) *Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*, 10 M. I. A. 403.

(*q*) *Rampershad Tewarree* v. *Sheochurn Doss*, 10 M. I. A. at p. 506. *Samudrala* v. *Venkata*, I. L. R. 33 Mad. 165; *Fakirappa* v. *Yellappa*, I. L. R. 22 Bom. 101.

(*r*) L. R. 30 I. A. 130.

(*s*) I. L. R. 35 Cal. 721.

(*t*) Transl. p. 40.

(*v*) *Op. cit.* p. 164.

(*w*) *Op. cit.* p. 205.

§ 1. *D.*—HEIRS TO MALES WHO HAVE ENTERED A RELIGIOUS ORDER.

(1.) To a Yati or Sannyasi.—*The virtuous pupil (and not the relative by blood) of a Sannyasi is his heir* (*x*).

See Digest of Vyavasthas, Chap. III., sec. 1; and for Authorities, *loc. cit.* Q. 1, and sec. 2, Q. 1; Vyav. May., Chap IV., sec. 8, para. 28.

Regarding the question—what is meant by the estate of a Yati? see Mit. Chap. II., sec. 8, paras. 7 and 8.

(2.) To a Naishthika Brahmachari.—*The preceptor (Acharya) inherits the property of a Naishthika-Brahmachari.*

See Digest of Vyavasthas, Chap. III., sec. 2; and for Authorities, see Q. 1.

§ 2. HEIRS TO FEMALES.

§ 2 *A.*—To Unmarried Females.

Brothers, and on failure of them, the mother, on failure of her the father, and on failure of him the nearest Sapindas, inherit the property of a girl who died before the completion of her marriage (*y*).

See Digest of Vyavasthas, Chap. IV., A. secs. 1, 2, 3; and for Authorities, *loc. cit.* sec. 1, Q. 1, and sec. 3, Q. 1.

Regarding the question—what constitutes the property of an unmarried female, see Mit. Chap. II., sec. 11, para. 30. The inherited property of the betrothed damsel to which as well as to gifts from her own family her brothers are heirs can but rarely be of great value. But the rule given by Vijnanesvara, coupled with the text on which he bases it, is important, as it shows that he ranked a heritage in a maiden's stridhana.

(*x*) *Ramdas* v. *Baldevdasji*, I. L. R. 39 Bom. 168.

(*y*) *Janglubai* v. *Jetha Appaji*, I. L. R. 32 Bom. 409, father's mother's sister succeeding in preference to maternal grandmother; *Tukram* v. *Narayan*, I. L. R. 36 Bom. 339 (F. B.), father's sister, as being his nearer heir, preferred to his male gotraja sapinda five or six degrees removed; *cf. Gojabai* v. *Bhosle*, I. L. R. 17 Bom. 114.

§ 2 *B*.—Heirs to Married Females leaving Issue.

(1.) Daughters.—*Daughters inherit the separate property, Stridhana, of their mothers. Unmarried daughters inherit before married ones, and poor married ones before rich married ones.*

See Digest of Vyavasthas, Chap. IV., B, sec. 1; and for Authorities, *loc. cit.*, Q. 1 and Q. 13.

The question — what constitutes Stridhana, the separate property of a married female, as well as its descent, are topics regarding which, as Kamalakara in the Vivadatandava despairingly exclaims, "the lawyers fight tooth and nail," (yatra yuddham kachakachi). It is impossible to reconcile with each other even the views of those lawyers whose works are the authorities in the Bombay Presidency. As pointed out in the Introductory Remarks to Digest of Vyavasthas, Chap. IV., B, sec. 6, Nilakantha makes a distinction between the paribhashika, the sixfold stridhana proper, as defined by the law-books, and other acquisitions over which a woman may have proprietary rights. This is the distinction which Nilakantha keeps in view when fixing the succession to the estate of a childless married female. But in the case of a married female leaving issue, there is yet a third distinction to be observed. In this case, the following three categories of stridhana are to be taken into account, and descend each in a different manner:—

a. The Anvadheya, the gift subsequent to the marriage, and the Pritidatta, the affectionate gift of the husband, are shared by the sons and the unmarried daughters, small tokens of respect only being due to married daughters, and some trifle to daughter's daughters. (Vyav. May. Chap. IV., sec. 10, paras. 13—16.)

b. The rest of the paribhashika stridhana, the stridhana proper, as defined by the law-books (see Vyav. May. *loc. cit.* para. 5), descends to the daughters, &c., in the manner described by the Mitakshara. (See Vyav. May. *loc. cit.* paras. 17—24 especially, regarding the limitations, paras. 18 and 24.)

c. Other acquisitions, as property acquired by inheritance, go to *the sons and the rest*.

The Mitakshara, on the other hand, knows of no distinction between paribhashika and other stridhana. Everything acquired by a married female, by any of the recognised modes of acquisition, descends in the same manner to her daughters, daughters' daughters, &c. The views of the High Courts have varied on

this subject like those of the commentators. In the judgment of the Bombay High Court, in the case of *Jamiyatram and Uttamram* v. *Bai Jamna* (z) the following passage occurs:—

"The notion that according to the Mitakshara such (immoveable) property (inherited from a sonless husband) forms part of the widow's stridhana, and as such goes on her death to her heirs, not to her husband, was founded on a passage of Sir T. Strange (p. 248, 4th ed.), which was itself based on a mistaken reference to the Mitakshara. The Mit. Chap. II., sec. 11, cl. 2, undoubtedly classes property acquired by inheritance under the widow's stridhana; but (as pointed out in *Devacooverbai's Case*) clause 4 of the same chapter and section conclusively shows that the words 'acquired by inheritance,' as used in clause 2, relate only to what has been received by the widow from her brother, her mother, or her father, *i.e.*, from her own family."

According to this passage, it would seem that, in the opinion of the Court, clause 4 is to be read with clause 2, and intended to restrict the sense of the latter. Though this interpretation of Mr. Colebrooke's version of the Mitakshara might be possible, still no Sanskritist, who reads the original of the Mitakshara, will be able to allow, or has allowed, that this was the intention of Vijnanesvara. Unfortunately, Mr. Colebrooke has left untranslated (a) two words of the Sanskrit text which head the fourth clause. These are "yatpunah," "but as to (what is said by Manu . . . that is intended," &c.). It is the custom of Hindu scientific writers to indicate by these two words, or others of similar import, that the passage which follows is intended to ward off a possible objection to some statement made by them previously. Now, in this case, Vijnanesvara had stated, in clause 3, that the term "stridhana" was to be understood according to its etymology, and had no technical (paribhashika) meaning. The words "yatpunah" (*lit.* "again what") indicate, therefore, that clause 4 removes a possible objection to clause 3.

The same conclusion, indeed, follows from a consideration of the general course of the argument. "Stridhana," Vijnanesvara says, "includes property acquired by inheritance," &c. Such is the real purport (mistaken by some lawyers) of Manu and the rest, for "stridhana" etymologically means (all) a woman's

(z) 2 Bom. H. C. R. 11.

(a) Regarding another slight inaccuracy in Colebrooke's translation of clause 2 of Mit. Chap. II. sec. XI., see below, Dig. Vyav., Chap. II., sec. 2, Q. 10.

acquisitions, and this sense being an admissible one, is preferable to a merely technical interpretation. *It is true no doubt* that six sorts of stridhana are expressly enumerated by Manu, but that is meant not as a restriction to those six, but as a denial only that any of those six are not "stridhana." He is commenting on the passage of Yajnavalkya (II., 143, Mit. Chap. II., sec. 11, para. 1) which says that a gift, or *any other* separate acquisition, of a woman is termed "stridhana"; and he contends, in tacit opposition to the Eastern lawyers, that stridhana is to be taken in the widest sense. It would, therefore, be a self-contradiction if he wound up this contention by admitting restrictions which it was his very object to combat. "What has been received" in paragraph 4 does not mean "what has been *inherited.*" It means, like the passage in Yajnavalkya, "what was given by the father," &c., and to apply it to the limitation of the phrase "acquired by inheritance" in paragraph 2 involves a serious misconception both of the sense of the Sanskrit text, and of the author's logical method. Take the several paragraphs 2, 3, 4, however, (1) as developing the sense of the Smriti, (2) as supporting this development by a special argument, and (3) as meeting a possible objection to that argument, and all becomes explicable and consistent. The process of reasoning is precisely that which argumentative writers amongst the Hindus usually take. The passage is in its proper place, and involves neither contradiction nor restriction of the preceding statements.

Its meaning consequently is—"But in case you (the imaginary opponent) should say that my statement stands in contradiction to the verse of Manu IX., 194, then I answer that this verse does not contain a complete enumeration of the various kinds of stridhana, but only gives some of the most important." It appears, therefore, that clause 4 is to be read in connection with clause 3. For this reason we must still adhere to Sir T. Strange's opinion, that the property inherited from the husband becomes, according to Vijnanesvara, stridhana. The most recent decision of the Judicial Committee, to be presently cited, puts a narrower limitation on the rule than that adopted by the High Court of Bombay in *Jamiyatram's Case* (*b*). That case allowed property inherited from a woman's own family to rank as stridhana, but the gifts particularly specified as forming part of the stridhana were clearly not meant to include inheritance, and the technical

(*b*) 2 Bom. H. C. R. 11.

restriction of stridhana being accepted at all, necessarily leads to the result of excluding inheritance altogether, which is the one arrived at by the Privy Council. The Viramitrodaya (Transl. p. 136 ss.) assigns to the widow complete ownership of her separated husband's estate on his death with a right to dispose of the property if necessary. But from an injunction of Katyayana to the widow only to enjoy the property with moderation, Mitramisra deduces a limitation in her case on the power of alienation usually accompanying ownership, except for necessary religious and secular purposes. And another part of the same passage: "After her let the heirs (dayadas), take," he construes as meaning the husband's heirs because of the previous reference to the husband and the honour of his bed, not the widow's own heirs—her daughters, &c. This passage is not quoted by Vijnanesvara. He merely makes property taken by a woman as heir part of her stridhana, and says that her stridhana as thus defined is to be taken by her kinsmen (*c*). So Colebrooke has understood the doctrine, which he contrasts with the different views taken by the lawyers of the Eastern School (*d*). In *Bhagwandeen Doobey* v. *Myna Baee* (*e*) the Privy Council were of opinion that no property, inherited by a woman from her husband, formed part of her stridhana in the narrower sense involving a special mode of devolution. Property inherited from a father or a brother has, on the other hand, been held in Bombay to be stridhana, and a widow has been held to succeed to her son's property on the same terms as to her husband's. The question then arose, whether all property inherited by a woman was, under the Mitakshara, to be deemed stridhana, or whether none was so. In the case of *Vijiarangam* v. *Lakshman* (*f*), stridhana is said, according to the Mitakshara, to include all a woman's acquisitions of property, the descent of which is governed by the form of her marriage. According to the Vyavahara Mayukha, it is said, stridhana in the narrower sense descends according to special rules, while stridhana such as property inherited descends as if the female owner had been a male (*g*). The latest ruling of the Judicial Committee on this subject which seems intended to shut out all further controversy is, that regard being had to the

(*c*) Mitakshara Chap. II., sec. XI., paras. 2, 9.

(*d*) See his notes 2-13 to para. 2 of Mitakshara, Chap. II., sec. XI.

(*e*) 11 M. I. A. 487.

(*f*) 8 Bom. H. C. R. 244, O. C. J.

(*g*) See below on Stridhana, and *Jaikisondas* v. *Harkisondas*, I. L. R. 2 Bom. 9.

authority of other commentators and to other parts of the Mitakshara, the passage declaring property inherited by a woman to be stridhana does not in the case of "inheritance from a male" confer upon her "a stridhana estate transmissible to her own heirs" (*h*), nor does it confer upon her any greater rights in respect of inheritance from a female (*i*). It is on her death to pass to "the heirs" of the last male owner, the woman's estate being regarded as a mere interruption. This may not, unfortunately, settle the matter. The decisions in Bombay have not been placed on so extremely general a construction as that adopted by the Privy Council (*k*). The local usage may perhaps not admit it (*l*), and the "other commentators" accepted as having authority in Madras have little or no weight in Bombay against the Mitakshara itself (*m*). There is an exception in the case of the Vyavahara Mayukha, but this work does not give back the heritage after the death of a female successor to the original heir; it makes the female the source of a new line of descent as if she were a male (*n*). Such, at least, is the literal sense of its rule: how it is to be worked out in detail is not laid down.

In Madras it would seem that the daughter's estate is wholly assimilated to the widow's (*o*) as to succession on her death.

From the rule given in § 2. *B*. (1), the "fee or gratuity" of a woman is excepted, which goes to her brothers (Mit. Chap. II., sec. 11, para. 14); see also Gautama XXVIII. 23, 24.

(*h*) *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar*, L. R. 8 I. A. 99, 109; *Raja Chelikani's Case*, L. R. 29 I. A. 156.

(*i*) *Sheo Shankar* v. *Debi Sahai*, L. R. 30 I. A. 202.

(*k*) See *Tuljaram Morarji* v. *Mathuradas*, I. L. R. 5 Bom. 662; *Vinayak Anundrao* v. *Lakshmibai*, 1 Bom. H. C. R. at pp. 121, 124; *Bai Benkor* v. *Jeshankar Motiram*, Bom. H. C. P. J. F. for 1881, p. 271.

(*l*) See *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. at p. 436; Steele L. C., pp. 63-65.

(*m*) *Narayan Babaji* v. *Nana Manohar*, 7 Bom. H. C. R. 167, 169; *Krishnaji Vyanktesh* v. *Pandurang*, 12 Bom. H. C. R. 65; *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, at pp. 438, 439; *Lallubhai Bapubhai* v. *Mankuverbai*, I. L. R. 2 Bom. at p. 418; *Rahi* v. *Govind valad Teja*, I. L. R. 1 Bom. at p. 106; *Sakaram Sadashiv* v. *Sitabai*, I. L. R. 3 Bom. at pp. 367, 368.

(*n*) See Vyav. May. Chap. IV. § X. para. 26, Steele L. C., pp. 63, 64; *Sheo Shankar* v. *Debi Sahai*, *supra*.

(*o*) See *Muttayan Chetti* v. *Sivagiri Zamindar*, I. L. R. 3 Mad. at p. 374; *Simmani Ammal* v. *Muttamal*, *Ibid.*, 268; *Virasangappa* v. *Rudrappa*, I. L. R. 19 Mad. 110; *Venkatarama* v. *Bhujanga*, I. L. R. 19 Mad. 107; *Raja Chelikani's Case*, *supra*.

§ 2. *B*. (2) GRAND-DAUGHTERS.—*On failure of daughters, daughters' daughters inherit the estate of a married female.*

See Digest of Vyavasthas, Chap. IV. B, sec. 2; and for Authority, *loc. cit.* Q. 1.

Grand-daughters, descended from different daughters, share according to their mothers. (Mit. Chap. II., sec. 11, para. 16.)

On concurrence of daughters and grand-daughters, the latter receive a trifle. (Mit. Chap. II., sec. 11, para. 17.)

§ 2. *B*. (3) DAUGHTERS' SONS.—*On failure of daughters' daughters, daughters' sons inherit the estate of a married female.*

See Digest of Vyavasthas, Chap. IV. B, sec. 3; and for Authority, *loc. cit.* Q. 1.

§ 2. *B*. (4) SONS.—*On failure of daughter's sons, sons inherit the estate of a married female.*

See Digest of Vyavasthas, Chap II. B, sec. 4; and for Authority, *loc. cit.* Q. 1.

The word "son" does not include her husband's son by another wife (*p*), or her own son born of adulterous intercourse (*q*). Both, according to the Mitakshara and the Mayukha, the sons do not take a joint estate, but a tenancy in common (*r*), unlike the law in other parts of India (*s*).

§ 2. *B*. (5) SONS' SONS.—*On failure of sons, sons' sons inherit the estate of a married female.*

AUTHORITY.

Mit. Chap. II., sec. 11, para. 24.

§ 2. *C*.—HEIRS TO A MARRIED FEMALE LEAVING NO ISSUE.

§ 2. *C*. (1) THE HUSBAND.—*On failure of sons' sons, the husband inherits his wife's estate, if she was married according to*

(*p*) *Bhimacharya* v. *Ramacharya*, I. L. R. 33 Bom. 452.
(*q*) *Jagnnath* v. *Narayan*, I. L. R. 34 Bom. 553.
(*r*) *Bai Parson* v. *Bai Somli*, I. L. R. 36 Bom. 424.
(*s*) *Raja Chelikani's Case*, L. R. 29 I. A. 156; *Sheo Shankar* v. *Debi Sahai*, I. L. R. 30 I. A. 202.

one of the laudable rites. [If she was married according to one of the blamed rites, her property devolves on her parents.]

See Digest of Vyavasthas, Chap. IV. B., sec. 5; and for Authority, *loc. cit.* Q. 1.

There are no opinions of the Sastris in the Digest illustrating the parts of this and the following paragraph enclosed between brackets [ ]. See the cases of *Vijiarangam* v. *Lakshaman* (*t*), *Jaikisondas* v. *Harkisondas* (*v*), *Jagnnath* v. *Narayan* (*q*), *Bhimacharya* v. *Ramacharya* (*p*), *Bai Kesserbai* v. *Morariji* (*w*). Regarding the question, which rites of marriage are laudable and which blamed, see Digest of Vyavasthas, Chap. IV. B, sec. 5, Q. 1, and Remark.

§ 2. *C.* (2) THE HUSBAND'S SAPINDAS.—*On failure of the husband, the husband's Sapindas, or blood relations within six degrees on the father's side, and within four degrees on the mother's side, together with the wives of such male blood relations, inherit the estate of a female leaving no issue, if she was married according to one of the laudable rites. [If married according to the blamed rites, the estate devolves on her parents' Sapindas* (*x*).

A co-widow, according to all the Schools of the Hindu law, is entitled to succeed to the stridhana of a widow dying without issue in preference to her husband's brother or brother's son (*y*); but the grandson of a co-widow is entitled to succeed in preference to another co-widow or husband's brother's son (*z*). Among husband's brothers one of the whole blood is preferred to one of the half blood (*a*).

See Digest of Vyavasthas, Chap IV. B, sec. 6; and for Authority, *loc. cit.* Introductory Remarks.

(*t*) 8 Bom. H. C. R. 244, O. C. J.

(*v*) I. L. R. 2 Bom. 9.

(*w*) I. L. R. 30 Bom. 431, P. C.; S. C. L. R. 33 I. A. 176.

(*x*) *Chunilal* v. *Surajram*, I. L. R. 33 Bom. 114; *Authi Kesavelu* v. *Ramanujaru*, I. L. R. 32 Mad. 512.

(*y*) *Bai Kesserbai* v. *Morariji*, I. L. R. 30 I. A. 176; *Krishnabai* v. *Shripati*, I. L. R. 30 Bom. 333.

(*z*) *Gojabai* v. *Bhosle*, I. L. R. 17 Bom. 114.

(*a*) *Parmappa* v. *Shiddappa*, I. L. R. 30 Bom. 607; *Bachha Jha* v. *Jugmon*, I. L. R. 12 Cal. 348.

§ 2. *C.* (3) WIDOW'S SAPINDAS.—*On failure of the husband's Sapindas, the widow's own Sapindas inherit her Stridhana, even though she was married according to the laudable rites.*

See Digest of Vyavasthas, Chap. IV. B, sec. 7; and for Authorities, see the Introductory Remarks to that section.

III.—SUCCESSION UNDER THE DAYABHAGA.

AUTHORITIES.

1. Dayabhaga.
2. Daya Krama Sangraha.
3. Daya Tatwa of Raghunandana.

The Dayabhaga of Jimutavahana bases the right of succession to property on the principle of spiritual benefits conferred by those who are competent to offer oblations at the parvana Sraddha, which is celebrated in honour of the deceased and his paternal and maternal ancestors every year on the day called mahalaya.

At the parvana Sraddha spiritual benefits are conferred by the offer of pindas or funeral cakes (1) to the deceased himself, to his paternal ancestor, to whom he (the deceased) used to present pindas during his lifetime, and in which he participates after his own decease; and (2) to his maternal ancestors, to whom he used to give pindas as a matter of duty. The crumbs or pinda-lepas which get attached to the hand while the ingredients composing the first set of pindas are being mixed up are scraped by the Kusa grass and offered to remoter paternal ancestors. Oblations of water are offered to those relations who are still more remotely related.

Of the two sets of cakes offered at the parvana Sraddha, the first set of three cakes is given to the paternal ancestors—that is, the father, the grandfather, and the great-grandfather, their respective wives sharing the cakes with them. The second set of cakes is presented to the maternal ancestors—that is, maternal grandfather, maternal great-grandfather, and maternal great-great-grandfather, but their respective wives do not participate in the enjoyment of the cakes so offered. The crumbs of the first set of cakes are offered to the remoter paternal ancestors only.

According to Baudhayana, as mentioned by Jimutavahana, "the paternal great-grandfather and grandfather, the father, the man himself, his brothers of the whole blood, his son by a woman of the same tribe, his son's son and his great-grandson, all these partaking of undivided oblations are pronounced Sapindas. Those

who share divided oblations are called sakulyas" (*b*). This definition does not include maternal ancestors. "If two Hindus are bound during the respective terms of their natural life to offer funeral oblations to a common ancestor or ancestors, either of them would be entitled after his death to participate in the oblations offered by the survivor to that ancestor or ancestors, and hence it is that the person who offers those oblations, the person or persons to whom they are offered, and the persons who participate in them are recognised as sapindas of each other" (*c*). Thus the Sapinda relationship includes all those who share the same cake as the deceased. The son is a sapinda of the deceased because after his own death he will partake of the cakes offered to the deceased and his immediate ancestor, while the deceased shares the three cakes offered by his son to himself and his two immediate ancestors. Again, the pindas may be presented by agnatic descendants, such as son, son's son, or by cognatic descendants, such as daughter's son. The pindas offered by the agnates are regarded of greater spiritual benefit than those offered by the cognates.

"The doctrine of funeral cakes is the key to the whole Hindu law of inheritance" (*d*). "Give the pinda and take the inheritance" is a maxim well known to every lawyer of the Bengal or Gauriya School. Those who are related by virtue of offering undivided pindas, called sapindas, succeed as heirs before the Sakulyas, who are connected through divided pindas or crumbs, and the latter in their turn succeed before the Samanodakas, who are associated by means of libation of water only (*e*).

The following are the rules applicable to the determination of priority in inheritance among the Sapindas (*f*):

(1) "Those who offer the pinda to the deceased himself are preferred to those who offer the pinda to his ancestors."

(2) "Those who are competent to offer funeral cakes to the paternal ancestors of the deceased are preferred to those who are competent to offer such cakes to maternal ancestors only, as the first kind of cakes is held to be of greater spiritual value."

(*b*) D. B. Chap. XI., sec. 1, para 37.

(*c*) *Guru Gobind* v. *Anand Lal*, 5 Beng. L. R. 15, 40, F. B.; S. C. 23 W. R. 49 F. B.

(*d*) *Amrita Kumari Debi* v. *Lakhi Narayan*, 2 Beng. L. R. 39 F. B.; 5 Beng. L. R. 15, F. B.

(*e*) *Digumber* v. *Motilal*, I. L. R. 9 Cal. 563.

(*f*) 5 Beng. L. R. 15, 39.

(3) "Those who offer a larger number of cakes of a particular description are preferred to those who offer a less number of cakes of the same description."

(4) "If the number of cakes be equal, then the one who is competent to offer the cake to the nearer ancestor is preferred as an heir."

(5) "Agnatic sapindas are preferred to cognatic sapindas in any line" (*g*).

In *Guru Gobind* v. *Anand Lal* (*c*), a full Bench decision, it has been held that the enumeration of heirs in the Dayabhaga is not exhaustive. Certain persons who were not mentioned as heirs in the Dayabhaga have been in consequence included in the list of heirs, according to the Bengal School, the guiding principle being the greater religious benefits conferred. In *Akshay Chandra* v. *Hari Dass* (*h*), however, it has been decided that mere spiritual benefit is not always the governing principle of inheritance under the Dayabhaga, and that in cases not contemplated by Jimutavahana or his followers the law should be interpreted on rational lines, consistently with the principles followed in similar cases, and on the theory of propinquity and natural love and affection, for mere blind adherence to the principle of religious efficacy may lead to the violation of other principles consistent with natural justice.

The following table will show the position of Sapindas in relation to the deceased and to each other. Those who belong to the father's side are called Sapindas *ex parte paternâ*, and those who are related through the mother are classed as Sapindas *ex parte maternâ*. The order in which each succeeds has been indicated in Arabic numerals. Those whose names do not occur in the Dayabhaga have been shown in Roman numerals. Thus a son (No. 1) who offers undivided cakes to the deceased himself, to his father and grandfather, would succeed before the uncle (No. 9) who offers cakes to the father, grandfather, and great-grandfather of the deceased, and before daughters' son (No. 6) who, though he offers cakes to the deceased, his father, and grandfather, presents cakes of inferior religious efficacy on account of being a cognate. A brother's daughter's son (*i*) who offers cakes to the brother, father, and grandfather of the deceased would for the same reason be preferred to the great-great-grandfather's

(*g*) *Hari* v. *Bama*, I. L. R. 15 Cal. 790, 791.

(*h*) I. L. R. 35 Cal. 721.

(*i*) *Digumbar* v. *Motilal*, I. L. R. 9 Cal. 566, F. B.

great-great-great-grandson. For the same reason—that is, spiritual benefit—son's daughter's son (*k*), who offers cakes to the son (No. 1), to the deceased and his father (No. 7) will be preferred to mother's brother's son (No. 27), who offers cakes to No. 26 (his own father), No. 25 (his grandfather), and to No. IX. (his great-grandfather).

There are four classes of heirs: (1) Sapindas, (2) Sakulyas, (3) Samanodakas, and (4) certain specified strangers commencing with the spiritual preceptor and ending with the learned Brahmin of the village. The order of succession amongst the Sapindas who are relations "connected through the medium of undivided oblations" is as follows:

1. Son.
2. Grandson.
3. Great-grandson.

   As in the Mitakshara these succeed *per stirpes* which applies only to the male issue in the male line. Thus a son, a grandson by a predeceased son, and a great-grandson, whose father and grandfather are both predeceased, succeed jointly.
4. Widow.
5. Daughter—
   a. Maiden.
   b. Married daughter likely to have male issue—
      A sonless widowed daughter, a barren daughter, and a daughter who is mother of female children only, are excluded from inheritance.
6. Daughters sons—

   Different daughter's sons take *per capita.*
7. Father.
8. Mother.
9. Brother—
   a. Full.
   b. Half.
10. Brother's son—

    Son of a united brother is preferred to a son of a separated brother—*Akshay* v. *Hari*, I. L. R. 35 Cal. 721.
11. Brother's son's son.

(*k*) *Braja* v. *Jiban*, I. L. R. 26 Cal. 285.

12. Father's daughter's son—
    Half-sister's son takes with full sister's son—*Bhola Nath* v. *Rakhal Dass*, I. L. R. 11 Cal. 69.
13. Paternal grandfather.
14. Paternal grandmother.
15. Paternal uncle.
16. Paternal uncle's son.
17. Paternal uncle's son's son.
18. Paternal grandfather's daughter's son.
19. Paternal great-grandfather.
20. Paternal great-grandmother.
21. Paternal grand-uncle.
22. Paternal grand-uncle's son.
23. Paternal grand-uncle's grandson.
24. Paternal grandfather's daughter's son.

According to the principle of spiritual benefit as explained in *Guru Gobind* v. *Anand* (*l*), the following eight cognates, though not mentioned in the Dayabhaga, are entitled to succeed before the Sapindas *ex parte maternâ*:

(i.) Son's daughter's son.
(ii.) Grandson's daughter's son.
(iii.) Brother's daughter's son.
(iv.) Brother's son's daughter's son.
(v.) Paternal uncle's daughter's son.
(vi.) Paternal uncle's son's daughter's son.
(vii.) Paternal grand-uncle's daughter's son.
(viii.) Paternal grand-uncle's son's daughter's son.

It has been contended that son's daughter's son and grandson's daughter's son, who are descendants of the deceased, should succeed before his parents and their descendants, and brother's daughter's son and brother's son's daughter's son, who are the descendants of the father, should succeed before the grandfather. But as this contention meant interference with the order of succession laid down by the Dayabhaga, it was rejected in *Gobind-prasad v. Moheschandra* (*m*). In conforming with the ruling in *Guru Gobind* v. *Anand* it has been held in *Braja Lal* v. *Jiban* (*n*) that the sons of these eight daughters succeed in preference to

(*l*) 5 Beng. L. R. 15, F. B.
(*m*) 15 Beng. L. R. 35.
(*n*) I. L. R. 26 Cal. 285.

maternal relatives; and on the same principle of spiritual benefit, in *Digumbar* v. *Motilal* (*o*), that brother's daughter's son was preferable to great-great-great-grandfather's great-great-great-grandson.

25. Maternal grandfather.
26. Maternal uncle.
27. Maternal uncle's son.
28. Maternal uncle's son's son.
29. Mother's sister's son.

According to the commentary on the Dayabhaga, the Daya Krama Sangraha of Sri Krishna Tarkalankara (*p*), the following, who are not mentioned in the Dayabhaga, succeed before the Sakulyas, who are relations connected by virtue of divided oblations or crumbs:

(ix.) Maternal great-grandfather.
(x.) His son.
(xi.) His grandson.
(xii.) His great-grandson.
(xiii.) His daughter's son.
(xiv.) Maternal great-great-grandfather.
(xv.) His son.
(xvi.) His grandson.
(xvii.) His great-grandson.
(xviii.) His daughter's son.

The second class of heirs, called the Sakulyas, who are related by means of lepa or remnants of cakes or divided oblations, come next. According to the Daya Krama Sangraha (*q*) they are of two descriptions, first descending and second ascending. The first includes the great-grandson's son and the rest down to the third degree in the descending line. The second embraces the great-grandfather's father and other ancestors up to the third degree in the ascending line, with their sons, grandsons, and great-grandsons. The order of succession is the order in which they are mentioned—that is to say, the descendants of the propositus succeed before the descendants of his ancestors in the order they are related to the deceased.

The next to succeed are the Samanodakas, the third class heirs, related by common libations of water. The work Sakulya

(*o*) I. L. R. 9 Cal. 566, F. B.
(*p*) Chap. I., sec. 10, paras. 17 and 20.
(*q*) Chap. 1, sec. 10, paras. 22, 23.

embraces the word Samanodaka (*r*). Srikrishna remarks that "the Samanodakas must be taken to be included in the term 'Sakulya' because they also have sprung from the same family. Although both classes of heirs (near Sakulyas and Samanodakas or remote Sakulyas) are included in the same term, their order of succession is regulated by the degree of the benefit conferred." Here the Dayabhaga and the Mitakshara overlap each other, as the Samanodakas are the same under both systems. The order of succession among them is determined by the principle that the descendants of a near ancestor succeed first, each in its turn excluding the one more remotely related to the ancestor in question.

The fourth and the last class comprises:

1. The spiritual preceptor.
2. The pupil.
3. The fellow student.
4. The sagotra, persons bearing the same family name, residing in the same village.
5. The samana parvaras, persons descended from the same patriarch, inhabiting the same village, and
6. The King, who takes a non-Brahmin's estate, that of a Brahmin going to another Brahmin.

IV.—PERSONS DISQUALIFIED TO INHERIT.

Persons disabled from inheriting are—

1. Persons diseased, or infirm in body or mind, who are—
   - *a.* Impotent.
   - *b.* Blind (*s*).
   - *c.* Lame (*t*).
   - *d.* Deaf (*t*).
   - *e.* Dumb.
   - *f.* Wanting any organ.
   - *g.* Idiots.
   - *h.* Madmen (*v*).

(*r*) D. B. Chap. XI., sec. 6, paras. 15 and 23.

(*s*) *Murariji* v. *Parvatibai*, I. L. R. 1 Bom. 177.

(*t*) *Hira* v. *Gangasahai*, I. L. R. 6 All. 322; *cf. Venkata Subba Rao* v. *Purushotam*, I. L. R. 26 Mad. 133.

(*v*) Insanity, to act as a bar, must be congenital, although the High Courts at Calcutta and Allahabad have held that it is a disqualification if it exists at the time succession opens. *Bodhunarain* v. *Ormas*, 13 M. I. A. 519; *Koer Goolab* v.

i. Sufferers from a loathsome and incurable disease such as ulcerous leprosy. See Chap. VI., sec. 1, Q. 5 (*w*).

2. Illegitimate children of Brahmins, Kshatriyas, and Vaisyas.

3. Persons labouring under moral deficiencies—
   a. Enemies of their father (*x*).
   b. Outcastes and their children (*y*).
   c. Persons addicted to vice (*z*).
   d. Adulteresses and incontinent widows.

See Digest of Vyavasthas, Chap. VI.; and for Authorities, see Digest of Vyavasthas, Chap. VI., sec. 1, Q. 1, 5; *ibid.* sec. 3 *a*, Q. 1 *b*, Q. 1. and *c*, Q. 1.

Remarks.

If an heir is disqualified from taking the inheritance the next heir succeeds at once. Such an heir, if taking as a full owner, cannot be deprived of the inheritance by any birth which subsequently takes place, though removal of the disability in the first

Rao Kurun, 14 M. I. A. 176; *Murariji* v. *Parvatibai*, I. L. R., 1 Bom. 182; *Ram Bijai* v. *Jagatpal*, I. L. R. 18 Cal. 111 P. C.; *contra*, *Braja Bhukan* v. *Bichan*, I. L. R. 9 Beng. L. R. 204; *Dwarkanath* v. *Mahendranath*, 9 Beng. L. R. 198; *Woma Pershad* v. *Grish Chunder*, I. L. R. 10 Cal. 63; *Deo Kishen* v. *Bubh Prakash*, I. L. R. 5 All. 509 (F. B.).

(*w*) See *Ananta* v. *Ramabai*, I. L. R. 1 Bom. 554; *Janardhan Pandurang* v. *Gopal et al.*, 5 Bom. H. C. R. 145, A. C. J.; and as to wife's society, *Bai Premkuvar* v. *Bhika Kallianji*, 5 Bom. H. C. R. 209, A. C. J.; *Mohunt Bhagoban* v. *Raghunandan*, L. R. 22 I. A. 94.

(*x*) Disqualification—for example, murder of the deceased owner by the heir—is only *personal*, and does not debar the heir's representatives to claim the inheritance (*Gangu* v. *Chandrabhagabai*, I. L. R. 32 Bom. 275); but the Madras High Court holds a contrary view (*Vedammal* v. *Vedanayaga*, I. L. R. 31 Mad. 100).

(*y*) See above, p. 56 (*c*). The sons of outcastes born before their father's expulsion are not outcastes, but take their father's place. Sons born after expulsion are outcastes, but Mitramisra says a daughter is not, for "she goes to another family." Viramitrodaya, Tr. p. 254, Steele L. C. p. 34. The doctrine of outcastes' heritable incapacity does not apply to families sprung from outcastes, *Syed Ali Saib* v. *Sri R. S. Peddabali Yara Simhulu*, 3 M. H. C. R. 5. Act 21 of 1850 has removed any disqualification occasioned by exclusion from caste—for example, change of religion. *Bhagwant Singh* v. *Kallu*, I. L. R. 11 All. 100, and *Gobind* v. *Abdul Ayyam*, I. L. R. 8 All. 546.

(*z*) In a case at 2 Macn. H. L. 133 it is said that an unchaste daughter cannot succeed to her parents. Compare Dig. Vyav., Chap. VI., sec. 3*c*, Q. 6, and *Mussamut Ganga Jati* v. *Ghasita*, I. L. R. 1 All. 46.

heir will have a divesting effect. In *Kalidas* v. *Krishan* (*a*), a full Bench decision of the Bengal High Court, it was so held. The Bombay High Court followed this ruling (*b*), but the Madras High Court (*c*) thought that the Bengal decision was based upon the Dayabhaga, and that under the Mitakshara any such vesting of interest in an undivided coparcenary property could not affect rights coming into existence by subsequent births or deaths, on the analogy of divesting of a vested interest of a brother by subsequent adoption of a son by the widow of the deceased in case of an impartible estate (*d*).

Diseases, infirmities, or moral taints contracted after the property has vested do not disable a person for holding it any longer.

See Remark to Digest of Vyavasthas, Chap. VI., sec. 3*c*. Q. 6. *Kery Kolitany* v. *Moneeram*, L. R. 7 I. A. 115; *Abilakh Bhagat* v. *Bhekhi*, I. L. R. 22 Cal. 864; *Sellam* v. *Chinnammal*, I. L. R. 24 Mad. 441; *Tirbeni Sahai* v. *Mohammed Umar*, I. L. R. 28 All. 247.

It is only congenital blindness that excludes from inheritance according to *Umabai* v. *Bhavu Padmanji* (*e*), following *Murarji Gokuldas* v. *Parvatibai* (*f*), see also *Bakubai v. Munchabai* (*g*) for the different views held by the Sastris. The same condition as to dumbness is laid down in *Vallabhram* v. *Bai Hariganga* (*h*). As to mental incapacity, it is said, in *Tirumamagal* v. *Ramasvami* (*i*), that only congenital idiocy excludes. In 2 Macn. H. L. 133, the disqualifications are discussed at considerable length. In Steele's Law of Castes a general rule of exclusion for persons labouring under the specified defects is laid down at page 61, but this has been largely qualified by custom. At page 224 it is said that in seventy-two castes at Poona it was found that insanity excluded

(*a*) 2 Beng. L. R. 103 (F. B.); *Pareshmani* v. *Dinanath*, 1 Beng. L. R. (A. C. J.) 117; *Deo Kishen* v. *Mubh Prakash*, I. L. R. 5 All. 509; Tagore case, I. A. Sup., Vol. 47.

(*b*) *Bapuji* v. *Pandurang*, I. L. R. 6 Bom. 616; *Pawadeva* v. *Venketesh*, I. L. R. 32 Bom. 455.

(*c*) *Krishna* v. *Sami*, I. L. R. 9 Mad. 64.

(*d*) *Raghunada* v. *Broso Kishore*, L. R. 3 I. A. 154.

(*e*) I. L. R. 1 Bom. 557.

(*f*) I. L. R. 1 Bom. 177.

(*g*) 2 Bom. H. C. R. 5.

(*h*) 4 Bom. H. C. R. 135 A. C. J.; see also *Mohesh Chunder Roy et al.* v. *Chunder Mohun Roy et al.*, 23 C. W. R. 78; S. C. 14 Beng. L. R. 273.

(*i*) 1 M. H. C. R. 214.

only unmarried persons, and that in eighty-three castes blind persons, married and having families, might inherit. In such cases the management of the property would devolve on the owner's relations. See *Bhikaji Ramachandra* v. *Lakshmibai* (*k*), as to management of a suit. There is a case in which a boy bordering on idiocy was allowed to transmit a heritable right to his widow (*l*).

V.—SPECIAL RULES OF INHERITANCE ACCORDING TO CUSTOM. SACRED PROPERTY—RELIGIOUS AND CHARITABLE ENDOWMENTS.

The Hindu Law is largely influenced by custom, as already pointed out. But as even those castes and classes which have adopted special customs still recognise the general supremacy of the sacred writings, any divergence of custom from the ordinary law of succession must be established by satisfactory evidence (*m*), unless it has already been recognised as law binding on the class or family to which the parties belong, whom it is proposed to subject to the custom. A custom of male in preference to female inheritance to Bhagdari lands in Gujarat was recognised in *Pranjiwan* v. *Bai Reva* (*n*), as it had previously been in Bhau *Nanaji Utpat* v. *Sundrabai* (*o*) to temple emoluments. In the

(*k*) Special Appeal No. 62 of 1875 (Bom. H. C. P. J. F. for 1875, p. 231).

(*l*) *Bai Amrit* v. *Bai Manik et al.*, 12 Bom. H. C. R. 79.

(*m*) An Ikrarnama, signed by four brothers, was received as evidence sufficient to establish the adoption of a family custom of excluding childless widows from inheritance, differing from the general custom of the country, *Russik Lal Bhunj* v. *Purush Munnee*, 3 Mor. Dig. 188, Note 2; Viramitrodaya; Vyav. May., Chap. I.; Mitakshara, Chap. I., sec. III.; Manu. II., 12, XII., 113; Col. Dig., Book II., Chap. IV.

In *Rajah Nugendur Narain* v. *Raghonath Narain Dey* (C. W. R. for 1864, p. 20) it was held that a family custom as to intermarriages might be proved by declarations made by members of the family. But still the course of devolution prescribed by law cannot be altered by a mere private arrangement. *Balcrishna Trimbak Tendulkar* v. *Savitribai*, I. L. R. 3 Bom. 54.

In the case of an English copyhold an exclusion of females from succession and dower was held an admissible modification by custom of a customary rule of inheritance, though in Ireland it had been, in the case of Tanistry, pronounced void. See Elton's Tenures of Kent, 55.

(*n*) I. L. R. 5 Bom. 482.

(*o*) 11 Bom. H. C. R. 249. See Colebrooke in 2 Strange's H. L. 181; 1 Macn. H. L. 17, as to a Kulachar or family custom; and on the same subject, the Judicial Committee in *Chowdhry Chintamon* v. *Mussamut Nowlukho*, L. R. 2 I. A. at p. 269; *Ramalakshmi Ammal* v. *Sivanantha Perumal*, 14 M. I. A.

case of *Hubat Rao Mankar* (*p*) the Council of Sasris at Poona, admitting the custom of adoption by a widow to be opposed to the ancient law, yet insisted on its validity as a usage of the country. Evidence showing the custom as generally regulating the life of the people would be sufficient to establish its validity (*q*).

A family custom thus established binds the individual holder of a raj or zamindari so as to prevent his dividing it equally amongst his sons (*r*).

The cases of *The Court of Wards* v. *Rajcoomar Deo Nundun Singh* (*s*); *Rajkishen Singh* v. *Ramjoy Surma et al.* (*t*); *Chowdhry Chintamon Singh* v. *Musst. Nowlukho Konwari* (*v*), and the remarks of the Privy Council in *Soorendronath* v. *Mussamut Heeramonee* (*w*) show that a family custom of inheritance may be abandoned; and the cases of *Ramchandra* v. *Kothekar* (*x*) and *Abdurahim Haji* v. *Halimabai* (*y*) lay down that by merely migrating to another place outside British India *lex loci* of the place where the family settles down may be adopted, but in British India the presumption is in favour of retention of the observance of his shastra in the new place of settlement (*z*).

The ordinary rules of Hindu law are applicable to Jains, no special custom being proved (*a*). Hence, in the absence of custom or usage to the contrary, an alienation by gift by a widow of her husband's property is invalid according to the Mitakshara which governs the Bindala Jains (*b*), and on the same ground the right

576, 585; S. C. L. R. S. I. A. 1; *Narayan Babaji et al.* v. *Nana Manohar et al.*, 7 B. H. C. R. 153, A. C. J.; *Bhagvandas* v. *Rajmal*, 10 B. H. C. R. 260-261.

(*p*) 2 Borrodaile, 83.

(*q*) *Bhagwan Singh* v. *Bhagwansingh*, L. R. 26 I. A. 153.

(*r*) *Rawut Urjun Singh* v. *Rawut Ghanasiam Singh*, 5 M. I. A. 169, 180.

(*s*) 16 C. W. R. 143.

(*t*) I. L. R. 1 Cal. 186.

(*v*) I. R. 2 I. A. 269, 273.

(*w*) 12 M. I. A., at p. 91; *Ct. of Wards* v. *Pirthee Singh*, 21 C. W. R. 89 C. R.

(*x*) L. R. 41 I. A. 290.

(*y*) P. C. Dec. 3, 1915; S. C. L. R. 43 I. A. 35.

(*z*) *Parbati* v. *Jagdis*, L. R. 29 I. A. 82.

(*a*) *Lalla Mohabeer Pershad et al.* v. *Musst. Kundun Koowar*, 8 C. W. R. 116; *M. Govindnath Roy* v. *Gulal Chand et al.*, 5 C. S. D. A. R. 276; *Sheo Singh Rai* v. *Musst. Dakho et al.*, 6 N. W. P. H. C. R. 382; S. C. L. R. 5 I. A. 87; *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R. 241; *Hasan Ali* v. *Naga Mul*, I. L. R. 1 All. 288, where a special custom of adoption prevailed; *Chotay Lall* v. *Chunno Lall*, L. R. 6 I. A. 15.

(*b*) *Bachebi* v. *Makhan Lal*, I. L. R. 3 All. 55.

of a Jain widow of the Oswal caste to adopt without the consent of her husband remains unaffected by the conversion of the family to Vaishnavism (*c*). The Khojas—a class of Mahomedans converted from Hinduism—are goverened by the Hindu law of inheritance except so far as this has been modified by special custom. Being of Gujarathi origin the Khojas allow a precedence to the mother over the widow, which is comman to many castes in Gujarat, but the mother is not allowed to dispose of the estate, and after her death it goes to her son's heir, usually his widow (*d*).

In the case of Hindu converts to Mohammedanism —for example, the Borahs (*e*):

(1) They are generally governed by the Mohammedan law,

(2) They may by custom retain the Hindu law of inheritance,

(3) The custom must not be extended so as to embrace other divergencies, and

(4) Any alleged variation from the Hindu law of succession must be proved as a special custom.

But by migrating to another country and settling down in the midst of other Mohammedans the Memons have been held to adopt the Moslem law as the law of new domicil (*y*).

Succession to a Raj was held to be governed by custom in *Arjun Manic et al.* v. *Ram Ganga Deo* (*f*); by nomination in *Ramgunga Deo* v. *Doorga Munee Jobraj* (*g*) and *Beer Chunder Joobraj* v. *Neel Kishen Thakoor et al.* (*h*). An illegitimate son was excluded in *Bulbhudda Bhourbhur* v. *R. Juggernath Sree Chunrun* (*i*). As to a quasi-Raj, see *Chowdhry Chintamon Singh* v. *Musst. Nowlukho Konwari* (*k*), and the decision of the Judicial Committeee in *Periasami et al.* v. *The Representatives of Salugai Taver* (*l*).

A Kulachar, allotting certain portions of zamindaris to junior members (*m*) does not render the self-acquisitions, savings and

(*c*) *Masikchand* v. *Pram Kumari Bibi*, I. L. R. 17 Cal. 578.

(*d*) *Shivji Hasam* v. *Datu Mavji Khoja*, 12 Bom. H. C. R. 281; *Hirbai* v. *Gorbai*, 12 Bom. H. C. R. 294; *Rahimatbai* v. *Hirbai*, I. L. R. 3 Bom. 34.

(*e*) *Bai Baiji* v. *Bai Santok*, I. L. R. 20 Bom. 57; *Fatahsingji* v. *Harisingji*, I. L. R. 20 Bom. 181.

(*f*) 2 Cal. Sel. S. D. A. R. 139.

(*g*) 1 Cal. S. D. A. R. 270.

(*h*) 1 C. W. R. 177.

(*i*) 6 Cal. Sel. S. D. A. R. 296.

(*k*) L. R. 2 I. A. 269, 273. See Maine, Ancient Law, Chap. VII., p. 233.

(*l*) L. R. 5 I. A. 61.

(*m*) This custom of providing an appanage for each junior branch is widely

accumulations made by those members joint property (*n*), nor does it confer heritable right on females in respect of the zamindaris otherwise disqualified from inheriting by the Kulachar which need not be specifically proved (*o*).

A family custom of inheritance is not destroyed by a re-settlement of the terms of the holding from the Government, even though this should destroy many incidents of the previous tenure (*p*), and when, after a confiscation for twenty years, a grant of a "raj" was made to the brother of the former holder, the intention of the Government, it was held, was to restore the tenure as it had previously existed, with the special qualities of succession according to the family law (*q*).

When by family custom an estate is proved to be impartible, the ordinary Hindu law is suspended just so far as is necessary to give effect to the particular custom, but the general law still regulates all that lies beyond its sphere (*r*). In *Partapgiri Zemindari Case*, decided on April 26th, 1918, the Judicial Committee seem to approve of the law thus laid down; but in *Rajah of Pittapur's Case* the Board on May 2, 1918, has held that there is no coparcenary in an impartible Zemindari, and consequently no one who cannot prove his title by custom is entitled to maintenance.

The impartibility of an estate does not imply that it is inalienable (*s*). The inalienable quality is a question of family custom requiring proof (*t*). Yet as a point of customary law impartibility may be expected to be accompanied generally by limitations on alienability, having the same object in view, the preservation of

spread, and probably sprung from political conditions. See Col. Dig. Book II., Chap. IV., T. 15 Comm. : Panj. Cust. Law, II., 183; St. L. C. 229. Comp. Hallam Mid. Ag., vol. I. p. 88 (Chap. I., Pt. II).

(*n*) *Chowdry Hureehur Pershad* v. *Gocoolanand Doss*, 17 C. W. R. 129; *Katama Natchiar* v. *Raja of Shivaganga*, 9 M. I. A. 593.

(*o*) *Ekradeshwar Singh* v. *Bahuasin*, L. R. 41 I. A. 275.

(*p*) *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar*, I. L. R. 1 Cal. 186.

(*q*) *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1.

(*r*) *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523; *Timangavda* v. *Rangangavda*, Bom. H. C. P. J. F. for 1878, p. 242; *Muttayan Chetti* v. *Sivagiri*, I. L. R. 3 Mad., p. 374; *Kachi Kalyana Rengappa* v. *Kalakka Thola*, L. R. 32 I. A. 261; *Raja Yarlagadda's Case*, L. R. 17 I. A. 144.

(*s*) *Narain Khootia* v. *Lokenath Khootia*, I. L. R. 7 Cal. 461; *Anund Lal Singh Deo* v. *Maharajah Dheraj Gooroo Narayan Deo*, 5 M. I. A. 82; *Pittapur Case*, L. R. 26 I. A. 83.

(*t*) *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb*, L. R. 8 I. A. 248; *Narain Khootia* v. *Lokenath*, *ut supra*.

the estate to support the political, official, or social rank of the head of the family. In *Rajah Nilmony Singh* v. *Bikram Singh* (*v*) the Judicial Committee say: "The same principle which precludes a division of a tenure upon death must apply also to a division by alienation" (*w*).

A bad custom will not be allowed (*x*). Nor is a custom depending on instances to be extended beyond them (*y*). If opposed to recognised morality or the public interest it is to be disallowed (*z*). Thus a custom of a class of dancing women to introduce exclusively new devadasis and to set up a monopoly of the gains of prostitution was held unworthy of protection by the Courts (*a*), and so was held the conceding of heirship to sons by adultery (*b*).

Endowments.

As to property dedicated to an idol, see *Juggut Mohini Dossee et al.* v. *Musst. Sokheemony Dossee et al.* (*c*) and *Maharanee Brojosoondery Debia* v. *Ranee Luckhmee Koonwaree et al.* (*d*).

Endowments are either public or private. It is public if the property is dedicated to a religious object or to an object of public utility—for example, atithi-sala or shelter for pilgrims and wayfarers, maths or monasteries. It is private if the property is endowed for the worship of a deity of a particular family. A temple is dedicated to the worship of a god. A math, mattam, or sattara or monastery is dedicated to the promotion of religious, ethical and philosophical knowledge. It is either Saiva or Vaishnava. The former was formed by the followers of Sankara-

(*v*) Decided 10th March, 1882; S. C. L. R. 9 I. A. 104.

(*w*) Comp. *Rajah Venkata Narasimha Appa Row* v. *Rajah Narraya Appa Row*, L. R. 7 I. A. pp. 47, 48; *Katama Natchiar* v. *Raja of Shivagunga*, 9 M. I. A. 593.

(*x*) *Narayan Bharthi* v. *Laving Bharthi*, I. L. R. 2 Bom. 140; *Reg.* v. *Sambhu*, I. L. R. 1 Bom. at p. 352. See *Yajn.* by Janardhan Mahadao Slo. 186, p. 358. Narada quoted in Col. Dig. Book III., Chap. II., sec. 28 and Comm. show that customs opposed to morality or public policy are to be refused recognition.

(*y*) *Rahimatbai* v. *Hirbai*, I. L. R. 3 Bom. 34; compare *In re Smart*, L. R. W. N. for 1881, p. 111.

(*z*) See Narada, Pt. II., Chap. X., Jolly's Transl. p. 75. *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom. 545, 556.

(*a*) *Chinna* v. *Tegrai Chetri*, I. L. R. 1 Mad. 168.

(*b*) *Narayan* v. *Laving Bharthi*, I. L. R. 2 Bom. 140.

(*c*) 14 M. I. A. 289.

(*d*) 20 C. W. R. 95.

Acharya, who are divided into ten orders called Das-namis. It is to be found all over India, especially the Deccan. The Sannayasis attached thereto are given to the life of celibacy, and the order is kept up by the adoption of Chelas or spiritual sons. The worship is that of the lingam or phallic symbol in the temples connected with the maths. Chaitanya was the founder of the Vaishnava order. The maths of this order are to be found in Bengal, Behar and Orissa. The Sannayasis are allowed to marry. Sat-tras (protector of existence) are to be found in holy places like Benares, and provide board and residence to travellers, mendicants and pilgrims. The heads of these maths are called by various names, such as Sebait, Sevak, Adhikari, etc. (*Re* the creation of endowments and succession to managership, see pp. 198-199.)

Property dedicated to the service even of a family idol is impressed with a trust in favour of it, dissoluble only by the consensus of the whole family, which itself cannot put an end to a dedication to a public temple (*e*). In a case of alienation by one of four Sebaits aliening debuttar, the other three suing to recover the property must join the fourth as defendant with his vendees or those deriving from them (*f*).

It is competent for a Sebait or manager of an endowment "to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them." "He is empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so, the existence of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them. . . ." "A judgment obtained against a former Sebait in respect of debts so incurred should be binding upon succeeding Sebaits, who, in fact, form a continuing repre-

(*e*) *Dictum* of Sir M. E. Smith in *Konwar Doorga Nath Roy* v. *Ram Chunder Sen*, L. R. 4 I. A. at p. 58.

(*f*) *Rajendronath Dutt* v. *Shekh Mahomed Lal*, L. R. 8 I. A. 135. See also *Prosunno Koomari Debya* v. *Golab Chund Baboo*, L. R. 2 I. A. 145; *Konwur Doorganath Roy* v. *Ram Chunder Sen*, L. R. 4 I. A., at p. 57; *Khusalchand* v. *Mahadevgiri*, 12 Bom. H. C. R. 214; *Manohar Ganesh* v. *Keshovram Jebbai*, Bom. H. C. P. J. F. for 1878, p. 252.

sentation of the idol's property" (*g*). He may exclude objectionable persons from worshipping in the temple (*h*), and he is entitled to be indemnified for losses incurred in defending his position as a mahant (*i*).

If the object of an endowment has failed, a scheme will be settled by the Court to give effect to the intention of the settlor, or for an object as near as possible to the one which has failed (*k*). The destruction or mutilation of an idol is not the failure of the object of the endowment, as a new idol may be set up in its place (*l*).

VI.—BENAMI OR ISM-E-FARZI TRANSACTIONS.

A Benami or Ism-e-Farzi transaction, as the name indicates, is of a fictitious nature. It consists in making purchases in the name of a nominee or a person other than the purchaser himself. In the Hindu society, where the property belonged to all the coparceners jointly, such a purchase would indiscriminately be made in the name of any co-parcener, the property purchased belonging to the whole family. It was really to show that all members of the coparcenery were equal owners of the whole of the property belonging to the family. Amongst the Mohammedans it originated in the disability of a Mohammedan to make purchases in distant countries in his own name through an agent. As in the Roman law, so in the Mohammedan law, a purchase through an agent used to be a double transaction, the agent first buying in his own name and then transferring it to the real purchaser. In neither case would any of the hardships which are at present in existence in India in respect of this kind of transaction be found under olden conditions. A Hindu governed by the Mitakshara could not avail himself of the plea that the property was his when the claim was in regard to a debt incurred for the benefit of the family, for properties standing in the name of any member will belong to the family. For the same reason, in suits against his own personal debts the creditor could not proceed

(*g*) *Prosunno Kumari* v. *Golab Chand*, L. R. 2 I. A. 151, 152; *Jagadindra Nath* v. *Hemanta*, L. R. 41 I. A. 203; *Kasim Saiba* v. *Swami*, I. L. R. 18 Mad. 359; *Ishwar Shyam* v. *Ram Kani*, I. L. R. 38 Cal. 52 P. C.

(*h*) *Sankarlinga* v. *Raja Rajeswara Dorai*, L. R. 35 I. A. 177.

(*i*) *Peary Mohun* v. *Narendra Nath*, I. L. R. 37 Cal. 229.

(*k*) *Prayaga* v. *Pillai*, L. R. 34 I. A. 78.

(*l*) *Bijoychand* v. *Kalipada*, I. L. R. 41 Cal. 57.

against any purchases in his own name. The rule of *Damdupat*, which limited the rate of interest to the amount of the principal, was an additional check upon frauds. Amongst the Mohammedans the very existence of the law of agency, based upon a very strict notion of honest contracts, would be a bar against fraudulent dealings. But when the power of acquisition of wealth, owing to changed circumstances, is very much diminished, and when the money-lenders become unscrupulous, this kind of transaction is resorted to to protect whatever little was left for the support of the family.

The Judicial Committee acted in accordance with the principles both of the Hindu and the Mohammedan law when it laid down the rule "that the criterion of these cases in India is to consider from what source the purchase-money comes; that the presumption is that a purchase made with A.'s money in B.'s name is for A.'s benefit, and that from the purchase by a father, whether Mohammedan or Hindu, in the name of his son, the presumption of the English law of an advancement in favour of that son cannot be drawn" (*m*). The same is the rule if the purchase is in the name of a daughter (*n*). But in the case of a property found in possession of the wife, as in other cases, in the absence of strict proof that the purchase was a benami (*o*), there is no presumption that the property in her possession, the acquisition of which she cannot account for, was not hers but her husband's (*p*). Consistently with the principle laid down by the Privy Council, a purchase by the manager of a Hindu family in his own name would be for the benefit of the family (*q*), and the possession of the beneficial owner will not be disturbed at the instance of a

(*m*) *Moulvi Sayyud Uzhur Ali* v. *Ultaf Fatima*, 13 M. I. A. 232; *Gopekrist* v *Gungapersaud*, 6 M. I. A. 53; *Nawab Azimut Ali Khan* v. *Hurdwaree Mull*, 13 M. I. A. 395; S. C. 5 Beng. L. R. 578, P. C.; *Pandit Ram Narain* v. *Moulvi Mohammed*, L. R. 26 I. A. 38; *Bissessur Lall* v. *Luchmessur Singh*, L. R. 6 I. A. 233.

(*n*) *Chunder Nath* v. *Kristo*, 15 Suth. 357; *Nobin Chunder* v. *Dokhobala*, I. L. R. 10 Cal. 686; *Uman Parshad* v. *Gandarp*, L. R. 14 I. A. 127.

(*o*) *Bai Motivahu* v. *Purshotam*, I. L. R. 29 Bom. 306; *Srumanchunder* v. *Gopauchunder*, 11 M. I. A. 28; *Faez Baksh* v. *Fukurudin*, 14 M. I. A. 234; *Suleman* v. *Mehdi*, L. R. 25 I. A. 15; *Nirmal* v. *Siddick*, L. R. 25 I. A. 225.

(*p*) *Diwan Ram Bijai* v. *Inderpal Singh*, L. R. 26 I. A. 226; *Thakro* v. *Ganga Pershad*, L. R. 15 I. A. 29; *Dharani Kant* v. *Kristo Kumari*, L. R. 13 I. A. 70.

(*q*) *Bodh Singh* v. *Gunesh*, 12 Beng. L. R. 317, P. C.; *Tundum* v. *Pokh Narain*, 5 Beng. L. R. 546.

benamdar by virtue of a certificate of purchase in his name at a revenue sale or a sale under the decree of the Court, which title has been laid down as absolute by various enactments of the Indian Legislature (*r*).

This kind of transaction often leads to frauds on innocent persons who, *bona-fide* believing that the property was that of the benamdar, purchase the property or advance sums of money by way of mortgage, and upon creditors when the property ostensibly appears in the name of a farzidar and is intended to be placed beyond the reach of a creditor. In *Ramcoomar* v. *McQueen* (*s*) the Privy Council said that "it is a principle of natural equity, which must be of universal application, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there were circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it." In cases where no fraud has been committed on a mortgagee, who is aware of the real nature of the transaction, and in which the beneficial owner acquiesces, the money advanced has been held to be a charge on the property (*t*). In cases where a property is placed in the name of a person other than the real owner with a view to defeat the claims of creditors or for an illegal purpose, such transaction would be wholly void (*v*); but as against the benamdar, if the intention to perpetrate a

(*r*) *Buhuns* v. *Lalla Buhooree*, 14 M. I. A. 496; *Lokhee* v. *Ralypuddo*, L. R. 2 I. A. 154; *Govinda* v. *Lalla Kishun*, I. L. R. 28 Cal. 370; Act. VIII. of 1859; Act X. of 1877; Act XIV. of 1882; Act V. of 1908; Act I. of 1845 (Bengal Revenue Sale); Act XI. of 1859 (Bengal Zemindary Revenue Sale).

(*s*) 11 Beng. L. R. 46, 52, P. C.; *Mir Mohamed* v. *Kishori Mohun*, L. R. 22 I. A. 129; *Luchman* v. *Kalli Churn*, 19 Suth. 292, P. C.; *Chundercoomar* v. *Harbans Sahai*, I. L. R. 16 Cal. 137; *Sundar Lal* v. *Fakirchand*, I. L. R. 25 All. 62; *Vyankapacharya* v. *Yamansami*, I. L. R. 35 Bom. 269; *Imambandi* v. *Kumleswari*, L. R. 13 I. A. 160.

(*t*) *Sarju Pershad* v. *Bir Bhaddar Sewak Panday*, L. R. 20 I. A. 108.

(*v*) *Abdool Hye* v. *Mozuffer Hossein*, L. R. 11 I. A. 10; *Yaramati* v. *Chundra*, I. L. R. 20 Mad. 326; *Govinda* v. *Lallakishan*, I. L. R. 28 Cal. 370; *Sidlingappa* v. *Hirsa*, I. L. R. 31 Bom. 405; *Sheo Narain* v. *Mata Prosad*, I. L. R. 27 All. 73.

fraud has not been carried into effect, the title of a beneficial owner will stand (*w*).

A benamdar is competent to institute a suit in his own name to enforce a mortgage bond (*x*), and to be sued in an action for setting aside an execution sale without the real owner being made a party thereto (*y*). He will be acting as an agent for the real owner, and the decree would be binding on the latter (*z*). But there is a conflict of decisions in the case where a benamdar sues for possession of the land in question, or for ejectments, or for a declaration of his right to the land. The Calcutta High Court holds the view that a benamdar cannot bring a suit for possession of land or for any relief which assumes the rights of possession for its basis (*a*). The Madras High Court, though holding a contrary view before (*b*), now holds the same view as the Calcutta High Court (*c*). The Allahabad High Court (*d*) and the Bombay High Court (*e*) have held that a benamdar can bring a suit of any kind in his own name, when he would be acting as the agent of the real (or beneficial) owner, the matter decided upon being *res judicata* against the latter. But this question has been set at rest by the decision of the Judicial Committee in *Chaudhri Gur Narayan et al.* v. *Sheo Lal Singh et al.* argued during the Trinity Sittings, 1918.

(*w*) *Jadunath* v. *Rup Lal*, I. L. R. 33 Cal. 967; *Sreemutty Debia* v. *Bimola*, 21 Suth. 422; *Gopenath* v. *Jadoo*, 23 Suth. 42; *Ram Sarun* v. *Pran Peary*, 13 M. I. A. 551; *Babaji* v. *Krishna*, I. L. R. 18 Bom. 372; *Shamlal* v. *Amerendro*, I. L. R. 23 Cal. 474; *Kalicharan* v. *Rasik*, I. L. R. 23 Cal. 962; *Honapa* v. *Narsapa*, I. L. R. 23 Bom. 40. *Cf.* The English law appears to lay down the same principle. *Cottington* v. *Fletcher*, 2 Atk. 156; *Young* v. *Peachey*, 2 Atk. 254; *Symes* v. *Hughes*, L. R. 9 Eq. 475; *Tennent* v. *Tennent*, L. R. 2 Sc. & D. 9; *Cecil* v. *Butcher*, 2 Jac. & W. 565; *Davies* v. *Otty*, 35 Beav. 208; *Manning* v. *Gill*, L. R. 13 Eq. 485; *In re Great Berlin Steamboat Co.*, L. R. 26 Ch. D. 616; *Duke of Bedford* v. *Coke*, 2 Ves. Sen. 116.

(*x*) *Bhola Pershad* v. *Ram Lall*, I. L. R. 24 Cal. 34; *Sachitnanda* v. *Buloram*, I. L. R. 24 Cal. 644.

(*y*) *Baroda Kanta* v. *Chunder*, I. L. R. 29 Cal. 682.

(*z*) *Gopinath* v. *Bhugwat*, I. L. R. 10 Cal. 697.

(*a*) *Mohandra Nath* v. *Kali Proshad*, I. L. R. 30 Cal. 265; *Hari Gobind* v. *Akhoy Kumar*, I. L. R. 16 Cal. 364; *Issur Chandra* v. *Gopal Chandra*, I. L. R. 25 Cal. 98.

(*b*) *Shangara* v. *Krishnan*, I. L. R. 15 Mad. 267.

(*c*) *Kathaperumal* v. *Sec. of State for India*, I. L. R. 30 Mad. 245.

(*d*) *Bacha* v. *Gangadhar*, I. L. R. 28 All. 44; *Yad Ram* v. *Umrao Singh*, I. L. R. 21 All. 380; *Nand Kishore* v. *Ahmad Ata*, I. L. R. 18 All. 69.

(*e*) *Ravji Appaji* v. *Mahadeo Bapuji*, I. L. R. 22 Bom. 672; *Dagdu* v. *Balvant*, I. L. R. 22 Bom. 820.

VII.—BURDENS ON INHERITANCE.

Some of the principal burdens on inheritance have already been noticed, as in § 1. *A*. (5), and § 1. *B*. (1), in connexion with the rights, to which they are most commonly annexed. The powers of an owner in relation to his property form the subject of the following section, but it seems useful to collect, in this place, some of the more general rules applying to charges on property which passes to successors as deduced from the recognised Hindu authorities and the cases decided in recent years.

There is a general obligation resting on the heir (or other person) taking property of one deceased to pay the debts of the late owner. But in a united family this does not extend to the debts of a member deceased incurred for his purely personal purposes, unless his interest in the joint property which could have been seized and sold (*f*) during his lifetime has been attached before his death (*g*) or has vested in the Official Assignee under an insolvency (*h*), or even for the family if there was no necessity (*i*), except in the case of a deceased father's or grandfather's obligations (*k*) lawfully contracted.

In *Amar Chand* v. *Sebakchand* (*l*) the Calcutta High Court adopted the rule laid down by the Bombay High Court (*m*) that a money decree obtained against the father might be executed against the son, who may raise objections as to the legality of the debt under sec. 47 of C. P. C. The rule thus laid down has been adopted in secs 50, 52, and 53 of C. P. C. (Act V. of 1908).

Promises deliberately made by the father are by the Hindu law regarded as equally binding on his sons, especially if made to his wife (*n*).

If property descends as hereditary, the income (of a zemindari) is liable to pay the debts of the deceased zemindar. Such seems

(*f*) *Deendayal* v. *Jugdeep*, L. R. 4 I. A. 217.

(*g*) *Suraj Bansi Koer* v. *Sheo Pershad*, L. R. 6 I. A. 88, 108; *Subaya* v. *Nagappa*, I. L. R. 33 Bom. 264.

(*h*) *Fakirchand* v. *Motichand*, I. L. R. 7 Bom. 438.

(*i*) See *Saravan Tevan* v. *Muttayi Ammal*, 6 Mad. H. C. R. 383; *Magluiri Garudiah* v. *Narayan Rungiah*, I. L. R. 3 Mad. at p. 365, and below, Partition, Liabilities on Inheritance.

(*k*) Above, p. 76. Narada, III., secs. 4-6; Vyav. Mayukha, V. Sc. 4 (17).

(*l*) I. L. R. 34 Cal. 642, F. B.

(*m*) *Umed* v. *Goman*, I. L. R. 20 Bom. 385.

(*n*) Viramit. Transl. p. 228; Vyav. May. Chap. IV., sec. X., para. 4; sec. IV., p. 15; Chap. IX., p. 10; see also Act IX. of 1872, sec. 25.

to be the principle involved in the judgment of the Privy Council in *Oolgappa Chetty* v. *Arbuthnot* (*o*). But in Bombay, Calcutta, or Madras the estate is not, without a specific lien, so hypothecated for the father's debt as to prevent the heir disposing of it and giving a good title (*p*), though "it descends incumbered with the debts or accompanied by an obligation to pay the debts of the ancestor" (*q*). In the case of *Sangili Virapandia Chinnathamb* v. *Alwar Ayyangar* (*r*) it was held that though an attachment against the lands, impartible by family custom, of a zemindar for his debts might, if made during his life, continue after his death, yet as at his death the entire interest in the zemindari passed to his son, there was nothing in the estate itself "which was attachable assets of the late zemindar, or which could be made available in execution of the decree against his representative *quâ* representative." The son seems to have been regarded as taking the estate as a "purchaser" or independently of the father, as under the English Statute De Donis, while other property of which the father could have disposed passed to his representatives as such. The Hindu law, however, identifies the son with his father for all lawful obligations, as completely as the Roman law or as the English law under which *haeres est pars antecessoris* (*s*). It was by an analogous identification of persons that the executors, as in their sphere "universal" successors, became representatives of a testator. The impartibility of an estate may, to a considerable extent, prevent its being incumbered, as was the case also with feudal estates; but supposing the estate to be absolutely inalienable as well as impartible, it would seem that no charge at all would attach to

(*o*) L. R. 1 I. A. at p. 315; S. C., 14 Beng. L. R. at p. 141.

(*p*) *Jamiyatram* v. *Parbhudas*, 9 Bom. H. C. R. 116; *Unnopoorna* v. *Gunga*, 2 Suth. 296; *Veerasokkaraju* v. *Papiah*, I. L. R. 2 Mad. 792; *Ram Oottum* v. *Oomesh*, 21 Suth. 155.

(*q*) *Sakharam Ramchandra* v. *Madhavrao*, 10 B. H. C. R. 361, 367. See also *Nilkant Chatterjee* v. *Peari Mohan Das et al.*, 3 B. L. R. 7 O. C. J.; *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 I. A. 321; *Suraj Bansi Koer* v. *Sheo Prasad Singh*, L. R. 6 I. A. 88, 106; *Udaram Sitaram* v. *Ranu*, 10 B. H. C. R. 83; *Sadashiv Dinkar* v. *Dinkar Narayan*, Bom. H. C. P. J. for 1882, p. 139; *Narayanacharya* v. *Narso Krishna*, I. L. R. 1 Bom. 262; *Karimuddin* v. *Gobind Krishna*, I. L. R. 31 All. 506, P. C.; *Rashid* v. *Sherbanoo*, I. L. R. 29 Bom. 411.

(*r*) I. L. R. 3 Mad. 42; *Suraj Bansi Koer* v. *Sheo Pershad*, L. R. 6 I. A. 88; *Sadabart* v. *Foolbash*, 3 Beng. L. R. 34-37, F. B.; *Koopookonan* v. *Chinnayan*, 1 Mad. L. R. 63.

(*s*) Co. Lit. 22, *b*.

it after the ownership proceeded against had ended by the death of the debtor (*t*), while so far as it was alienable or subject to incumbrance, the heir should be identified with his ancestor for all purposes, as well for the execution of a decree rightly obtained as for the establishment of a claim. He becomes a representative, and takes as a representative through this identification. What he takes is the aggregate familia as a " universitas " in the character of " heres suus " equally when the property is impartible as when it is partible, and this " universitas " or aggregate includes all obligations properly attaching to the headship of the family equally with the property and rights annexed to it (*v*). The rules of partition show that the obligation to pay a father's debt is a part of the inheritance or familia as much as the property to be divided (*w*), and it is not less so when the property is impartible, save in so far as it might defeat the purpose of the grantor, or the law of the principality. To the extent, therefore, to which the deceased could have charged the property or disposed of it, and so enjoyed a complete ownership, it would seem that the heir is a representative liable to execution under sec. 50 of the Code of Civil Procedure on account of such property of the deceased having " come to his hands." The distinction grounded in *Muttayan Chetti* v. *Sivagiri Zamindar* (*x*) on a son's not being able to obtain a partition of an impartible estate does not rest on the Hindu law which makes the son responsible and bids him postpone his own interests to the payment of the just debts of his father (*y*). He cannot obtain a partition of an ordinary estate in Bengal as of right, but this does not exempt the estate from liability. For the case of a Polygar in Madras see *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (*z*).

(*t*) See *Goor Pershad* v. *Sheodeen*, 4 N. W. P. R. 137, referred to in *Udaram Sitaram* v. *Ranu*, 11 Bom. H. C. R. at p. 78; and *Surja Bansi Koer* v. *Sheo Pershad*, L. R. 6 I. A. at p. 104.

(*v*) See Gaius, Inst. II. 157; Di. Lib. 28 Ti. 2, Fr. 11; Col. Dig. Book II., Chap. IV. T. 15 Comm; Vyav. May. V. sec. IV. 14 ss.; *ibid* Chap. IV. sec. IV. 33; Manu. IX. 130; Col. Dig. Book V., Chap. IV. T. 210.

(*w*) Vyav. May. Chap. IV., sec. VI.

(*x*) I. L. R. 3 Mad. at p. 381.

(*y*) Col. Dig. Book I., Chap. V. T. 188; Vyav. May. Chap. V., sec. IV. 16. 17; and the judgment has since been reversed by the Privy Council in the case of *Muttayan Chettiar* v. *Sivagiri Zamindar*. The Judicial Committee, L. R. 9 I. A. at p. 144, say: " The fact of the zamindari being impartible could not affect its liability for the payment of the father's debts, when it came into the hands of the son by descent from the father."

(*z*) I. L. R. 3 Mad. 145.

As to the maintenance of a widow see the section on Maintenance, and *Baijun Doobey et al.* v. *Brij Bhookun Lall* (*a*); *Musst. Lalti Kuar* v. *Ganga Bishan et al.* (*b*), *Visalatchi Ammal* v. *Annasamy Sastry* (*c*), *Baboo Goluck Chunder Bose* v. *Ranee Ohilla Dayee* (*d*), *Lakshman Ramchandra et al.* v. *Sarasvatibai* (*e*), *Musst. Golab Koonwar et al.* v. *The Collector of Benares et al.* (*f*), *Parmi* v. *Mahadevi*, where she claims maintenance under her husband's will, though unchaste (*g*), and the cases referred to above pp. 73-75, and under Partition, Book II.

A reasonable charge subsists to provide even for a concubine and her daughters (*h*) and her sons excluded from inheritance (*i*).

The son is responsible for unsecured debts contracted by his father during the life-time of the latter (*k*). As to secured debts thus contracted during his minority, or, with his acquiescence, after his attaining his majority, the case is the same (*l*). He is also liable for contribution to his father, when his father has had to pay them. A discharge or distribution of the debts by ordinary coparceners making a partition being expressly enjoined, it might seem to follow, *à fortiori*, that a son taking his share of the family estate from his father should take also, if his father desire it, his proportion of the burdens; but this is not prescribed by the law books. After the father's death the son is by Hindu law responsible for all his debts (*m*) except those contracted for immoral purposes (*n*), and this liability, as under the Roman law, is

(*a*) L. R. 2 I. A. at p. 279.

(*b*) 7 N. W. P. R. 261 (F. B.).

(*c*) 5 M. H. C. R. 150.

(*d*) 25 C. W. R. 100.

(*e*) 12 Bom. H. C. R. 69.

(*f*) 4 M. I. A. 246.

(*g*) I. L. R. 34 Bom. 278.

(*h*) See *Salu* v. *Hari*, Bom. H. C. P. J. F. for 1877, p. 34; *Khemkor* v. *Umiashankar*, 10 Bom. H. C. R. 381.

(*i*) *Rahi* v. *Govind*, I. L. R. 1 Bom. 97; *Roshan* v. *Balwant*, L. R. 27 I. A. 51.

(*k*) *Govind* v. *Sakharam*, I. L. R. 28 Bom. 383; *Durbar* v. *Harsur*, I. L. R. 32 Bom. 345; *Shivaram* v. *Sakharam*, I. L. R. 33 Bom. 39; *Shiam Lal* v. *Ganeshi*, I. L. R. 28 All. 288; *Amrutrow* v. *Trimbuckrow et al.*, Bom. Sel. Ca., p. 245; *Chennapah* v. *Chellamanah*, M. S. D. A. R. 1851, p. 33; Col. Dig. Book I., Chap. V. T. 167, Note.

(*l*) See 1 Mit. Chap. I., sec. I., paras. 28, 29; *Gangabai* v. *Vamanaji*, 2 Bom. H. C. R. 318 (2nd Ed., p. 301), a case of ratification.

(*m*) Vyav. May Chap. V. S. 4. pl. 11-14; Stokes's H. L. B. 121, 122; *Keshow Rao Diwakar* v. *Naro Junardhun Patunkar*, 2 Borr. at p. 222.

(*n*) Col. Dig. Book I., Chap. V. T. 147-149, Comm.; 2 Str. H. L. 456.

independent of inherited assets (*o*), though where there were assets he who has taken them is primarily answerable (*p*); but this has been limited by Bombay Act VII. of 1866, sec. 4, to the amount of the family property taken by the son. In Bengal it has been held (*q*) that the Mit. Chap. I., sec. 6, para. 10 (Stokes's H. L. B. 395) authorises the alienation by a father for the payment of joint debts, even *against* the will of his son, so that the father could protect himself in that way. The separated son is not legally liable to the creditors either during his father's life or after it, unless he choose to accept the property left by his father according to the remarks of Colebrooke in the cases at 2 Str. H. L. 274, 277, 456 (*r*); but with this compare the *dicta* of the Sastris at those places, and in the case above quoted from Bombay Sel. Cases, which correctly express the doctrine formerly prevailing at this side of India, making the son's obligation a legal and not merely a moral one. In another case (No. 997 MS.), the Sastri answered that an adopted son, like one begotten, is responsible, independently of assets received, for the debts of

(*o*) *Narasimharaw* v. *Antaji Virupaksh et al.*, 2 Bom. H. C. R. 61; Col. Dig., Book I., Chap. V. T. 173.

Nilakantha, in the Vyav. Mayukha, Chap. IV., sec. IV., p. 17, insists on the character of an inheritance as a "universitas" or inseparable aggregate of rights and obligations. The latter descend only to sons and grandsons in the absence of all property; but he who takes any property, however small, must pay the debts, however large. So, too, must he who takes the widow of the deceased regarded as part of the "familia," see Col. Dig., Book I., Chap. V. T. 220, 221. Similarly *Qui semel aliquâ ex parte heres extiterit deficientum partes etiam invitus excipit, id est, deficientum partes etiam invito adcrescunt* (L. 80 de leg. 3 D. XXXII.). was the rule of the Roman Law when it had allowed the institution by testament of an heir replacing the heir by descent. The whole "familia" or none had to be given to the legatee who accepting the benefit became answerable for all debts and for due celebration of the "sacra privata." The son had no option; in the absence of a will he, continuing the person of his father, took the inheritance, benefits and burdens as a universitas. The English law has sprung from an entirely different conception, at least so far as real property is concerned. Though at one time the heir was in a sense a universal representative, yet the distinct character of several fees prevented their uniting in a true universitas. The ecclesiastical jurisdiction was introduced over chattels, and the heir then became successor only to the real property, accompanied, in Bracton's time, with a legal duty to pay his father's debts to the extent of his inheritance and a duty of humanity to pay them out of his other property, akin to the Hindu rule. See Bract. *f*. 61 b.

(*p*) See *Zemindar of Sivagiri* v. *Alwar Ayyangar*, I. L. R. 3 Mad., at p. 44; Vyav. May., Chap. V., sec. IV., para. 17; Col. Dig. Book I., Chap. V. T. 172.

(*q*) *Bishambhur Naik* v. *Sudasheeb Mohapatter et al.*, 1 C. W. R. 96.

(*r*) See also Col. Oblig., Chap. II., 51.

the adoptive grandfather, though not incurred for the benefit of the family (they not having been contracted for an immoral purpose).

In the case of *Hunooman Persaud Panday* v. *Musst. Babooee Munraj Koonweree* (*s*), the Privy Council grounded on the son's obligation as a pious duty to pay his father's debts, a capacity in the father to charge the estate, even though ancestral, for such debts contracted by him as the son could not piously repudiate. The same case, however, as recently construed in *Kameswar Pershad* v. *Run Bahadur Singh* (*t*), imposes on a creditor the necessity of making due inquiry whether in the particular case the manager (even, it would seem, the father) is acting for the benefit of the estate (*v*). In *Giridharee Lall et al.* v. *Kanto Lall et al.* (*w*), a decree having been obtained against a father for a debt, not of an immoral kind, but, as appears, not contracted for any benefit to the family, he sold the ancestral property to satisfy it. In a suit by his son to recover the estate, the High Court awarded to him one-half of his father's share, but the Privy Council reversed this decision and held that the deed of sale could not be set aside at the suit of the son. "*Hanooman Persaud's* case," their Lordships say, " is an authority to show that ancestral property, which descends to a father, is not exempted from liability to pay his debts, because a son is born to him." So, in *Oolagappa Chetty* v. *Arbuthnot et al.* (*x*), the income of an hereditary polliam was pronounced liable for a father's debts. The property in that case, however, was subject to the rules of singular succession applicable generally to a Raj. In accordance with these cases, it has, in Bombay, been said that "these decisions go to fix the son and his estate, except in cases of wanton extravagance, with the father's debt, whether secured or not on the property" (*y*), and that, "subject to certain limited exceptions (as, for instance, debts contracted for an immoral or illegal purpose), the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts

(*s*) 6 M. I. A. 421.

(*t*) I. L. R. 6 Cal. 843; S. C. L. R. 8 I. A. 8; *Daya* v. *Sri*, I. L. R. 33 Cal. 842

(*v*) See Book II. Introd. § 6 A.; 1 Str. H. L. 202.

(*w*) L. R. 1 I. A. 321; S. C., 14 Beng. L. R. 187.

(*x*) L. R. 1 I. A. 268.

(*y*) *Govindram* v. *Vamanrav*, R. A. No. 16 of 1874, Bom. H. C. P. J. F. for 1875, p. 118. See *Note* (*k*) on p. 164, *supra*.

of the father or grandfather" (*z*). But this liability is exceptional, resting on special texts (*a*). And as to whether the sale of the living father's interest binds as against his sons the whole ancestral property, as decided in *Narayanacharya* v. *Narso Krishna* (*b*), on the authority of *Giridharee* v. *Kanto* (*c*) (see *supra*, p. 161). The case of *Luchmi Dai Koori* v. *Asman Sing et al.* (*d*) follows *Giridharee* v. *Kanto* (*e*) to the same effect; but in the case of *Rungama* v. *Atchama et al.* (*f*), the Privy Council say of a son in relation to his father's distribution of property, "If Jagannatha takes, as we think he is entitled to do, the whole ancestral property *which the father could not dispose of without his consent, &c.*" So in *Pandurang* v. *Naro* (*g*). In *Bhugwandeen Doobey* v. *Myna Baee* (*h*) it is said, "Between undivided coparceners there can be no alienation by one without the consent of the other," and see *Suraj Bansi Kooer's case* (*i*). The High Court of Calcutta adopted this principle in the cases of *Sadabart Prasad Sahu* v. *Foolbash Koer* (*k*) and of *Mahabeer Pershad* v. *Ramyad Singh et al.* (*l*), which, in *Baboo Deendyal Lall* v. *Baboo Jugdeep Narain Singh* (*m*), have not been dissented from "as to voluntary alienations."

Even as to a sale in execution of the "right, title, and interest" of a father in the ancestral property, affected to be mortgaged by him "under legal necessity," as conclusively found by the District Court, their Lordships held, on the one hand, that the whole property would not be made available by a suit directed against the father alone, and a sale in execution of his "right, title, and interest." To make the other co-sharers

(*z*) *Udaram* v. *Ranu Panduji et al.*, 11 Bom. H. C. R. 83, citing Col. Dig. Book I., Chap. V. T. 167; cited and approved by the Judicial Committee in *Suraj Bansi Koer* v. *Sheo Pershad Singh*, L. R. 6 I. A., at p. 104. See also Narada, Pt. I., Chap. III., Sl. 12; 1 Str. H. L. 173; *Keshow Rao* v. *Naro Junardhun*, 2 Borr. 222.

(*a*) 11 Bom. H. C. R. 85 (*supra*), citing Col. Dig., Book I. T. 169, 229.

(*b*) I. L. R. 1 Bom. 262.

(*c*) *Supra*.

(*d*) I. L. R. 2 Cal. 213.

(*e*) *Supra*.

(*f*) 4 M. I. A., at p. 103.

(*g*) Sel. Rep. 186.

(*h*) 11 M. I. A., at p. 516.

(*i*) L. R. 6 I. A. 88, 100, 102.

(*k*) 3 Ben. L. R. 31 F. B.

(*l*) 12 Ben. L. R. 90.

(*m*) L. R. 4 I. A., p. 247.

answerable, it was necessary to join them as parties according to *Nugender Chunder Ghose et al.* v. *S. Kaminee Dossee et al.* (*n*); and *Baijun Doobey et al.* v. *Brij Bhookun Lall* (*o*). On the other hand, their Lordships ruled that by the purchase of the judgment debtor's (father's) right in execution, the purchaser had acquired his "share and interest in the property, and is entitled to take proceedings . . . to have that share and interest ascertained by partition" (*p*). It may seem rather too broad a statement, therefore, "that under the Mitakshara and Mayukha the son takes a vested interest in ancestral estate at his birth, but that interest is subject to the liability of that estate for the debts of his father and grandfather" (*q*). Some inquiry would seem to be necessary, and a reasonable assurance of benefit to the family, to warrant a lender in advancing money at the father's instance on the whole family estate (*r*). Subject to this the father's authority as manager is to be liberally construed (*s*), and a recent ruling of the Judicial Committee makes ancestral estate assets in the hands of the heir for payment of the late owner's debts without distinction apparently of their character (*t*).

It does not seem that by the Hindu law a father can, during his life, directly charge the ancestral estate for his purely personal debts beyond his own interest so as to make the whole immediately available to the incumbrancer. That he could charge the whole of the estate for his debts contracted *antecedent* to the mortgage or to the suit (*v*) [and according to some decisions of Allahabad and Madras High Courts even for his *present* debt (*w*)] has been laid down by the Judicial Committee in *Chandra Deo* v. *Mata Prosad* (*x*), and that he could deal with his own undivided share so as to give to his vendee, or mortgagee,

(*n*) 11 M. I. A. 241.

(*o*) L. R. 2 I. A. 275.

(*p*) So in *Haza Hira* v. *Bhaiji Modan*, S. A. No. 444 of 1874, Bom. H. C. P. J. F. for 1875, p. 97.

(*q*) *Narayanacharya* v. *Narso Khrisna*, I. L. R. 1 Bom., at p. 266.

(*r*) *Saravana Tevar* v. *Muttaya Ammal*, 6 Mad. H. C. R. 371.

(*s*) *Babaji Mahadaji* v. *Krishnaji Devji*, I. L. R. 2 Bom. 666; *Ratnam* v. *Govindarajulu*, I. L. R. 2 Mad. 339. See B. II. Partition.

(*t*) *Muttayan Chetiar* v. *Sangali Vira Pandia*, L. R. 9 I. A. 128.

(*v*) *Kishna* v. *Tipan*, I. L. R. 34 Cal. 735; *Khalilal* v. *Gobind*, I. L. R. 20 Cal. 328, 346; *Lachman* v. *Giridhar*, I. L. R. 5 Cal. 855, F. B.

(*w*) *Debi* v. *Jadu*, I. L. 24 All. 459; *Chidambara* v. *Koothaperumal*, I. L. R. 27 Mad. 326.

(*x*) L. R. 31 I. A. 176.

a right to call for a partition has become the established law of Bombay and Madras—" a broad and general rule defining the right of the creditor " in the language of the Privy Council. On the father's death a new obligation arises as against his sons, whose first duty it is to pay his debts, who are commanded to provide for their payment in making a partition, and even to alienate their own property to redeem their father from " Put " (*y*), apart from " charges " which could operate only on his own share during his own life, though as founded on debts they now seem to bind the whole inheritance after his decease, except when they are of profligate origin to the knowledge of the creditor. In the recent case, however, of *Ponnappa Pillai* v. *Pappuvayyangar* (*z*) it has been held (*a*) by the High Court of Madras that a son's interest even during his father's life is bound by an execution sale on a decree against the father. This decision, resting on *Giridharee Lall* v. *Kantoo Lall* and *Muddun Thakor's Cases* (*b*) goes to make the interest of the son in a heritage altogether subordinate to that of the father, and to place it in all ordinary cases entirely at the father's disposal.

To sum up the decisions of the Privy Council on this point. In *Muddun Thakoor* v. *Kantoo Lall* (*c*) their Lordships of the Privy Council laid down that ancestral property which descended to a man under the Mitakshara law was not exempted from liability to pay his debts because a son was born to him; that it was the pious duty on the part of the son to pay his father's debts; and the ancestral property in which the son, as son, acquired an interest by birth was liable for the father's debts, unless they had been contracted for immoral purposes; and that the Mithila law was the same. This view was affirmed in *Suraj Bansi* v. *Sheo Pershad* (*d*), when the Judicial Committee said " That where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property unless they show that

(*y*) Narada, Pt. I., Chap. III. Sl. 6.

(*z*) I. L. R. 4 Mad. 1. See too *Ram Narain's Case*, I. L. R. 3 All. 443.

(*a*) By a majority against Innes and Muttusami, J.J.

(*b*) L. R. 1 I. A. 321.

(*c*) L. R. 1 I. A. 331.

(*d*) L. R. 6 I. A. 88.

the debts were contracted for immoral purposes, and that the purchaser had notice they were so contracted." This has been followed in *Nomani Babuasin* v. *Modun Mohun* (*e*), where their Lordships observed: "There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present-vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. . . It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far sons can be precluded, by proceedings taken by or against the father alone, from disputing that liability. Destructive as it may be of the principle of independent coparcenery rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority. . . . If his (father's) debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenery interest alone (and in *Deendayal's Case* (*f*) there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings."

(*e*) L. R. 13 I. A. 1.
(*f*) L. R. 4 I. A. 247.

The same principle has been confirmed in *Bhagbut* v. *Girja* (*g*); *Mesnakshi Naidu* v. *Immudi Kanaka* (*h*), *Mahabir Pershad* v. *Rai Markunda Nath* (*i*); and *Sripat Singh Dugar* v. *Maharajah Sir Prodyot Kumar Tagore* (*k*).

The cases of *Deendyal* v. *Jugdeep* (*l*), *Suraj Bansi* v. *Sheo Pershad* (*m*), *Hardi* v. *Rudar* (*n*), *Simbhu Nath.* v. *Golab Singh* (*o*), *Pettachi* v. *Sangili Veera Pandia Chinnathambiar* (*p*), and *Abdul Aziz* v. *Naicker* (*q*) are authorities for the proposition that in execution of a decree against the father only that share which would have come to him on a partition being made could be sold.

Recently, in *Thakur Sri Sri Radha Krishna Chanderji* v. *Ram Bahadur* (*r*), the cases above referred to were mentioned at the Bar, but their Lordships lay down the rule that when "right, interest and title" of the father in execution of a money decree against him are sold, only his *life estate* passes. They say as follows: "Doubtless they (decree holders) supposed that interest (that of the father) to have been absolute, and the family may have thought so too. Even if the interest of Sheo Parkash in the land, which was sold in execution, determined with his life, it was said that the interest of his sons must be deemed to have been sold too, for the ancestral property in a joint Hindu family may be made liable for the father's debts unless they can be shown to have been for an illegal or immoral consideration. Such rules, however, do not always apply. The creditor's conduct, for example, may evidence his intention not to resort to such a right, whereby after all one man's property is taken to pay another man's debt. This is peculiarly so where the form of his proceedings points to an election to seek execution against his own debtor's interests, and no further. . . . It does not appear that he claimed execution at any time against the family property generally."

In this case the property in question was in possession of the

(*g*) L. R. 15 I. A. 99; S. C. I. L. R. 15 Cal. 717.
(*h*) L. R. 16 I. A. 1; S. C. I. L. R. 12 Mad. 142.
(*i*) L. R. 17 I. A. 11; S. C. I. L. R. 17 Cal. 584.
(*k*) L. R. 44 I. A. 1.
(*l*) L. R. 4 I. A. 247; S. C. I. L. R. 3 Cal. 198.
(*m*) L. R. 6 I. A. 88; S. C. I. L. R. 5 Cal. 148.
(*n*) L. R. 11 I. A. 26; S. C. I. L. R. 10 Cal. 626.
(*o*) L. R. 14 I. A. 77; S. C. I. L. R. 14 Cal. 572.
(*p*) L. R. 14 I. A. 84; S. C. I. L. R. 10 Mad. 241.
(*q*) L. R. 31 I. A. 1; S. C. I. L. R. 27 Mad. 131.
(*r*) P. C. Judgment, dated Aug. 3, 1917.

father. The sons, who were minors, were made parties to the execution proceedings against which they had unsuccessfully appealed to the High Court. All parties understood that the entire interest of both the father and the sons passed on to the purchasers at the auction in execution of the decree against the father alone. As the property was already in possession of the father, no partition was necessary, or it was effected by the property being defined in execution proceedings. Further, if the deed of gift was invalid, being a gift of the father's undivided share, the property in question was a joint ancestral property, and the fact of the sons being made parties to the execution proceedings would pass their interest too. If, on the contrary, the deed of gift operated as a partition also (*s*), the property in dispute had fallen to his share, and the sale thereof would also pass the entire interest of the family therein. The principle, therefore, as now laid down, unsettles the law once more, and leaves it where it was started when the decision in *Muddum Thakoor's Case* was given. What the parties understood at the time the sale took place, it appears, is immaterial.

VIII.—LIMITATIONS OF PROPERTY AND RESTRAINTS ON DISPOSAL UNDER THE HINDU LAW.

The power which a Hindu proprietor may exercise in disposing of the property he owns (*t*) varies according to his family relations, to the way in which the property has been obtained, as it is ancestral or self-acquired, as it is immoveable or moveable, as it supports or not a public service or object, and according also to the necessities to which the owner is subjected, and to the purposes he has in view. Thus the member of a united family can deal with his own share only under exceptional rules (*v*). The father may incumber the ancestral estate only for purposes of a respectable kind, or not distinctly the reverse; for immoral

(*s*) *Girjabai* v. *Sadashiv*, L. R. 43 I. A. 151; *Kawal Nain* v. *Budh Singh*, L. R. 44 I. A. 159.

(*t*) Devanda Bhatta insists on that being property which in itself is capable of alienation, whether or not in any particular case it can be alienated. Smriti Chandrika, Tr. p. 10.

(*v*) *Lakshmishankar* v. *Vaijnath*, I. L. R. 6 Bom. 24; *Vrandavandas Ramdas* v. *Yamunabai*, 12 Bom. H. C. R. 229; *Gangubai Kom Shidapa* v. *Ramanna bin Bhimanna*, 3 Bom. H. C. R. 66, A. C. J. and Note; *Chamaili Kuar* v. *Ram Prasad*, I. L. R. 2 All. 267; *Ganga Bisheshar* v. *Pirthi Pal*, *ib*. 635. See above, VII. 6, *Burdens on Inheritance*, pp. 166—169.

purposes it has been said that he cannot bind even his own share as against his son's survivorship. The managing member has special powers subject to special restrictions (*w*). The son's right is born, and unless realised by division, dies with him. The daughter, wife, and widow are subject to limitations as to the estates they can confer and the control under which they act. The general right of dealing with property acquired by oneself does not extend to ancestral estate. In the latter the birth-right of a son enables him, according to the law of the Mitakshara, to claim partition at his own will. Again, the absolute necessities of a family may justify any member in selling so much as may be necessary to meet them, and in the case of a manager a family necessity is liberally construed (*x*). The testamentary power depends on unity or severance of the family, and on the nature of the property.

The questions arising under these different heads are dealt with in the Introduction to Book II., and at other places where they occur; but it will be convenient to set forth here some of the principal powers and limitations which, according to the Hindu law, may be regarded as inseparable from the notion of property enjoyed under the law.

As to the acquisition of ownership, this, Vijnanesvara says, is a matter of secular cognizance (*y*). It arises from Occupation, Finding, Purchase, Inheritance, and Partition (*z*), as common to

(*w*) *Kameshwar Pershad* v. *Run Bahadur Singh*, I. L. R. 6 Cal. 843; *Daulat* v. *Mehr*, I. L. R. 15 Cal. 70; *Sheo* v. *Saheb*, I. L. R. 20 Cal. 453; *In re Haroon Mohamed*, I. L. R. 14 Bom. 194; *Jagannath* v. *Mannu Lal*, I. L. R. 16 All. 231; *Gharibullah* v. *Khalak*, L. R. 30 I. A. 165; S. C., 25 All. 407; *Sheo Shanker* v. *Ram Shewak*, I. L. R. 24 Cal. 77.

(*x*) *Babaji Mahadaji* v. *Krushnaji Devji*, I. L. R. 2 Bom. 666; *Hurronath Roy* v. *Rundhir Singh*, L. R. 18 I. A. 1; *Kameswara Sastri* v. *Veeracharlu*, I. L. R. 34 Mad. 422; *Bhagirathi* v. *Jokku Ram*, I. L. R. 32 All. 375; *Sundrabai* v. *Shivanarayana*, I. L. R. 32 Bom. 81.

(*y*) Mitakshara, Chap. I., sec. I., paras. 9, 10. There are many subtile disquisitions in the Hindu commentaries on the specially approved means of acquisition, as Gift for a Brahman, Conquest for a Kshatriya, and Gain for a Vaisya or Sudra. The general result appears to be that though for sacrificial purpose the property offered should have been acquired in the authorized way, yet a mere deviation from what is specially approved does not deprive an acquisition of the character of property. The Smriti Chandrika, Tr. p. 11, seems to hold that the enumeration given in the Smritis is rather a statement of facts of experience than a rule in itself determining the essentials of property. See the Sarasvati Vilasa, § 400 ss.

(*z*) *Ibid.*, para. 12; *Bhaskarappa* v. *The Collector of North Kanara*, I. L. R. 3 Bom., at p. 524.

all castes and conditions. The peculiar relations of inheritance and partition as understood by the Hindu lawyers are discussed above p. 63*n*, and in the Introduction to Book II. Occupation or appropriation of waste lands is regarded as a natural right (*a*), but as one concurrent with a right in the sovereign to a rate or tax on the produce (*b*). Hence naturally possession is the strongest proof (*c*). The strength of the ownership thus attested is such that the rule has sometimes been recognised that the occupying owner of a field who has absconded may at any time return and recover it on terms equitable to the intermediate occupant (*d*), as his ownership cannot be really destroyed without his distinct assent (*e*), that for the same reason execution for debt against a man's land is a notion foreign to the pure Hindu law (*f*), that a royal gift of occupied land is construed to mean only a gift of the revenue (*g*), and that even a conqueror acquires

(*a*) See Viramit., Chap. I., sec. 13; Smriti Chandrika, Tr. p. 11; Comp. Imp. Gaz., vol. VII., p. 520; *Bhaskarappa* v. *The Collector of North Kanara*, I. L. R. 3 Bom., at pp. 548, 563, &c.; *Vyakunta Bapuji* v. *Government of Bombay*, 12 Bom. H. C. R. App. 30 ss.; Comp. Panj. Cust. Law, vol. II., pp. 21, 254, which shows in how many various ways, as between individuals, a proprietary right may be acquired in land not completely appropriated.

(*b*) *Ibid.*, and Col. Dig., Book II., Chap. II. T. 12, Comm.; T. 17, T. 22, Comm.; T. 24, Comm.; *Vasudev Sadashiv Modak* v. *Collector of Ratnagiri*, L. R. 4 I. A., at p. 125.

(*c*) Vyav. May., Chap. II., sec. 1, para. 8; comp. Col. Dig., Book II., Chap. II. T. 10, Comm.; T. 12, Comm.; Steele, L. C. 207; *Vishvanath* v. *Mahadaji*, I. L. R. 3 Bom. 147. The cultivator is regarded as bound to maintain the land he holds in cultivable condition.—Manu. VIII. 243, a duty which is recognised by the Mahomedan law also, and by other systems.

(*d*) Mitak. in Macn. H. L. 202, 205, 207; *Bhaskarappa* v. *The Collector of North Kanara*, I. L. R. 3 Bom., at pp. 525-6. See Narada II. XI. 23 ss.; *Piarey Lall* v. *Saliga*, I. L. R. 2 All. 394; *Harbhaj* v. *Gumani*, *ib.* 493; and comp. *Joti Bhimrav* v. *Balu Bin Bapuji*, I. L. R. 1 Bom. 208; *ib.* cases referred to at p. 94; Col. Dig., Book II., Chap. II. T. 24 Comm. *sub fin*; Tod's Rajasthan, vol. I., p. 526; M. E. Elphinstone in Rev. and Jud. Sel., vol. IV., p. 161; General Briggs, *ib.* p. 694.

(*e*) *Parbhudas Rayaji* v. *Motiram Kalyandas*, I. L. R. 1 Bom. 207; Col. Dig., Book II., Chap. II. T. 27, Comm.; T. 28, Comm.; T. 27, Comm. The consequences of this on the law of partition are traced in Book II., Introd. § 5 B and notes. In the latter references will be found to the rights of communities as still in some places asserted, and to the formerly inalienable character of the patrimony. See Mr. Chaplin's Report, Rev. and Jud. Sel., vol. IV., pp. 474-477.

(*f*) Col. Dig., Book II., Chap. II. T. 28, Comm.; T. 24, Comm.; comp. Hunter's Roman Law, p. 807.

(*g*) Vyav. May., Chap. IV., sec. I., para. 8; comp. Col. Dig., Book II., Chap. II. T. 10, Comm.; T. 12, Comm.; Steele, L. C. 207; *Vishvanath* v. *Mahadaji*, I. L. R. 3 Bom. 147.

only the rights of the vanquished ruler. The property in the land is thus rather allodial than feodal. Tenure in the English sense hardly exists (*h*), except in the case of estates granted by the sovereign for the support of particular services to the State, or for the furtherance of purposes recognised as beneficial to the community. Jagirs for military service come the nearest in character to feudal holdings of the earlier type, the terminable beneficia which were succeeded by hereditary estates held by homage and military service (*i*). They are usually grants of the revenues of a district as a means of supporting a body of troops, and are resumable at the pleasure of the sovereign power (*k*). From their nature they are impartible, and so, too, are saranjams and inams, granted either for life or hereditarily, for services rendered or for maintaining the dignity of a family, and they are resumable by the government if granted by treaty (*l*). Vatans granted for the support of local hereditary offices are subject in a measure to disposal by the State. Subject to the support of the office-holder, they are usually partible and alienable amongst the group of co-sharers, but cannot be sold to strangers or burdened for more than the life of a sharer as to his own share. The appropriation of these estates to the public service is now secured, and the competence of individual sharers is strictly limited by statute (*m*).

They probably in many cases originated in an exemption, or a partial exemption, from the Government assessed land-tax of lands held as private property; but to these were generally added various haks or dues now abolished (*n*). Lands held for various

(*h*) Comp. Bom., Acts II. and VII. of 1863.

(*i*) See Hallam, Mid. Ages, Chap. II., Note IX.; Freeman, Hist. of Norm. Conquest, vol. V., pp. 132, 379; Maine, Anc. Law, Chap. VII., pp. 230, 233 (3rd. ed.); Munro by Arbuthnot, vol. I., pp. 152, 154; vol. II., 307; *Rajah Nilmoni Singh* v. *Bakranath Singh*, L. R. 9 I. A., at p. 122; *Imperial Gazetteer of India*, vol. VII., p. 519.

(*k*) Bom. Reg. XVII. of 1827 § 38.

(*l*) See *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*, I. L. R. 2 Bom. 346; Bom. Govt. Selections, No. XXXI. *passim*; Bom. Act VII. of 1863 § 2; Act II. of 1863, 1; *Sheikh Sultan Sani* v. *Ajinodin*, L. R. 20 I. A. 501; Madras Regulation XXV. of 1802, § 3; *Maharaja Mirza Sri Ananda* v. *Pidaparti*, L. R. 13 I. A. 32—an inam is inalienable but for Government revenue; *Dosibai* v. *Ishwardas*, L. R. 18 I. A. 22; *Golabdas* v. *Coll. of Surat*, L. R. 6 I. A. 54.

(*m*) See Index Tit. Vatan; Bom. Act III of 1874.

(*n*) See Steele, L. C. 204 ss.

other public services, such as the jyotishi vatans of astrologers, and in general all religious endowments (*o*) are subject to restrictions as to the estates held in them (*p*), and the conditions or accompanying obligations with which they are held by the successive tenants, which give them a special character (*q*). The enforcement of the public duties in these cases was formerly secured by forfeiture, in the necessary cases, of the exemption from assessment (r), but in the case of charitable endowments the ownership of the property itself was still recognised, and an opportunity was allowed to those interested to avoid the forfeiture (that is, the imposition of the assessment) by a suit to compel performance of the duty. In the Bombay Presidency charitable endowments are now in an anomalous position. They are mostly of a religious or quasi-religious kind, and the Government has withdrawn from all connection with religious endowments (*s*), while the provisions for the security of the property extend in Bombay only to the district of Canara (*t*). In the southern part of the Presidency it is expressly provided that charitable endow-

(*o*) The proportion of the land and of the public revenues dedicated to religious services is in some districts very considerable. It would have been much greater but for the indifference with which successive rulers resumed their predecessors' grants (see Sir T. Munro's Minutes, vol. I., p. 136 ss.), and the encroachments which, very often by collusion with the mohants or trustees of the dewasthans, were made upon the sacred estates and secured by prescription or an actual failure of evidence after a longer or shorter time (see Steele, L. C. 206). The large number of ancient grants for religious purposes which are from time to time discovered, show that the greater part of the land must thus have been placed *extra commercium*, but for the negligence and the revolutions by which the dedicated estates were restored to common use. The Peshwa used, like the kings of England, sometimes to resume religious endowments while he made up his mind who was best entitled to take them (*ibid.*), but an avowed resumption of such property was virtually unknown. (*The Collector of Thanna* v. *Hari Sitaram*, Bom. H. C. P. J. F. for 1882, p. 206; I. L. R. 6 Bom. 546.)

(*p*) These interests and all sources of a periodical income (" nibandh ") are looked on by the Hindu law as of the character of immoveable property. See Col. Dig., Book II., Chap. IV. T. 27, Comm.; Yajn. II. 122; Mit., Chap. I., sec. V., paras. 3, 4; *Vithal Krishna Joshi* v. *Anant Ramchundra*, 11 Bom. H. C. R. 6; *Divakar Vithal* v. *Harbhat*, Bom. H. C. P. J. F. for 1881, p. 106.

(*q*) See *Ukoor Doss* v. *Chunder Sekhur Doss*, 3 C. W. R. 152; *Prosunno Koomari Debya* v. *Golab Chand Baboo*, L. R. 2 I. A. 145; *Narayan* v. *Chintaman*, I. L. R. 5 Bom. 393.

(*r*) Bom. Reg. XVII. of 1827 § 38.

(*s*) Act XX. of 1863 § 22.

(*t*) Bom. Act VII. of 1865.

ments held free from land-tax shall be inalienable (*v*), but civil hereditary offices with inams attached to them are alienable (*w*). In Bengal, generally speaking, Ghatwali hereditary tenures cannot be alienated (*x*). Elsewhere, and as to all property not included in the provision, the statutable safeguard is wanting; but the generally inalienable character of endowments under the Hindu, as under the Mahomedan law, is recognised by the Courts (*y*).

The sharers in Bhagdari and Narwadari villages are subject to special restrictions in dealing with their shares, of which custom, now ratified by statute (*z*), forbids the division. In these estates, too, there are special laws of succession ranking originally perhaps as rules of a family or a class as such. Where their prevalence is proved effect is given to them as customary law (*a*). The exclusion of a daughter from succession may probably have originated in the fear that the share would in such a case, through her marriage, pass to heirs who were strangers to the "bhau-band" or fraternity (*b*) constituting the village community, and

(*v*) Bom. Act II. of 1863 § 8; *Bhikaji Mahadev* v. *Babusha*, Bom. H. C. P. J. F. for 1877, p. 297.

(*w*) *Bhimappaiya* v. *Ramchandra*, I. L. R. 22 Bom. 427; Bombay Hereditary Officers Act, 1874, sec. 56.

(*x*) *Nilmoni Singh* v. *Bakranath*, L. R. 9 I. A. 104; *Tekait Kali Pershad* v. *Anund Roy*, L. R. 15 I. A. 18; *Narain Mullick* v. *Badi Roy*, I. L. R. 29 Cal. 227.

(*y*) *Khusalchund* v. *Mahadevgiri*, 12 Bom. H. C. R. 214; *Narayan* v. *Chintaman*, I. L. R. 5 Bom. 393; *The Collector of Thanna* v. *Hari Sitaram*, Bom. H. C. P. J. F. for 1882, p. 207. The Indian Trusts Act II. of 1882, § 1, does not apply to Bombay, nor does it anywhere affect charities.

(*z*) Bom. Act V. of 1862.

(*a*) *Pranjivan Dayaram* v. *Bai Reva*, I. L. R. 5 Bom. 482.

In the Panjab there are many instances of restrictions imposed in the interest of the clan or group of co-proprietors descended from the original band of occupants of the waste, or conquerors of land already occupied, who held part in common and distributed the rest something after the fashion of the Corinthian Geomori in dealing with the territory of Syracuse. See the work quoted below.

(*b*) In the Panjab women as they marry persons not members of the village community do not transmit a right to the village lands, which are thus preserved to the community. See Tupper, Panj. Cust. Law, vol. II. 58, 145, 175, 177. The prevention of similar mischiefs engaged the care of most ancient legislators or of the communities whose customs they embodied. See Numbers, Chap. XXVII., XXXVI. The Athenian law compelled the nearest male relation to marry the female *epikleros*, taking the estate with her. Isacus III. 64, Sir W. Jones' Works, vol. IX., p. 103; Smith's Dic. Antiq. *sub voce*. Comp. Ruth., Chap. IV.

jointly and severally responsible for the contribution of their village to the land-tax. Mirasdars were at one time, it would seem, subject to restrictions in favour of the village community (*c*). They could reclaim their lands in theory after any lapse of time (*d*). This was inconsistent with the laws of limitation, and even with the prescription recognised by the Hindu law (*e*). The joint mirasi village community had generally broken up even under the Indian rule, and the mirasdar is, through the elevation of the class once below him, distinguishable only on Inam estates as a tenant at a quit rent or at a reasonable rent (*f*), not subject to ejectment so long as he pays it.

Other special customs might be referred to (*g*), but these not forming a part of the general Hindu law cannot be here treated in such detail as would be useful. We proceed to the remarks on the capacity of the owner to deal with his property apart from special circumstances which are of general application.

It is not competent to those interested in an estate to alter the course of devolution by any mutual arrangement (*h*). *Ipso jure heres exsistit* (*i*) and an agreement which attempts to establish a new line of descent unknown to the law is inoperative (*k*). So far as their own interests are concerned, the parties who share the ownership may generally deal with them at their pleasure—even to parting with the whole or subjecting their enjoyment to any burdens consistent with public policy (*l*). This rests on the

(*c*) See on miras generally, Steele, L. C. 207; Mr. Chaplin's Rep., para. 14 ss.; Rev. Sel., vol. IV.; Madras Mirasi papers; *Vyakuntha Bapuji* v. *Government of Bombay*, 12 Bom. H. C. R. App. 68 ss.

(*d*) *Vyakuntha Bapuji* v. *Government of Bombay*, 12 Bom. H. C. R. App. 50.

(*e*) *See Babaji and Nanaji* v. *Narayan*, I. L. R. 3 Bom. 340; *Tarachand Pirchand* v. *Lakshman Bhavani*, I. L. R. 1 Bom. 91, and the cases referred to at p. 94.

(*f*) *Prataprav Gujar* v. *Bayaji Namaji*, I. L. R. 3 Bom. 141. The mirasi holdings may be compared with the customary tenancies of the North of England; see *Burrell* v. *Dodd*, 3 Bos. & P. 378.

(*g*) As in *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C. R. 249, and the cases there referred to.

(*h*) *Myna Boyee* v. *Ootaram*, 8 M. I. A., at p. 420; *Balkrishna Trimbak* v. *Savitribai*, I. L. R. 3 Bom. 54.

(*i*) Comp. Maine's Anc. Law, Chap. VI., p. 188 (3rd ed.).

(*k*) *Rajender Dutt* v. *Sham Chund Mitter*, I. L. R. 6 Cal., at p. 115. Comp. Clark, Early Rom. Law, pp. 117 ss.

(*l*) But only such. Thus an agreement by which an adopted son resigned the bulk of the family property to his adoptive mother was pronounced void. Q. 15 MS.

recognition by the State of individual freedom in dealing with property, while the freedom is coupled with a present interest, and a capacity for varying the management according to circumstances (*m*). But when these conditions fail it is only to a limited and prescribed extent that the State allows him who is no longer able personally to exercise the power of appropriation and use of the property to impose terms on its enjoyment by others (*n*). Thus by will the owner may make such dispositions only as the law (*o*) allows as consistent with the general welfare (*p*). The Hindu law does not tolerate the abeyance of an estate (*q*). It prescribes a certain mode of devolution, and from him in whom unqualified proprietary right has once become vested, it must, in the absence of a will made by him, not by a predecessor, devolve in that way (*r*). The owner may make a gift or a will which, as to property fully at his disposal (*s*), will operate according to the analogy of the law of gifts, but having thus created rights in the beneficiaries, he cannot, except subject to strict limitations, cut down those rights by further dispositions (*t*). The immediate beneficiary may be limited to a life-interest if the remainder is given to a person in existence at the time of the gift; and a will

(*m*) See Col. Dig., Book II., Chap. II. T. 12, Comm.; T. 24, Comm.

(*n*) "Quatenus juris ratio patitur." The general subordination of private property and its disposal to the discretion of the sovereign under whose protection it is enjoyed is insisted on by Jagannatha in Col. Dig., Book II., Chap. IV. T. 15, Comm. Comp. Laboulaye, Hist. du Droit de propriété Foncière, p. 62.

(*o*) Including the custom of his province, caste or class. See Col. Dig., Book V., Chap. V. T. 365; *Sreemutty Kristoromoney Dossee* v. *Maharajah Norendro Krishna Bahadur*, L. R. 16 I. A. 29; *Tarakeswar* v. *Shoshi*, L. R. 10 I. A. 51.

(*p*) *Kumara Asima Krishna Deb* v. *Kumara Kumar Krishna Deb*, 2 Beng. L. R. 11 O. C. J.

(*q*) *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri*, I. L. R. 7 Cal. 178.

(*r*) "A man cannot create a new form of estate or alter the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy," *per* Turner, L.J., in *Soorjimony Dossee* v. *Deenobundo Mullick*, 6 M. I. A., at p. 555. A mahant has no power to say who shall succeed his own successor, *Greedharee Doss* v. *Nundkishore Dutt*, 1 Marsh. 573; S. C. 11 M. I. A. 405; *Raikishori Dasi* v. *Debendranath Saicar*, L. R. 15 I. A. 37; L. R. 16 I. A. 29; L. R. 10 I. A. 51.

(*s*) *See Lakshman* v. *Ramchandra*, I. L. R. 5 Bom. 49; *Haribhat* v. *Damodarbhat*, I. L. R. 3 Bom. 171. See The Testamentary Power, p. 215.

(*t*) *Maccundas* v. *Ganpatrao*, Perry's Or. Cases, 143; see *Annantha Tirtha Chariar* v. *Nagamuthu Ambalagaren*, I. L. R. 4 Mad. 200; *Mokoondo Lal Shaw* v. *Ganesh Chunder Shaw*, I. L. R. 1 Cal. 104.

speaks at the death of the testator, but as by the Hindu law of the Mitakshara School there must be some one in existence to take a gift (*v*) as well as to bestow it, a bounty to persons unborn or who may be born or unborn according to circumstances cannot take effect (*w*). An attempt to provide for unborn grandchildren of the donor by a gift for their benefit to a son-in-law was declared by the Sastri to be void on account of the partial reserve of the ownership which this involved (*x*).

There is an exception in the case of public grants (*y*) of the nature of jagirs (*z*) or of watans for the support of a family or to maintain a public office (*a*), but not one extending the power of private disposal. To these grants effect must be given according to the intention of the Sovereign power in making the grant, which itself may make the estate impartible (*b*) and determine the mode of devolution (*c*).

(*v*) Comp. the Transfer of Property Act IV. of 1882, secs. 122, 129. A distinct change of physical possession, though generally necessary (see below, Book II., Introd., Signs of Separation), is dispensed with in the case of a wife or an infant or other wholly dependent person who is obviously benefited, under circumstances in case of an absent person, and where the exercise of the right does not consist in or require possession. 2 Str. H. L. 26; *ibid.* 7, 427; *Lalubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom. 299, 326; *Bai Suraj* v. *Dalpatram Dayashankar*, I. L. R. 6 Bom. 380, 387. In Bengal, it is said, in *Narain Chunder Chuckerbutty* v. *Dataram Roy*, I. L. R. 8 Cal., at p. 611, that delivery of possession is not "necessary to give full validity and effect to a transfer for valuable consideration." Under the Transf. of Prop. Act IV. of 1882, sec. 54, the mere concurrence of the will of the contracting parties does not create an interest in the property intended to be sold unless it is manifested by a registered instrument or in petty cases by a change of possession.

(*w*) See *Soorjee Mony Dossee* v. *Deenbundo Mullick*, 9 M. I. A. 123; *Tagore* v. *Tagore*, L. R. S. I. A., at pp. 67, 70, 74; *Rajendar Dutt* v. *Sham Chunder Mitter*, I. L. R. 6 Cal. 116.

(*x*) See Digest of Vyavasthas I., Chap. II., sec. 7, Q. 17.

(*y*) As to jurisdiction in such cases, see Act 23 of 1871 and *Maharaolal Mohansingji Jeysingji* v. *The Government of Bombay*, L. R. 8 I. A. 77.

(*z*) As to these, see *Ramchandrarao Narayan Mantri* v. *Venkatrao Madhava Mantri*, Bom. H. C. P. J. F. 1882, p. 234, and the cases cited there.

(*a*) See now Act 23 of 1871, Bom. Act III. of 1874; *Radhabai* v. *Anantrao*, I. L. R. 9 Bom. 198.

(*b*) See *Raja Lelanund Sing Bahadoor* v. *The Bengal Government*, 6 M. I. A., at p. 125; *Radha* v. *Buddah*, I. L. R. 22 Cal. 938; *Bhimapaiya* v. *Ramchandra*, I L. R. 22 Bom. 422; *Madhava* v. *Sridhar*, I. L. R. 37 Bom. 409.

(*c*) See *Ramchandrarao Narayan Mantri* v. *Venkatrao Madhava Mantri*, Bom. H. C. P. J. F. 1882, at p. 233; *Gulabdas Jagjivandas* v. *The Collector of Surat*, L. R. 6 I. A. 54; *Raja Nilmony Singa* v. *Bakranath Sing*, decided by

The same principle has been applied to a village astrologer or priest, and even to cases of private estates where the original grant was, or must be presumed to have been, made for the support of an hereditary line of performers of religious functions for which such succession was necessary or at least proper. The decision against a dealing by the officiating holder of a purohitta in 2 Str. H. L. 12, 13, and similar cases may be referred to this principle.

To ordinary private grants free from a sacred or public connexion a different rule applies (*d*); they can operate only within the lines prescribed by the general law, as Government grants also do in the absence of special limitations expressed or implied in the nature of the grant (*e*). This applies to a Toda Giras hak as distinguished from a pension (*f*), as to all ordinary Inams (*g*).

It is thus, apparently, that we must understand and apply the decision of the Judicial Committee in *Surjeemonee Dossee's Case* (*h*). A Hindu may by settlement or by will dispose of "self-acquired property by way of remainder or executory devise upon an event which is to happen at the close of a life in being" (*i*), but a gift cannot take effect unless the event upon the happening of which it is made contingent has happened before the testator's death (*k*). For the Bombay Presidency the power of a Hindu to make a testamentary disposition of whatever is his absolute property is now clearly established (*l*). So also in the North-West

the P. C. on 10th March, 1882; S. C. L. R. 9 I. A. 104; Ellis in 2 Str. H. L. 364, 366. Comp. Maine's Anc. Law, p. 230.

(*d*) *Gulabdas Jagjivandas* v. *The Collector of Surat*, L. R. 6 I. A., at p. 62.

(*e*) 1 Str. H. L. 209, 210; *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*, I. L. R. 2 Bom. 346; *Sanniyasi Razu* v. *Sahir Zemindar*, I. L. R. 7 Mad. 268; *Mahadevi* v. *Vikrama*, I. L. R. 14 Mad. 375; *Radha* v. *Buddha* I. L. R. 22 Cal. 938.

(*f*) *Ganeshgiri Gosava* v. *Baba bin Ramapa Naik*, Bom. H. C. P. J. F. for 1881, p. 96.

(*g*) See below, Digest of Vyavasthas, Chap. II., sec. 6 A, Q. 8; Steele, L. C. 206; *Padapa* v. *Swamirao*, L. R. 27 I. A. 86; S. C. I. L. R. 24 Bom. 556; *Appaji* v. *Keshav*, I. L. R. 15 Bom. 13.

(*h*) 9 M. I. A. 123; see *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 I. A. 138; *Ram Lal Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A., at p. 61.

(*i*) *Supra.* The executory devise is itself limited according to the principles laid down in the *Tagore Case*, see L. R. S. I. A. pp. 70, 72, 76.

(*k*) *Narendra Nath Sarcar* v. *Kamalbansi*, L. R. 23 I. A. 18.

(*l*) *Bhagvan Dulabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641; *Laskshmibai* v. *Gunpat Moroba*, 5 Bom. H. C. R. 135, 138, 139 O. C. J.; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1, 37.

Provinces under the Mitakshara (*m*) and in Madras (*n*). But the nature and extent of the power are not to be "governed by any analogy to the law of England" (*o*). "The law of wills has grown up from a law which furnishes no analogy but that of gifts (*p*), and it is the duty of tribunals dealing with a case new in the instance to be governed by the established principles and analogies that have prevailed in like cases" (*q*), and by any construction of the text laid down by authority, although it may not commend itself to the judgment of the Court (*r*). Hence it was that in the *Tagore Case* "the final decision, speaking generally, was that the limitation in tail and the subsequent limitations were contrary to the Hindu law, and void, and that upon the expiration of the first life-interest, the appellant, the testator's only son, was entitled as heir to the estate" (*s*). The allowance of wills was not really opposed to the principles of the Hindu law, as will be shown hereafter (*t*). It was merely a development of the principles already recognised, quite analogous to that which the English law of devise has undergone in the course of three centuries; but the Hindu law requiring a disposition to be in favour of some definite object existing when it is declared, many arrangements possible under the English law cannot be made.

In *Shoshi Shikhuressur Roy* v. *Tarokessur Roy* (*v*) it was held that a gift is bad in so far as it is limited to male descendants. The language used in that case relating to the gift over to the testator's surviving nephew or nephews was, however, deemed not inconsistent with an intention of the testator that the whole augmented share should pass to the plaintiff, the surviving nephew. This effect was given to it, but having regard to the doctrine frequently acted upon by courts in India, it was held he

(*m*) *Nana Nurain Rao* v. *Huree Panth Bhao*, 9 M. I. A. 96; *Adjoodhia Gir* v. *Kashee Gir*, 4 N. W. P. H. C. R. 31.

(*n*) *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*, 6 M. I. A. 309; Colebrooke in 2 Str. H. L. 435 ss.

(*o*) *Mt. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*, 10 M. I. A. 279; per Turner, L. J., in *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*, 8 M. I. A. at p. 85.

(*p*) 2 Str. H. L. *loc. cit.*

(*q*) *Tagore Case*, L. R. S. I. A. at p. 68.

(*r*) *Bai Kesserbai* v. *Morariji*, I. L. R. 30 Bom. 431, P. C.

(*s*) *Ganendro Mohun Tagore* v. *Rajah Juttendro Mohun Tagore*, L. R. 1 I. A. at p. 392.

(*t*) See below on the Testamentary Power.

(*v*) I. L. R. 6 Cal. 421; S. C. L. R. 10 I. A. 51.

was only entitled to a life-estate. In *Sreemutty Kristoromoney Dossee v. Maharajah Norendro Krishna* (*w*) it was held that a Hindu could not create an estate of inheritance unknown to the Hindu law. He may, however, create an absolute estate subject to be defeated by a subsequent event, provided (1) that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, and (2) that the gift over must be in favour of somebody in existence at the time of the gift.

As the law of wills follows the law of gifts, though with some differences (*x*), it will be understood that a grant in favour, partly, of persons not in existence at the time of execution so far fails (*y*) with the estates dependent on it. When it is said "that a man cannot by gift *inter vivos* or by will give property absolutely to another, and yet control his mode of enjoyment in respect of partition or otherwise" (*z*), what is meant is that such estates and interests, and such only, as the law recognises can be conferred or created (*a*). No one really intends to give an estate which shall at the same time be "absolute" and conditional or limited: what people try to do is to mould the interests they dispose of in ways unknown to the law, or which the law to which they are subject does not allow. "Great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property" (*b*). The complication of rights that arises even under any existing system with its defined and limited interests is enough to show that an unlimited power of variation would lead to unlimited litigation and make land almost unmarketable; and this conviction arrived at by the rulers would of itself justify them, according to the

(*w*) L. R. 16 I. A. 29.

(*x*) *Kherode Money Dossee* v. *Doorga Money Dossee*, I. L. R. 4 Cal. at p. 472; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 5 Bom. 48; *Tarachand* v. *Reeb Ram*, 3 Mad. H. C. R. at p. 55.

(*y*) *Soudaminey Dossee* v. *Jogesh Chunder Dutt*, I. L. R. 2 Cal. 262; *Kherodemoney Dossee* v. *Doorgamoney Dossee*, I. L. R. 4 Cal. 455; *Rajender Dutt* v. *Sham Chund Mitter*, I. L. R. 6 Cal. at p. 116; *Sir Mangaldas Nathubhoy* v. *Krishnabai*, I. L. R. 6 Bom. 38.

(*z*) *Rajender Dutt* v. *Shamchund Mitter*, I. L. R. 6 Cal. at p. 116. See also *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren*, I. L. R. 4 Mad. 200; *Ashutosh Dutt* v. *Doorga Churn Chatterjee*, L. R. 6 I. A. 182; *Sookhmoy Chunder Dass* v. *Manohurri Dasi*, L. R. 12 I. A. 103; *Raikishori Dasi* v. *Debendranath Sircar*, L. R. 15 I. A. 37.

(*a*) See per Willes, J., in the *Tagore Case*, L. R. S. I. A. at p. 65.

(*b*) Per Lord Brougham in *Keppell* v. *Bailey*, 2 Myl. and K. 517.

Hindu law, in prescribing the necessary restraints (*c*) and refusing to give legal effect to any transaction not falling within the recognised limits. But as the law thus gives effect to only a certain range of intentions (*d*), the instruments creating rights, or having this for their purpose, are construed, if they can be reasonably construed, so as to express something which the law will carry out (*e*). Thus, where a grant to a sister contained the words " no other heirs of yours (than lineal descendants) shall have any right or interest," which it was said went to create an estate tail in the descendants contrary to the Hindu law, the grant was construed as one of the whole interest in the property subject to defeasance should the grantee die without children (*f*), and a gift to a sister of a share in a village for maintenance, with the words " on your death, your husband, sons, grandsons and other heirs in succession will continue to enjoy and possess the power of disposal by gift or sale," was held to confer on her a heritable estate (*g*). Unambiguous dispositive words in a will, however, are not to be controlled or qualified by any general expression of intention (*h*). Where a Hindu widow in Bengal takes her hus-

(*c*) See Narada, quoted Macn. H. L. 152; and Col. Dig., Book III., Chap. II. T. 28.

(*d*) *Tagore Case*, L. R. S. I. A. at p. 64. Domat's C. L., sec. 2413.

(*e*) See *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, 6 M. I. A. 1; *Sreemutty Soorjeemoney Dossee* v. *Denobundo Mullick*, *ibid.* at p. 550; *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, 12 M. I. A. 380; *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 I. A. at p. 147.

(*f*) *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 I. A. 138. *See Krishnarav Ganesh* v. *Rangrav*, 4 Bom. H. C. R. 1 A. C. J.; and *Bahirji Tannaji* v. *Oodatsing et al.*, Bom. H. C. P. J. F. 1872, No. 33; *Rajah Nursing Deb* v. *Roy Koylasnath*, 9 M. I. A. 55.

In the case of a grant to a Nadgavda (a headman of a district) by Tippu Sultan, it was contended that the expression " aulad aflad " in the Persian implied and necessitated a descent different from what the Hindu law prescribed in a family subject to a rule of impartibility. It was ruled, however, that the words might be construed as meaning " hereditary not merely personal," and it was said " the precise devolution of the estate would nevertheless be governed by the law to which the grantee was subject so far as this was consistent with keeping the estate together so as to afford a means of support to the office to which it was attached." *Timangavda* v. *Rangangavda*, Bom. H. C. P. J. F. 1878, p. 240, at p. 242. Comp. *Ram Lal Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. at pp. 61-62; *Rajah Venkata Narasimha Appa Rao* v. *Raja Narayya Appa Row*, L. R. 7 I. A. pp. 38, 48, 49; and as to the preservation of the estate for the intended purpose, see *Raja Nilmoney Sing* v. *Bakranath Sing*, L. R. 9 I. A. 104.

(*g*) *Basant Kumari Debi* v. *Kamikshaya Kumari*, L. R. 32 I. A. 181.

(*h*) *Lalit Mohun* v. *Chukkanlal*, L. R. 24 I. A. 76.

band's share by arrangement with his brethren, the instrument will be construed with reference to the Hindu law in order to determine the estate she has obtained (*i*), but in the case of *Musst. Bhagbutty Daee* v. *Chowdry Bholanath Thakoor* (*k*) the Judicial Committee construed a will as a family settlement, completed by a document executed by an adopted son, whereby the widow became entitled to use as she pleased and invest as she pleased, as her separate property, all that she derived from the estate given to her for life. The grant by a Hindu to his wife must be specific, whether it is by way of maintenance or as stridhan, for in the absence of such specific grant she takes only a limited estate (*l*).

The Courts refuse effect to an intended perpetuity in favour of mere private persons, even though it is disguised as a religious endowment (*m*). It is only in such a form, perhaps, that a perpetuity could be devised, as the creation of a right can be only in favour of a person in existence at the time of the declaration (*n*). An idol does not expire, and the emoluments of its service may be limited to a family (*o*).

(*i*) *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick*, 6 M. I. A. 1.

(*k*) L. R. 2 I. A. 256.

(*l*) *Braja Kishore* v. *Kudana*, L. R. 26 I. A. 66.

(*m*) *Shookmoy Chunder Dass* v. *Monohari Dassi*, I. L. R. 7 Cal. 269. See *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb*, 2 Ben. L. R. 11 O. C. J.; *Sookhmoy Chunder Dass* v. *Monohurri*, L. R. 12 I. A. 103; *Raikishori Dasi* v. *Debendranath Sircar*, L. R. 15 I. A. 39.

(*n*) *Tagore Case*, *supra*; *Chundi Churn* v. *Sidheswari Debi*, L. R. 15 I. A. 149.

(*o*) See below. The ideal personality of the idol is recognised in many cases, as in *Kondo* v. *Babaji*, Printed Judgments for 1881, p. 337, and *Juggodumba Dossee* v. *Puddomoney Dossee*, 15 Ben. L. R. 318. Under the Roman law the *res sacrae* in the higher sense were dedicated to the public divinities, and this dedication required the concurrence of the public authority. When Christianity became the religion of the Empire the same principle was recognised, though the object of the dedication was changed, and it found its way into England, as into other countries, with an omission in great part of the condition of the assent of the sovereign authority, until at a later time the laws of mortmain reasserted the interest of the State in its territory. The sense of the dominant interest of the sovereign makes itself manifest even amongst the pious Hindus in Narada's rule that "whoever gives his property away (that is, makes a religious dedication, as gifts for merely secular purposes were discountenanced) must have a special permission to do so from the king. This is an eternal law" (Nar. Transl., p. 115). See Vyav. May. Chap. IV., sec. VII., para. 23. Besides the higher *res sacrae* the Romans had the *res sacrae* of each family descending as an integral part of its estate. These disappeared with the growth

According to the Viramitrodaya (*p*) a conditional gift is invalid (as under the Mitakshara law). The instance adduced might be construed as one of conditional defeasance. It is that of ornaments bestowed on a woman subject to a condition against using them except at particular festivals. A gift so conditioned, Mitramisra says, is void, but it seems rather that the gift is complete but subject to a conditional defeasance (*q*), or else that the condition or conditional revocation is void. It is a recognised principle that a mere licence, however liberal, to a woman and to her exclusively, to use ornaments on particular occasions (*r*), and on those only, does not constitute a gift (*s*). The ownership remains with the husband or other licensor, and forms part of the property to be divided in a partition (*t*). A conditional gift is not as such reckoned amongst those which are essentially void by

of Christianity, but traces of them are to be found still. In India these *sacrae privatae* are still intimately connected with the heritage. No legal restriction has been placed on the dedication of property to either public or private religious purposes; but in the latter case, though not in the former, the consensus of the whole family may annul the dedication. Per Sir M. E. Smith in *Koonwar Doorganath Roy* v. *Ramchunder* Sen, L. R. 4 I. A. at p. 58, and see *Rajendranath Dutt* v. *Shekh Mahomed Lal*, L. R. 8 I. A. 135; *Jaggut Mohini Dossee* v. *Mt. Sokheemoney Dossee*, 14 M. I. A., at p. 302; see also *Maharanee Brojosoondery Debea* v. *Ranee Luchmee Koonwaree*, 20 C. W. R. 95; *Subbaraya Gurukal* v. *Chellappa Mudali*, I. L. R. 4 Mad. 315; *Venkateswara Iyan* v. *Shekhari Varma*, L. R. 8 I. A., at p. 149; *Khusalchand* v. *Mahadevgiri*, 12 B. H. C. R. 214; *Manohar Ganesh* v. *Keshavram Jebhai*, Bom. H. C. P. J. 1878, p. 252; *Dhadphale* v. *Gurav*, I. L. R. 6 Bom. 122. That a stranger, though a Brahman, cannot be intruded as the celebrant of private ceremonies, see *Ukoor Doss* v. *Chunder Sekhur Doss*, 3 C. W. R. 152. The inalienable character of land consecrated to religious purposes has been generally recognised under the Roman, Christian, and Mahomedan systems as well as by the Hindu law, and under all has sometimes been felt as an embarrassment; see Ortolan Inst. v. II., p. 230 ss.; Bowyer, Civ. Law, p. 69; Spelman De non Tem. Eccles. Ch. VI. Ham. Hed. B. XV. As to the respect due to sacred property under different circumstances see Grotius, De Jur. B. et P. Lib. III. Cap. V. § II., compared with Vyav. May. Chap. IV. sec. I. para. 8.

(*p*) Transl., p. 221.

(*q*) Comp. the Transf. of Prop. Act, IV. of 1882, sec. 126.

(*r*) Vishnu VII. 22.

(*s*) *Kurnaram Dayaram* v. *Hinibhay Virbhan*, Bom. H. C. P. J. F. 1879, p. 8. See below on Stridhana. Under the English law a gift by a husband to his wife of ornaments makes them part of her paraphernalia, of which she cannot dispose without his assent during his life. See *Graham* v. *Londonderry*, 3 Atk. 394.

(*t*) *Infra*, Book II. Introd. § 5 B. *ad fin.*; Vyav. May. Chap. IV. sec. VII. para. 22; 2 Str. H. L. 424, 370.

Narada (*v*). The word *upadhi*, which Mitramisra construes as "condition," usually implies fraud (*w*), and every gift, it would seem, is by the strict Hindu law accompanied by a tacit condition of revocation if the intended purpose be not fulfilled (*x*). Regard being had, then, to the principle that a decision in such cases must be governed by the reason of the law (*y*), it seems that a condition subsequent does not invalidate a gift (*z*), though a condition precedent may do so through preventing any present change of ownership or of possession as owner (*a*), while a condition subsequent which is repugnant to the estate, granted as recognised by the law, is to be deemed void (*b*). Now ownership, when it subsists singly, is recognised as consisting in a right to

(*v*) Transl. p. 59; Vyav. May. Chap. IX. 6. Comp. *Lachmi Narain* v. *Wilayti Begam*, I. L. R. 2 All. 433.

(*w*) See Col. Dig. Book II. Chap. IV. sec. II. T. 54, Comm.

(*x*) Narada, Transl. p. 60; Col. Dig. Book II. Chap. IV. T. 53, 56, Comm.; Manu. VIII. 212.

(*y*) Col. Dig. Book II. Chap. IV. T. 28, Comm, *sub fin.*

(*z*) *Ram Lall Mookerje* v. *Secretary of State for India*, L. R. 8 I. A. 46.

(*a*) See Digest of Vyavasthas, Chap. II., § 7, Q. 17.

(*b*) Under the Roman law there were transactions which did not admit of a condition or a term annexed to the generation of the proposed legal relation, see Maine's Anc. Law, Chap. VI., p. 206 (3rd edition), Goud. Pand. 155, and the chief expressions of will as in marriage, divorce, adoption and partition repel as incongruous the suspensive effect of a postponement of the completion of the intended purpose which leaves the most weighty interests in uncertainty, and clogs intermediate acts of daily necessity with paralysing doubt. The principle, though not precisely formulated, is one which operates in the English law in cases not left to the unfettered volition of the parties. It extends even to the acceptance of a bill of exchange (see Act 26 of 1881, secs. 86, 91). Here the promise is absolute, the right immediate, though the fulfilment is deferred.

That a condition subsequent could not be annexed to marriage was held in *Seetaram* alias *Kerra Herra* v. *Musst. Aheeree Heeranee*, 20 C. W. R. 49 C. R. Whether a father giving his son in adoption can abandon the son's rights arising from the adoption, as ruled in *Chitko Raghunath* v. *Janaki* (11 Bom. H. C. R. 199) was questioned by the Privy Council in *Ramasawmi Aiyan* v. *Vencataramaiyan*, L. R. 6 I. A., at p. 208, and the High Court of Madras has declared that the adopted son, on attaining his majority, may get any such arrangement set aside. See *Lakshamana Rau* v. *Lakshmi Ammal*, I. L. R. 4 Mad., at p. 163. An agreement was pronounced null by the Sastri whereby an adoptive mother obtained from the son she adopted a resignation to her of the bulk of the family property. Such an agreement could not, the Sastri thought, be annexed to sonship, and he assigned to the adopted son the full rights of an heir, subject to the obligation of maintaining the adoptive mother. Adoption, Q. 15, MS.

deal with the object owned at pleasure (*c*), and though some kinds of property cannot be freely disposed of by the representative owner, either on account of other persons being interested or because of the necessary preservation of the corpus of the property for particular purposes (*d*), yet generally the ownership implies a power of alienation (*e*) as well as of use and abuse, except so far as the public law may be infringed (*f*) by any proposed dealing with the property. A grant, therefore, of ownership or a will (*g*) with a condition against alienation or the other common uses of ownership operates, while the condition is void as repugnant to the ownership created (*h*); but in *Sookhmoy Chunder Dass* v. *Manohurri* (*i*) it has been held that a gift simply of the enjoyment of the profits with the object of creating a perpetuity voided the whole will. It must be assumed that the grantor rather intended his act to be effectual than ineffectual, even though he should fail to secure the performance of some condition legally impossible or injurious; and the courts representing the State are not called on to give effect to commands or engagements which would violate their "dharm" or cause mischief to the community (*k*). But the grantor may stipulate or provide for various advantages to himself or to others (*l*) arising out of the property, and so far diminish the advantages of the proprietor in it. Co-owners, too, may make similar arrangements *inter se* as to their common property (*m*), reserving rights, for instance, to themselves in stated mutual

(*c*) See Viramit., Transl. pp. 34, 138. Narada, quoted Col. Dig., Book II., Chap. IV. T. 6.

(*d*) *Narayan* v. *Chintamon*, I. L. R. 5 Bom. 393. See above, p. 181.

(*e*) Narada, *ut supra*; Col. Dig., Book II., Chap. IV. T. 30, Comm.; Viramit. Transl. p. 138.

(*f*) Col. Dig., Book III., Chap. II. T. 28.

(*g*) *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Cal. 378.

(*h*) In the case of a charitable endowment an opposite principle prevails. Property sold in execution of a decree against a Mahant who had mortgaged it was recovered by the Vairagis associated with him as incumbered by a patent breach of trust which the Sastri said entitled the society to set the Mahant and his transactions aside. Q. 86, MS., Surat, 27th February, 1852.

(*i*) L. R. 12 I. A. 103.

(*k*) See Manu., Chap. VIII., sec. IV., para. 1; Col. Dig., Book III., Chap. II. T. 28.

(*l*) *Cally Nath Naugh Chowdry* v. *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Cal. at p. 388.

(*m*) *Nilkanth Ganesh* v. *Shivram Nagesh*, Bom. H. C. P. J. F. 1878, p. 237.

relations during and after a life interest which they join in granting (*n*). These stipulations the grantee personally must observe, and so must his heirs, as the Hindu law attaches a sacred value to a promise (*o*), but how far precisely they adhere to the property in the hands of alienees—that is, to use the English phrase, "run with the land"—can be determined only by degrees as actual cases arise (*p*). The Hindu law emphatically bids the judge to prevent the success of a fraud (*q*), and thus not only the doctrine of enforcing a representation which has been acted on (*r*), but of the obligation passing with the ownership (*s*) where public policy approves of the connexion, to a person who takes with notice of it, would be enforced in as full consistency with the Hindu law as with the English law (*t*). The law of Registration now enables every one who reserves any part of the ownership in property of which he is disposing to give virtual notice of this to every future purchaser (*v*). The omission to register any material stipulation will, in general, except in insignificant cases, deprive it of effect as an interest in the land, and perhaps turn the presumption of apparent fraud against him who has failed to take an obvious precaution (*w*).

The law of gift has been discussed with great subtlety by the Hindu lawyers on account of its close connexion with the law of sacrifices. The necessary concurrence at the same moment of the will of the donor and donee in passing some definite existing object from one to the other is usually insisted on (*x*) as a means

(*n*) A stranger to such an arrangement or to an award, though a relative, cannot rely on admissions in it, or relating to it, as a ground for rights to which the law does not entitle him. *Ganga Sahai* v. *Hira Singh*, I. L. R. 2 All. 809.

(*o*) Narada IV., 5, Transl. p. 59; Vyav. May. Chap. IX., sec. II. ss.; Col. Dig., Book II., Chap. IV. T. 3, 4, 5.

(*p*) See Transf. of Prop. Act, IV. of 1882, § 40.

(*q*) Manu. VIII. 165; Col. Dig., Book IV. T. 184; Vyav. May. IX. 10.

(*r*) See per Lord Cottenham in *Hammersley* v. *De Biel*, 12 C. F. 61 n.

(*s*) *Western* v. *MacDermott*, L. R. 2 Chap. Ap. 72; *Leech* v. *Schweder*, L. R. 9 Ch. A. 465, 475.

(*t*) *Juggutmohinee Dossee* v. *Sookhemoney Dossee*, 17 C. W. R. 41 C. R.

(*v*) See Act III. of 1877; Transf. of Prop. Act IV. of 1882, § 54, 59, 107, 123; *Ichharam Kalidas* v. *Govindram Bhowanishankar*, I. L. R. 5 Bom. 653; *Sobhagchand* v. *Khupchand Bhaichand*, I. L. R. 6 Bom. 193; *Bapuji Balal* v. *Satyabhamabai*, I. L. R. 6 Bom 490.

(*w*) Comp. *Tarachand* v. *Lakshman*, I. L. R. 1 Bom. 91.

(*x*) See Viramit, Tr. p. 31 ss; Dayabh., Chap. I., paras. 21-24; 2 Str. H. L.

of completing a gift; but Jagannatha points out that a debtor releases himself by assigning something yet to come into existence (*y*), and that an assignment of a periodical income operates necessarily through a past volition on each instalment as it falls due (*z*). Hence, he says, the gift of property is valid though it be accompanied by the donor's retention of a life interest (*a*), and so in the case of *Muhalukmee* v. *Three grandsons of Kripashookul* (*b*), it was said that a gift in Krishnarpan (religious charity) was good though possession was retained by the owner (*c*). In the case at 2 Macn. H. L. 207 it is said that a gift may be accompanied by the donor's retention for life; but then his subsequent gift accompanied by possession supersedes the deferred one. This would reduce the remainder arising on the donor's death to a mere equitable right (*d*), but the creation of the deferred right is at any rate not inconsistent with the Hindu law; and now by means of registration having virtually the effect of possession (*e*), great safety may be given to rights which are to be enjoyed only in the future (*f*). In the case of a near relation a mere gratuitous agreement thus becomes binding, though as between strangers void (*g*). As to all persons, however, it is said " Nothing in this section shall affect the validity

427; *Vithalrav Vasudev* v. *Chanaya*, Bom. H. C. P. J. F. 1877, p. 324. Comp. the Transf. of Prop. Act, IV. of 1882, § 122, 124.

(*y*) Col. Dig., Book II., Chap. IV. T. 43, Comm. The right in such a case passes immediately; it is the fruition of the right which is future. Comp. Savigny, Syst. § 385.

(*z*) See *Collector of Surat* v. *Pestonji Ruttonji*, 2 Morris 291, cited in *Maharaval Mohansingji Jeysingji* v. *The Government of Bombay*, L. R. 8 I. A. at p. 84. But in the case of *Babu Doolichand* v. *Babu Birj Bhookan* (decided 4th February, 1880) the Judicial Committee declined to affirm the principle that a merely expectant interest can be the subject of sale under the Hindu law. It is improbable, their Lordships say, that the principle of the English law, which allows a subsequently acquired interest to feed the estoppel can be applied to Hindu conveyances. Where the Transfer of Property Act, IV. of 1882, is in force, its provisions and exceptions must be considered along with this and similar judgments. See secs. 43, 54 of the Act.

(*a*) Col. Dig., Book II., Chap. II. T. 43, Comm.

(*b*) 2 Borr. R. at 561.

(*c*) See, however, *Lalubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom. at p. 331.

(*d*) See *Lalubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom. at p. 331.

(*e*) *Ibid.*, pp. 319, 332.

(*f*) *Abadi Begam* v. *Asa Ram*, I. L. R. 2 All. 162. See Act III. of 1877, sec. 50; Transfer of Property Act, IV. of 1882, secs. 54, 58, with sec. 5 where the Act is in force.

(*g*) Indian Contract Act, IX. of 1872, sec. 25.

as between the donor and donee of any gift actually made" (*h*). When the "gift is actually made" is left apparently to be governed by the law of the parties (*i*), and so amongst the Hindus by principles already partly considered (*k*). Whether a gift valid as against the donor is to all intents valid as against his representatives and his coparceners in a joint estate, is a point also left to be determined by the law of the parties (*l*). The distinction which the legislature had in view was probably one between the donor and his representatives on the one hand and his creditors or persons having claims on the property on the other. A Hindu husband, it has been held, cannot alienate by a deed of gift to his undivided sons by his first and second wives the whole of his immoveable property, though self-acquired, without making for his third wife, who has not forfeited her right to maintenance, a suitable provision to take effect after his death. After the husband's death, she is entitled to follow such property in the hands of her stepsons to recover her maintenance, her right to which is not affected by any agreement made by her with her husband in his lifetime. Her right is merely an inchoate right to partition, which she cannot transfer or assign away by her own individual act; and unless such right has been defined by partition or otherwise it cannot be released by her to her husband (*m*).

By the Hindu law, sale of land to be effectual had formerly to take the shape of a gift (*n*). The rule as to delivery and

(*h*) No reference to the enactment is made in the case of *Nasir Husain* v. *Mata Prasad*, I. L. R. 2 All. 891.

(*i*) See the Transfer of Property Act, IV. of 1882, secs. 122, 124.

(*k*) Under the English as under the Hindu law (see Col. Dig., Book V. T. 1, Comm. (vol. II. p. 514 Lond. edition, vol. II. p. 191 Madr. edition), "It requires the assent of both minds to make a gift as it does to make a contract," per Mellish, L.J., in *Hill* v. *Wilson*, L. R. 8 C. A. 896. But see also per Lord Mansfield in *Taylor* v. *Horde*, 1 Burr. at p. 124.

(*l*) As to coparceners see *Pandurung* v. *Naru*, Sel. Rep. 186; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A. 181; S. C. I. L. R. 5 Bom. 48; *Suraj Bansi Koer* v. *Sheo Proshad Singh*, L. R. 7 I. A. 88.

(*m*) *Narbadabai* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99.

(*n*) *Lalubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom. 299; 1 Str. H. L. 19. The exception of religious gifts from the general inalienability of the family estate under the early Hindu law had a close parallel in the Saxon and other Teutonic laws in Europe. Grants to the Church might be made without the concurrence of heirs, yet in Europe, exactly as in India, it was usual to obtain the signatures to a grant which might afterwards be disputed of all the persons interested. See Lex Sax. XV.; Laboulaye Histoire du Droit de Propriété

acceptance applies therefore equally to the one as to the other. But the Courts, in order to defeat fraud, will give an assistance to a purchaser for value which they will not to a mere gratuitous promisee (*o*), whose right, indeed, unless the transaction has been a "gift actually made," is, as we have seen, made null by the Indian Contract Act.

Though a proprietor cannot create interests of a kind unknown to the law, or give to his property an eccentric mode of devolution, and though his powers in these respects are more narrowly restricted by the Hindu than by the English law (*p*), yet he can carve out of his ownership many interests which his successors must recognise (*q*). Thus, as to his self-acquired property, he enjoys a virtual freedom of disposition as to the persons to be benefited by estates in themselves legal (*r*). As to the inheritance, his son's equal rights do not prevent him from burdening it with debts not prodigally or profligately incurred (*s*). If he dies with debts unsettled, but not secured by a specific lien, they do not form a charge on the estate itself (*t*), though the heirs taking the estate are so far answerable (*v*). It is assets for the discharge of the father's debts (*w*). A gift within reasonable

Fonçière en Occident, Lib. VIII., Chap. I. The first charters of *book-land* in England were granted to the Church, through which grants to laymen came in. See Stubbs, Const. Hist. I., 131; Elt. T. of Kent, pp. 15, 16; Mit. Chap. I., sec. I., para. 32; Vyav. May. Chap. II., sec. 1, para. 2; Col. Dig., Book II., Chap. IV. Text 33; Book V., Chap. VII. T. 390.

(*o*) See Col. in 2 Str. H. L. 433, 434.

(*p*) 1 Str. H. L. 25.

(*q*) See *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 I. A. 321; *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 6 I. A. at p. 104; *Jatha Naik* v. *Venktapa*, I. L. R. 5 Bom. at p. 21. The second proviso in Rule IV., sec. 11, Madras Act 8 of 1865 does not apply to leases which are *bonâ fide* and valid under the general Hindu law—only when they are a fraud upon the power of the grantor's successor as manager and to the prejudice of the successor.

(*r*) See Mit., Chap. I., sec. I., para 27; Vyav. May., Chap. IX., sec. 5; Smriti Chand, Chap. II., sec. I., paras. 22, 24, qualifying Chap. VIII., para. 25; Madhavya, paras. 16, 5; Col. in 2 Str. H. L. 439, 441; Varadraja, pp. 5, 8; *et infra*, Book II., Chap. I., sec. 2, Q. 2 and Q. 8.

(*s*) Col. Dig., Book II., Chap. IV. T. 15, Comm; *Hunooman Persaud Panday* v. *Musst. Babooee Munraj Koonweree*, 6 M. I. A. at p. 421.

(*t*) *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 I. A. 321; *Jamiyatram* v. *Parbhudas*, 9 Bom. H. C. R. 116.

(*v*) *Oolagappa Chetty* v. *Hon. D. Arbuthnot and others*, L. R. 1 I. A. 268.

(*w*) *Muttayan Chettiar* v. *Sangili*, L. R. 9 I. A. 128.

limits to any child must be given effect to (*x*), and so must a provision for a wife, a concubine, or an illegitimate child (*y*). These dependants are indeed entitled as of right to a provision even against the terms of a will (*z*) or a gift (*a*), though not as against a sale for the payment of a family debt which it is the duty of the head of the family to pay (*b*).

The general injunction to perform a father's promise must be regarded now rather as a moral than as a legal precept, and the obligation to pay the debts of the father does not extend to those of the other members of a family, even of a joint family, unless they have been contracted for the common good or under pressure of some severe necessity (*c*). When there are no sons or

(*x*) Viramit. Trans., p. 251; 1 Str. H. L. 24. A gift by a Joshi of a material part of his vatan to his daughter's children was pronounced void as against his adopted son, who, however, it was said, must make good a present of a reasonable portion, Q. 712 MS. The testamentary power under the Roman law seems to have received recognition on account of its enabling the testator to provide for his children in some measure, according to his affection for them. See Maine, Anc. Law, Chap. VII., p. 218 (and this section *sub fin*). *Bachoo* v. *Mankorebai*, I. L. R. 31 Bom. 373, P. C.; *Kamakshi* v. *Chakrapay*, I. L. R. 30 Mad. 452.

(*y*) *Salu* v. *Hari*, Bom. H. C. P. J. F. 1877, p. 34; *Rahi* v. *Govinda*, I. L. R. 1 Bom. 97. The mistress, it was said, must not alienate the house given to her by her patron, Q. 712 MS.

(*z*) *Comulmoney Dossee* v. *Ramanath Bysack*, 1 Fult. 189.

(*a*) *Narbadabai* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99; *Jamna v. Machul Sahu*, I. L. R. 2 All. 315.

The Hindu jurists who recognise the power of a father to make away with the patrimony, though he incurs sin in doing so, point to remedies analogous to those provided by the Roman law. The son has a right of interdiction to prevent improvident alienations. Mit., Chap. I., sec. VI., paras. 9, 10; and this, the Sastri said, applied equally to the adopted son and the brother, Q. 1735 MS. He may claim to have the gift or disposal set aside if he be thus impoverished as implying mental derangement on the part of the donor. Col. Dig., Book II., Chap. IV., sec. 2, T. 53, 54. Comp. Vyav. May., Chap. IX., 3, 6, 7. For the Roman law see Voet ad Pand. Lib. XXVII. T. X., paras. 3, 6, 7; Inst. Lib. II. Tit. XVIII., and Voet ad Pand. Lib. XXXIX. Tit. V., paras. 36, 37; Ortolan ad Inst. § 787 ss. 799; Poste's Gaius, pp. 51, 205; Mommsen, Hist. of Rome, Book I., Chap. XI., Eng. Transl., vol. I. p. 161.

(*b*) *Natchiarammal* v. *Gopal Krishna*, I. L. R. 2 Mad. 126.

(*c*) Mitak., Chap. I., sec. I., paras. 28, 29; 2 Str. H. L. 342; Col. Dig., Book I., Chap. V. T. 180, 181; *Ram Ratan* v. *Lachman Das*, I. L. R. 30, All. 460; *Aghore Nath* v. *Grish Chunder*, I. L. R. 20 Cal. 18; *Sakharam* v. *Devji*, I. L. R. 23 Bom. 372; *Baldeo* v. *Mobarak*, I. L. R. 29 Cal. 583; *Raghunathji* v. *Bank of Bombay*, I. L. R. 34 Bom. 72; *Sanka Krishna* v. *Bank of Burma*, I. L. R. 35 Mad. 692; *Bishambar* v. *Sheo*, I. L. R. 29 All. 166.

grandsons holding a joint estate with the ancestor the line of succession is prescribed by law; but, subject to provisions for maintenance, the property is entirely at the disposal of the owner notwithstanding the existence of collateral heirs (*d*).

There does not seem to be good authority for saying that the person giving property to the members of a Hindu family can impose on them such terms as that they shall become divided or remain undivided (*e*). The decision in *Ganpat* v. *Moroba* (*f*) may have proceeded upon a misapprehension of Balambhatta's comment on the Mitakshara, Chap. I., sec. II., para. 1 (*g*). Sons cannot be made separate *inter se* against their will, since partition itself is defined as a particular kind of intention (*h*), in the absence of which, therefore, it does not exist. So the declaration of such intention will constitute partition, and cannot be prevented (*i*). The grantor may bestow separate interests on members of a joint family, or a joint interest on separated members; but he cannot thus effect their status *inter se*. As separate properties may be held by members of a united family (*k*), they may take an estate as tenants in common side by side with their inheritance and its accretions held in union, and separated members may take a property as joint tenants or as partners (*l*), but their interests and mutual relations are in such a case, and without a reunion, essentially different from those of a joint Hindu family. The sacrifices continue separate, and this makes a true unity of the family impossible. It follows that property given to Hindus, though it may be subjected to charges as already shown, cannot be controlled in the hands of the donee by fantastic directions as to its enjoyment or devolution, or by accompanying conditions on matters which the Hindu law intends to leave to the religious feeling (*m*) or the worldly

(*d*) See Col. in 2 Str. H. L. 15; above, p. 129.

(*e*) See *Maccundas* v. *Ganpatrao*, Perry's O. Cases, 143.

(*f*) 4 Bom. H. C. R. 150 O. C. J.

(*g*) See *infra*, Book II., Introd., § 4 C.

(*h*) Vyav. May., Chap. IV., sec. III., para. 2; *infra*, Book II., Chap. III., S. 3, Q. 6; and Book II., Chap. IV., Q. 8.

(*i*) *Mookoond Lall Sha* v. *Ganesh Chandra Sha*, I. L. R. 1 Cal. 104; *Rajender Datt* v. *Sham Chand Mitter*, I. L. R. 6 Cal. 106, 116; *Girja Bai* v. *Sadashiv*, L. R. 43 I. A. 151; *Kawal* v. *Budh Singh*, L. R. 44 I. A. 159.

(*k*) See *Vasudev Bhat* v. *Venkatesh Sanbhav*, 10 Bom. H. C. R. at pp. 157, 158.

(*l*) See *Rampershad* v. *Sheo Churn Doss*, 10 M. I. A. 490.

(*m*) So under the Roman law, see Goudsmit, Pand. p. 168.

wisdom of the owners for the time being (*n*). The law itself prescribes many regulations for the preservation and welfare of the family which is its principal care (*o*). It allows for the varying rules of custom (*p*), and having done this gives but little scope to the caprices of individuals. It accepts, indeed, a theory more comprehensive even than Plato's (*q*) of the inherent nullity of acts which, on account of their eccentricity, implying injustice, may be ascribed to a disturbance or perversion of the faculties (*r*).

The historical reason for the limited powers of disposition allowed to owners by the Hindu law is probably to be found in the ancient idea of the inalienability of the patrimony (*s*). This allowed mortgages but prevented sales (*t*). The mortgages were usually accompanied with possession, and the lien by degrees became confused very often with ownership. Then gifts to religious uses were highly commended (*v*). They were, in principle at least, inalienable and irrevocable (*w*) even by the

(*n*) See *Maccundas* v. *Ganpatrao*, Perry, Or. Cases, 143, and *Abdul Gannee* v. *Husen Miya*, 10 Bom. H. C. R. at p. 10.

(*o*) See 1 Str. H. L. 17.

(*p*) Col. Dig., Book V., Chap. V. T. 365.

(*q*) See Grote's Plato, III. 396.

(*r*) Col. Dig., Book II., Chap. IV., sec. II., Art. III.; Vyav. May., Chap. IX., paras 6, 8; Vivada Chintamani, Tr. pp. 82, 83.

(*s*) This may have been developed from the sacredness of the house and the curtilage at a stage in which the labour of clearing the land from trees formed the only appraisable element of the value of any holding. The lot was consecrated to those who had cleared it as a safeguard against invasion and alienation both. Comp. Grote's Plato III. 390. It has been found in some cases, as in the Canara Forest case, referred to in the next note, that persons who in remote places had consecrated shrines to the honour of the forest gods, supposed to be protective against tigers and miasma, and maintained a rude worship to these divinities, claimed on that account a lordship of the tract, which was acquiesced in by immigrants through superstitious fear. Continued enjoyment grew in time into a kind of ownership, which it was then attempted to assert with all the incidents belonging to it under an advanced system of individual and exclusive proprietary right. Comp. Lavel. Prim. Prop. 24, 104, 121.

(*t*) Mit., Chap. I., sec. I., para. 32. See 5th Report on Indian Affairs, p. 130, as to the mortgages of Canara redeemable after any lapse of time, and *Bhaskarappa* v. *The Collector of North Kanara*, I. L. R. 3 Bom. at p. 525, and comp. Tupper, Panj. Cust. Law, vol. II., pp. 89, 45.

(*v*) Mit., Chap. I., sec. I., para. 32; Manu. IV., 230, 235.

(*w*) Vyav. May., Chap. IX. 6; Chap. IV., sec. VII., paras. 21, 23; Col. Dig., Book V., Chap. V. T. 395; *Narayan* v. *Chintamon and Another*, I. L. R. 5 Bom. 393; *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, 13 M. I. A. at p. 273; *The Collector of Thanna* v. *Hari Sitaram*, Bom. H. C. P. J. F. 1882, p. 204; S. C. I. L. R. 6 Bom. 546.

sovereign, if the strongest imprecations on him who should resume a grant could make them so (*x*). It was impossible that these should be attended with the manifold limitations by which, in dealing with purely secular property, a settlor or testator might endeavour to mould the interests of successive generations and provide for the reversion of the property in particular events. Sales as they were introduced had to take the form of gifts (*y*), and were thus made equally without qualification or reserve. The united family, however, providing by birth or by adoption a *heres necessarius* in almost every case, and making the assent of sons necessary for the disposal of immovable property (*z*), acted as a continual check on the ingenuity and even on the wishes of the class of proprietors. It would be almost impossible to obtain the acquiescence of the co-owners in any settlement to which they were not bound to submit, and the ancient lawyers, unaided by powerful courts of conscience, had not hit on the manifold applications of uses. The unchangeableness, too, of the political and social condition of the Hindus during many centuries favoured the natural immobility of an essentially religious law. The manes had to be duly honoured (*a*), the present and the coming generation provided for (*b*), while little or nothing occurred to tempt proprietors from the worn track of past centuries. Although the widely spread Mohammedan rule for six or seven hundred years did not interfere with the growth and continuance of Hindu states, and the development of a progressive Hindu polity, nevertheless men were for the most part absorbed in their families and their traditions as their centres of interest, leaving the development of the law in the hands of the Brahmins, whose power remained supreme owing to the policy of tolerance and non-interference so common in the Mohammedan system of government, while externally none of the astounding changes of

(*x*) It is interesting to compare with the familiar "60,000 years in ordure" in the Hindu grant the invocation of the fate of Dathan and of Judas on those who should resume an ecclesiastical grant in Europe. Annal. Bened. II., 702, "Veniam consequantur quando consecuturus diabolus." Marculf., Lib. II., Form 1. See Lab. *op. cit.*, p. 303, compared with Ind. Antiq., vol. XI., pp. 127, 162.

(*y*) *Lalubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom., at p. 331; Col. Dig., Book V., Chap. VII. T. 390; Mit. Ch. I., sec. I., para. 32.

(*z*) Mit., Chap. I., sec. I., para. 27; *Rangama* v. *Atchama*, 4 M. I. A. at p. 103; *Pandurang* v. *Naru*, Sel. Rep. 186. See above, p. 191.

(*a*) Manu. IX., 1858.

(*b*) Mit., Chap. I., sec. I., para. 27.

physical circumstances which have marked the period of British dominion arose to break the shackles of custom and to arouse intelligence to new possibilities of making wealth and of dispensing it. Some movement there was: the legislative and systematising faculty showed itself in such works as those of Apararka and of Rudra Deva (*c*), the *mrityu patra* and the gift in trust, the mortgage and the lease in their manifold forms supplied a foundation on which a whole system of Hindu equity and of interests in estates, no less far-reaching and complicated than those of England, might have been built up; but though the materials were at hand, the circumstances were wanting in which they could be organised. It was not until the British rule prevailed that the Hindu, with endless incentives to mental activity, began to adopt rules tending always to extension of the individual's plastic power over property. The subsequent history of the Hindu law, though it presents a development of several purely indigenous principles, has been enormously influenced by English notions. It is impossible, even were it desirable, that these should be wholly cast aside: they are mostly in harmony with the general mass of English thought which is leavening the Indian mind; and they practically afford the only common standard and source to which the Courts can resort when the meagre resources of the primitive law fail. But the Judicial Committee, in some of its more recent decisions, has shown itself quite alive to the fact that the narrower peculiarities of the English law will not blend with the Hindu system, and has carefully dwelt on the points of distinction (*d*). It has shown no favour to any extension to India of the endless "dissipations" of the ownership in minute and tangled interests, or to the paralysing restrictions on the use and exchange of property which in England itself are now felt as a serious impediment to the general welfare. It seems likely, therefore, that in yielding to the new influences brought to bear upon it, the Hindu law will go forward in a few and simple steps to the point of adaptation to the actual needs of society without passing through those

(*c*) The Sarasvati Vilasa.

(*d*) See *Tagore Case*, *passim*, L. R. S. I. A. 47.

"The Hindu law contains in itself the principles of its own exposition. The Digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies." 13 M. I. A. at p. 390.

intermediate stages of nominal ownership united so often with a real helplessness of the proprietor, the rules regarding which form so large a portion of the present English law.

It will have been seen that the creation of a perpetuity by a private person in favour of private persons is impossible under the Hindu law (*e*). The nearest approach to it, perhaps, is in the case of the purohits or hereditary family priests. Property given to the family of a purohit as such for ever is of the nature, in part at least, of a religious endowment (*f*). In creating such an endowment there is a virtually unlimited power of disposal of property fully owned (*g*), provided only that the support of the family and its dependants be not impaired (*h*). The founder may provide for successors to the immediate donee who have still to come into being (*i*), and may in some measure prescribe the mode of succession or the qualifications of the successors (*k*). The idol, deity, or the religious object is looked on as a kind of human entity (*l*), and the successive officiators in worship as a corporation with rights of enjoyment but not generally of parti-

(*e*) In a case from Penang, where the English law prevails "as far as circumstances will admit," it was held that the rule against perpetuities was applicable as founded on considerations of public policy of a general character, but subject to an exception "in favour of gifts for purposes useful and beneficial to the public, and which in a wide sense of the term are called charitable uses." *Yeap Cheah Nev* v. *Ong Cheng Nev*, L. R. 6 P. C. A. at p. 394.

(*f*) See 2 Str. H. L. 12, 13; Col. Dig., Book II., Chap. III. T. 43, Comm.

(*g*) Col. Dig., Book II., Chap. IV. T. 56, Comm.; T. 3; T. 33; *Dwarkanath Bysack* v. *Burroda Persaud Bysack*, I. L. R. 4 Cal. 443; *Lakshmishankar* v. *Vaijnath*, I. L. R. 6 Bom. 24.

(*h*) See 2 Str. H. L. 12, 16, 342; Col. Dig., Book II., Chap. IV. T. 10, 11 Comm.; T. 18 Comm.; *Radha Mohun Mundul* v. *Jadoomonee Dossee*, 23 C. W. R. 369; *Juggutmohinee Dossee* v. *Sookhemony Dossee*, 17 C. W. R. 41.

(*i*) *Khusalchand* v. *Mahadevgiri*, 12 Bom. H. C. R. 214.

(*k*) "Where the founder has vested in a certain family the management of his endowment, each member . . . succeeds . . . *per formam doni*," so that execution proceedings against one do not affect his successor in the endowment. *Trimbak Bawa* v. *Narayan Bawa*, Bom. H. C. P. J. F. for 1882, p. 350; S. C. I. L. R. 7 Bom. 188: "If a person endows a college or religious institution the endower has a right to lay down the rule of succession." Pr. Co. in *Greedharee Doss* v. *Nundo Kissore Doss Mohunt*, 11 M. I. A. at p. 421; 1 Str. H. L. 210; 2 *ibid.* 364; Comp. Maine, Anc. Law, Chap. VII., p. 230.

(*l*) *Maharanee Shibessuree Debia* v. *Mothooranath Acharj*, 13 C. W. R. 18, P. C.; S. C. 13 M. I. A. 270; *Moonshee Mahomed Akbar* v. *Kalee Churn Geeree*, 25 C. W. R. 401.

tion (*m*) or alienation, except so far as this may be necessary to prevent greater injury (*n*). The Bombay and Madras High Courts (*o*) have laid down that the *corpus* of the property is absolutely inalienable; but the Calcutta and Allahabad High Courts (*p*) permit even the alienation of the *corpus* if for the benefit of the benefaction. Such endowments are frequently founded by subscriptions, and are augmented by gifts and bequests simply to the institution (*q*). No rules have, in a majority of these cases, been formally prescribed: the intention of the founders has to be gathered from the traditional practice, and the succession is thus determined by the custom of each particular institution (*r*), though this may have become embraced in some more extensive custom (*s*). And as to the management of an endowment, it is not competent for the holders in one generation to impose rules on those of another (*t*). The endow-

(*m*) Viram. Tr. 249. See below Book II., Introd. Impartible Property and Rights, &c., arising on Partition; 1 Str. H. L. 210, 151; *Anund Moyee Chowdhrain* v. *Boykanthnath Roy*, 8 C. W. R. 193.

(*n*) See *Khusalchand* v. *Mahadevgiri*, 12 Bom. H. C. R. 214; *Manohar Ganesh* v. *Keshavram Jebhai*, Bom. H. C. P. J. F. 1878, p. 252; *Narayan* v. *Chintaman*, I. L. R. 5 Bom. 393; *Juggernath Roy Chowdhry* v. *Kishen Pershad*, 7 C. W. R. 266; *Drobo Misser* v. *Srineebash Misser*, 14 C. W. R. 409; *Nimaye Churn Puteetundee* v. *Jogendro Nath Banerjee*, 21 C. W. R. 365; *Mohunt Burm Suroop Dass.* v. *Kashee Jha*, 20 C. W. R. 471; *Prosunno Kumari Debya* v. *Goolab Chand*, 23 C. W. R. 253; S. C. L. R. 2 I. A. 145; *Doorganath Roy* v. *Ramchunder*, L. R. 4 I. A. 52; *Shri Gunesh* v. *Keshavram*, I. L. R. 15 Bom. 625.

(*o*) *Nallayappa* v. *Ambalavana Pandara Sannadhi*, I. L. R. 27 Mad. 466; *Shri Ganesh* v. *Keshavrav*, I. L. R. 15 Bom. 625; *Prosunno* v. *Golab*, L. R. 2 I. A. 145.

(*p*) *Bishen Chand* v. *Nadir*, I. L. R. 15 Cal. 329, P. C.; *Parsotam* v. *Datgir*, I. L. R. 25 All. 296.

(*q*) *Sammantha Pandara* v. *Sellappa Chetti*, I. L. R. 2 Mad. 175.

(*r*) *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*, L. R. 4 I. A. at p. 83. *Greedharee Doss* v. *Nundo Kissore Doss*, 11 M. I. A. at p. 427; *Janokoi* v. *Gopal*, L. R. 10 I. A. 37; *Genda* v. *Chatar*, L. R. 13 I. A. 100; *Lahar Puri* v. *Puran Nath*, L. R. 42 I. A. 115. If by election, then it must be *bonâ fide*—*Ramlingam* v. *Vythilingam*, L. R. 20 I. A. 150.

(*s*) Col. Dig., Book III., Chap. II. T. 5; *Gossain Dowlut Geer* v. *Bissessur Geer*, 19 C. W. R. 215; 1 Str. H. L. 151; *Malhar Sakharam* v. *Udegir Guru Champatgir*, Bom. H. C. P. J. F. 1881, p. 108, and the cases therein cited.

(*t*) Nor can the court prescribe such rules; *Burwaree Chand Thakoor* v. *Mudden Mohun Chuttoraj*, 21 C. W. R. 41. As to attempted restraint on choice of a successor, see *Greedharee Doss* v. *Nundokissore Doss*, 11 M. I. A. 405, 421.

ment once made cannot be resumed, but performance of the duties may be enforced (*v*).

Though a religious endowment is not necessarily confined to a single family (*w*), this is a very common kind of estate (*x*), and may be attended with the usual incidents subject only to providing for the performance of the religious functions (*y*). In the case of other public or semi-public offices the exclusive right of a single family and a several enjoyment of shares (*z*) is usually accompanied by a rule of non-alienability beyond the limits of the family, as in the case of vatans (*a*), and frequently of impartibility, the burden of proving which, however, rests on those who assert it (*b*).

It has been thought that trusts were unknown to the Hindu law (*c*). Such a notion is quite erroneous (*d*), though it is true there has been no such development of the first principles as has taken place under the Equity system in England. The endowments just spoken of, especially when founded by the members of a particular caste, are very frequently held by trustees (*e*), either the mohants bound to a particular appropriation of the revenues (*f*) or the general punchayat of the caste in the town or village or a body chosen *ad hoc* (*g*). Trusts for the maintenance of a family idol are very commonly created, and give to the trustee a valuable interest. The trust is dissoluble only by the

(*v*) See *Juggut Mohinee Doss* v. *Musst. Sokhee Money Dossee*, 14 M. I. A. at p. 302; *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

(*w*) See *Sammantha Pandara* v. *Sellappa Chetti*, I. L. R. 2 Mad. 175.

(*x*) 2 Str. H. L. 368; *Vithal Krishna Joshi* v. *Anant Ramchandra*, 11 Bom. H. C. R. 6; *Divaker Vithal* v. *Harbhat*, Bom. H. C. R. P. J. F. 1881, p. 106; *Mancharam Bhagvanbhat* v. *Pranshankar*, Bom. H. C. P. J. F. 1882, p. 120; S. C. I. L. R. 6 Bom. 298, and 7 Bom. 217.

(*y*) Col. Dig., Book II., Chap. III., T. 43 Comm.; *Ganesh Moreshwar* v. *Prabhakara Sakharam*, Bom. H. C. P. J. F. 1882, p. 181.

(*z*) 1 Str. H. L. 210, 2; *ibid.* 363, per Colebrooke.

(*a*) See Index *sub voce*, and Bom. Act III. of 1874.

(*b*) *Timungavda* v. *Rangangavda*, Bom. H. C. P. J. F. 1878, p. 240.

(*c*) See the *Tagore Case*, L. R. S. I. A. 47.

(*d*) *Mussumut Thukrain Sookraj Koowar* v. *The Government*, 14 M. I. A. at p. 127; *Thakurain Ramanund Koer* v. *Thakurain Raghunath Koer*, L. R. 9 I. A. at p. 50.

(*e*) *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, 12 M. I. A. 380; *Ram Doss* v. *Mohesur Deb Missree*, 7 C. W. R. 446.

(*f*) *Goluck Chunder Bose* v. *Rughoonath Sree Chunder Roy*, 17 C. W. R. 444.

(*g*) *Radha Jeebun Moostuffy* v. *Taramonee Dossee*, 12 M. I. A. 380, 394; *Juggut Mohinee Dossee* v. *Msst. Sokheemoney Dossee*, 14 M. I. A. 289.

assent of the whole family (*h*), or of all concerned when the idol is open to public worship (*i*).

Other trusts of a quasi-religious character—as, for instance, a devise in favour of "*dharam*" (*k*)—are such that effect can hardly be given to them (*l*) on account of the uncertainty of the purpose of the testator.

Property is not infrequently given to a husband in trust for his wife, in which she consequently has a beneficial interest quite distinct from her purely dependent joint ownership, so called, in her husband's property (*m*). Trusts for the benefit of widowed daughters and other helpless persons are not very uncommon (*n*). The remedy in case of failure is a revocation of the gift or a defeasance of the estate given to the trustee (*o*); but, the purpose

(*h*) *Konwur Doorganath Roy* v. *Ramchunder Sen*, L. R. 4 I. A. at p. 58. See above, pp. 185, 198.

(*i*) *Manohar Ganesh* v. *Keshavram Jebhai*, Bom. H. C. P. J. F. 1878, p. 252.

(*k*) *Runchordas* v. *Parvatibai*, L. R. 27 I. A. 71, *contra Partha* v. *Thiru*, I. L. R. 30 Mad. 340.

(*l*) *Maniklal Atmaram* v. *Manchersi Dinsha Coachman*, I. L. R. 1 Bom. 269. In *Promotho Dossee* v. *Radhika Prasad Datt*, 14 Ben. L. R. 175, a dedication by will was set aside as being in reality a settlement in perpetuity on the testator's descendants, and a new dedication was made with the assent of the parties.

(*m*) It is substantially the "dotal" estate of the French and other European Continental systems. See Col. Dig., Book II., Chap. IV. T. 28 Comm., T. 29 Comm., T. 30 Comm.

(*n*) See 2 Str. H. L. 234. A settlement may be found in the case of *Subedar Husseinshakhan Sayedshakhan*, Bom. H. C. P. J. F. 1882, p. 247, which, though in that case made by a Mohammedan, follows in form and substance a pattern common amongst Hindus. The settlor, being old, gives to his son his whole property, with a charge to maintain and shelter his stepmother, sister and other dependants. Provision is not made, probably through oversight, for the settlor's own subsistence. If this had been added we should have had the common form of a *Mrityu patra*, a settlement operating substantially as a will.

(*o*) Col. Dig., Book II., Chap. IV. T. 53 Comm, T. 56 Comm. Similarly under the Roman law the *modus*—that is, the charge or obligation accompanying a gift—might be enforced by an action to that end, or the donor could reclaim the gift. It was impossibility of performance only (including omission of any call for performance where a call was necessary) that excused the donee. This principle has been applied in India to many cases of lands granted for service in the sense that the service must be performed when required by the holders. See *Rajah Lelanund Singh Babadoor* v. *The Government of Bengal*, 6 M. I. A. 101; *Forbes* v. *Meer Mahomed Tuquee*, 13 M. I. A. at p. 463; *Rajah Lelanund Singh Bahadoor* v. *Thakoor Munoorunjun Singh*, L. R. S. I. A. 181; *Keval Kuber* v. *The Talukdari Settlement Officer*, I. L. R. 1 Bom. 586. Coke, L., 204, applies a more rigorous construction to royal grants than to those of private

being recognised as beneficial, effect may be given to it according to the law of reason (*p*), and now it is recognised that the Courts should rather enforce a performance of the trustee's duty than allow the founder or his representative to annul the trust or hand it over to a new trustee. The aid of the Courts may be invoked, and the High Courts can in such cases exercise the summary power conferred on them by the Indian Trustees' Act 27 of 1866; the substantive law forming the basis of the rights being the Hindu law, but the application of that law in cases falling within its principles but not its detailed rules being governed by the rules established in the English Courts of Equity (*q*). The same principles are applied as those of good conscience to the determination of cases arising in the Mofussil; of this there are many instances (*r*). Thus should a transaction be pronounced void or revocable by the Hindu law (*s*), and accordingly be rescinded by the Court, the determination of the legal relation would probably be governed, in Mofussil at any rate, by the Sastras as modified by custom; but for dealing with the resulting trust in favour of the grantor recourse would almost necessarily be had to the English precedents, because the Hindu jurists have not furnished any.

Regard may properly be had to Hindu usages and practices in determining whether in any disputed case a trust has been effectively created or not (*t*). Effect will be given to it so far as it subserves a practicable (*v*) and legal purpose (*w*), but an estate or mode of devolution or enjoyment not allowed by the Hindu law cannot be compassed by means of a trust (*x*). The case in the

persons. This should be borne in mind in reading *Forbes* v. *Meer Mahomed Tuquee*, *supra*.

(*p*) See 1 Str. H. L. 151; *Mohesh Chunder Chuckerbatty* v. *Koylash Chunder*, 11 C. W. R. 449 C. R.; *Gopeenath Chowdry* v. *Gooroo Dass Surma*, 18 C. W. R. 472 C. R.; *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

(*q*) *In re Kahandas Narrandas*, I. L. R. 5 Bom. 154.

(*r*) See *Juggutmohinee Dossee* v. *Sookhemony Dossee*, 17 C. W. R. 41; per Sir M. Westropp, C.J., in *Waman Ramchandra* v. *Dhondiba Krishnaji*, I. L. R. 4 Bom. at p. 154, referring to *Lalla Chunilal* v. *Savaichand*; 1 Morl. Dig., *Webbe* v. *Lester*, 2 B. H. C. R. 52, and *Gouree Kant Roy* v. *Girdhar Roy*, 4 Beng. L. R. 8 A. C.

(*s*) See Col. Dig., Book II., Chap. IV. T. 58, Comm.

(*t*) *Merbai* v. *Perozbai*, I. L. R. 5 Bom. 268.

(*v*) *Maniklal Atmaram* v. *Manchershi Dinsha*, I. L. R. 1 Bom. 269.

(*w*) *Anath Nath Day* v. *A. B. Mackintosh*, 8 Beng. L. R. 60; *Rajender Dutt* v. *Sham Chund Mitter*, I. L. R. 6 Cal. at p. 117.

(*x*) *Tagore Case*, L. R. S. I. A. at p. 72.

Digest of Vyavasthas, Chap. II., sec. 7, Q. 17, below, was really one of an attempt to create a trust by a declaration subject to a suspensive condition, or by giving property to a son-in-law for the benefit first of his son and secondly of his daughter, should one or the other be born, and thirdly of his wife, the grantor's daughter. The Sastri says that by thus deferring the complete abandonment of his ownership the grantor made the gift invalid.

Members of a joint family governed by the Mitakshara are joint tenants, while those who are subject to the Bengal or Gauriya school are tenants in common. A member of a coparcenary cannot even mortgage his undivided share without the consent of other coparceners under the Mitakshara in Bengal, Behar, and N.W. Provinces (*y*); but both in Bombay and Madras (*z*) he is allowed to alienate or mortgage his own undivided share, though he cannot dispose of it either by way of gift or by will (*a*). According to all the schools of the Hindu law a coparcener's undivided share, if attached during his lifetime, may be sold even after his death in execution of the decree (*b*).

Though the Hindu coparcener cannot in general dispose of the family estate, and the family lands are especially sacred (*c*), so that the father desiring to dispose of land must obtain the assent of all his sons (*d*), yet religious gifts within moderate limits may be made by a father (*e*), and his sons are bound to give effect even to his promise (*f*). Property thus promised is, indeed, said to be inalienable (*g*); but it must not exceed a certain reasonable proportion of the whole (*h*). If this proportion be exceeded the

(*y*) *Balgobind* v. *Narain*, I. L. R. 15 All. 339; *Sadaburt* v. *Foolbash*, 12 W. R. 1, F. B.; *Madho* v. *Mehrban*, I. L. R. 18 Cal. 157, P. C.

(*z*) *Gurlingapa* v. *Nandapa*, I. L. R. 21 Bom. 797; *Sitaram* v. *Haribai*, I. L. R. 35 Bom. 109; *Veraswami* v. *Ayyaswami*, 1 Mad. H. C. R. 471.

(*a*) *Lakshman* v. *Ram*, L. R. 7 I. A. 181; *Virayya* v. *Thata*, I. L. R. 9 Mad. 273.

(*b*) *Madho* v. *Mehrban*, I. L. R. 18 Cal. 157, P. C.; S. C. L. R. 17 I. A. 194; *Balkishen* v. *Rai Sita*, I. L. R. 7 All. 731; *Bailur* v. *Lakshman*, I. L. R. 4 Mad. 302.

(*c*) Yajn. quoted Col. Dig., Book II., Chap. IV. T. 13, 14.

(*d*) See above, pp. 167, 168, and below, Book II. Introduction.

(*e*) Col. Dig., Book II., Chap. IV. T. 2. See *Jaggat Mohinee's Case*, 14 M. I. A. at pp. 301, 302; see also *supra*, pp. 191, 192.

(*f*) Col. Dig., Book II., Chap. IV. T. 3.

(*g*) *Ibid.* T. 4.

(*h*) *Ibid.* T. 11, 12.

father is presumed to be deranged (*i*), though the presumption can be displaced (*k*). As to mere promises, these, as has been said, are not now regarded as creating a legal obligation except when they have amounted to a contract supported by a consideration. The power of alienation for religious purposes (*l*) by the head of the family qualifies his general incapacity to dispose of the immovable estate, but Hindu ideas on this subject have been so much supplanted in the Courts by those derived from the English law that the general incapacity can hardly now be said to subsist when sons take the estate as assets for fulfilment of all the father's ordinary obligations. And he may sell the whole ancestral property, or at any rate get it sold under a decree, to pay his personal debts (*m*). As a disposal of property even acquired by himself by a father which leaves his family unprovided for is by the Hindu law regarded as highly immoral, and is absolutely prohibited (*n*), it may be that the debts, the satisfaction of which out of the estate would almost exhaust it, may be treated as on that account not binding on the sons, should such a case be made for them (*o*). The religious gift, unless actually completed by delivery, would now probably be regarded as void under section 25 of the Indian Contract Act IX. of 1872, but a will necessarily operates without delivery, and dedications though the father alone has "Svatantrata": in ancestral property

A gift to a wife by her husband is not invalidated by the joint interest of his sons in the property. This may be attributed either to the once complete dependence of the sons or to the

(*i*) *Ibid.* T. 15, Comm.

(*k*) As to religious gifts by a woman, see on Stridhana below.

(*l*) Religious and charitable purposes are coupled in the Hindu authorities, and the example given is "a reservoir of water or the like constructed for the public good." Viram. Tr. p. 250. Under this definition rest-houses for travellers, groves of trees, roads, conduits, and schools, as well as the distribution of alms, have in various cases been held to come. And the Courts have exercised a libe--l discretion, as in the Dakore temple case, in moulding the application of founders' bounty to meet changed circumstances.

(*m*) See *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 I. A. 321, 334; *Muttayan Chettiar's Case*, L. R. 9 I. A. at pp. 143, 144; *Ponappa Pillai* v. *Pappuvayangar*, I. L. R. 4 Mad. 1; *Veliyammal* v. *Katha*, I. L. R. 5 Mad. 61; above, p. 167; *Mahabir* v. *Moheswar Nath*, L. R. 17 I. A. 11; *Uman Hathi Singh* v. *Goman*, I. L. R. 20 Bom. 385; *Abdul Aziz* v. *Appayasami*, I. L. R. 27 Mad. 131, P. C.

(*n*) See Manu. in Col. Dig., Book II., Chap. IV. T. 11; Yajn. *ibid.* T. 16; Brihasp. T. 18.

(*o*) See the section on Maintenance, and note (*x*) on next page.

father's administrative authority so long as it is not exercised to the obvious detriment of the family. But his discretion must not be exercised in a grossly partial manner: his bounty to his wife must not exceed a reasonable proportion to the joint estate (*p*). A promise of a provision is to be regarded by the sons as binding on them (*q*), but a departure from reason and equity is not to be upheld. So in a case where a member of a united family dwelt apart and acquired property the Sastri said (*r*) he could not be allowed to convert it into Stridhana by making presents of costly ornaments to his wife in fraud of his co-sharers, though a woman's jewels are usually excluded from partition. A gift from her husband is usually taken by a wife (or widow) on the terms discussed below under Stridhana, but when he is full owner he may give her a larger estate (*s*).

A gift to a daughter is warranted by the same authorities as sanction one to a wife (*t*), but the gift is for obvious reasons subject to a somewhat narrower limitation in the interest of the donor's family of which his daughter cannot in general remain a member (*v*). A gift to a favourite son is to be respected, though made out of the common property (*w*), but no rank injustice is to be allowed, much less a donation by which one son is enriched while another is reduced to want. A man may not deal thus heartlessly even with his own acquisitions (*x*), and as to the ancestral estate, though according to the decisions he may go far towards dissipating it he cannot dispose of it unequally amongst his sons (*y*).

(*p*) See Vyav. May., Chap. IV., sec. X., paras. 5, 6; and comp. Mit., Chap. I., sec. I., para. 25.

(*q*) *Ibid.*, para. 4; Viram. Tr. p. 228.

(*r*) Q. 315 MS. Ahmednugger, 13th June, 1853.

(*s*) See *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R. 5 Cal. 684; *Braja* v. *Kundana*, L. R. 26 I. A. 66.

(*t*) See Col. Dig., Book V. T. 354; *Daya Bhaga*, Chap. IV., sec. 3, paras. 12, 15, 29; *Bachoo* v. *Mankorebai*, I. L. R. 31 Bom. 373, P. C.

(*v*) A gift in trust for a daughter out of ancestral property was annulled at the suit of the son. *Ganga Besheshar* v. *Pirthee Pal.* I. L. R. 2 All. 635.

(*w*) See note (*t*). As to an illegitimate, Book I., Chap. VI., sec. 2, Q. 2.

(*x*) Col. Dig., Book II., Chap. IV. T. 11, 12, 14, 16, 18, 19; Book V. T. 26, 27, 33; Viram. Tr. p. 251; *Baboo Beer Pertab Singh* v. *Maharaja Rajender Pertab Sahee*, 12 M. I. A. 1.

(*y*) *Durga Persad* v. *Keshopersad*, I. L. R. 8 Cal. 656, 663. See *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 1 Bom. 561; S. C. L. R. 7 I. A. 181, and *infra*, Book II., Chap. I., § 2, Q. 5, and Introd.

The independent power of dealing with his self-acquired property assigned to the father by Mit., Chap. I., sec. 5, pl. 10 (now established), seems to be intended to illustrate the incompetence of the sons to exact a partition of such property by bringing into prominence their incapacity to control the father's authority as manager, without contradicting the special rules governing a partition actually made by the father, prescribed in Chap. I., sec. 2 (*z*). Narada, Part 1, Chap. III., paras. 36, 40, would apparently be explained or limited in the same way as Brihaspati; and the Smriti Chandrika, Chap. VIII., paras. 21 *ff*, dwells on the difference between " Svamya " and " Svatantrata "—that is, between " ownership " and " independence." In the father's acquisitions, Devanda Bhatta says, the sons have " Svamya," though the father alone has " Svatantrata "; in ancestral property the sons have both. Katyayana says that the son has not " Svamya " in the father's acquisition, but this is explained (para. 22) as a mere looseness of expression; and that it was not considered by its author to justify an irregular distribution may be seen from the Viramitrodaya, p. 55 compared with p. 74. In *Sital et al.* v. *Madho* (*a*), it was held that a father might bestow a house acquired by himself on one son to the exclusion of the other. The learned judges were of opinion that the Mit. Chap. I. sec. 1, pl. 27 (*b*), conveys only a moral prohibition against the alienation of self-acquired immovable property. That passage, however, with which the exposition in the Vivada Chintamani, page 309, may be compared, declares the participation of sons, not only in the ancestral but also in the paternal estate, and paras. 28-30 (*c*), show clearly, as it seems, that the father's power is there intended to be legally restricted, except in the

(*z*) So also the Vyav. May., Chap. IV., sec. 1, para. 14; sec. 4, pl. 4-8 (Stokes, H. L. B. 48, 49); Viram. Transl. pp. 65, 66.

The principle adopted by the Smriti Chandrika of a complete ownership arising immediately on birth accompanied by an exclusive power of administration in the father during his life is contested by Jimutavahana and Raghunandana, who argue that the ownership of the son arises only at the father's death. Mitramisra refutes this contention (Viram. Transl., pp. 7-15). At p. 45 he insists on the distinction between ownership and independence in the disposal of property. The different senses of such words as *swamitwa* have caused as much controversy amongst Indian lawyers as those of *dominium* in Europe.

(*a*) I. L. R. 1 All. 394.

(*b*) Stokes's H. L. B. 375.

(*c*) Stokes's H. L. B. 376.

particular cases specially provided for (*d*). But for this, indeed, para. 33 (*e*) would be almost unmeaning; and the next paragraph (*f*) which Vijnanesvara explains (sec. 5, pl. 1, *ibid.* 392), as relating to self-acquired property, would be superfluous if the father could give any share he pleased to any son. So, too, would the permission (sec. 5, pl. 7) to the father to reserve two shares of such property for himself in making partition *suo motu*. Sec. 5, pl. 10 (*g*) restates the son's right in the father's as well as the ancestral property; and the object of the discussion at that place being to restrict the scope of the texts affirming the son's dependance, not to extend the father's power, it would not be reasonable to extract from it a contradiction to the principles in section I., which it is plain, from para. 33 of that section, that the author did not intend (*h*). His view was apparently that which Devanda Bhatta adopted—a view illustrated by the cases of women and minors—ownership with joint executive power as to ancestral, without it as to paternal property, vested in the sons in virtue of their sonship (*i*). At the same time, Narada excludes a parent's gift from partition. Mit., Chap. I., sec. 1, p. 19 (*k*), and Yajn. (II. 124), says "Whatever property may be given by the parents to any child shall belong to that child." So also Vyasa, in Col. Dig., Book V. T. 354. This is allowed by Vijnanesvara to qualify the rights of other children (Mit., Chap. I., sec. 6, pl. 13) (*l*), and would possibly, notwithstanding Chap. I., sec. 2, pl. 13, 14 (*m*) cover the cases of *Sital* v. *Madho* and *Baldeo Das* v. *Sham Lal* (*n*). These assign to the father a power of disposition even over the ancestral property, qualified only by the son's right to call for partition, which does not seem reconcileable with Mit.,

(*d*) In the Panjab it appears that an owner cannot in some districts give away his immovable property, whether ancestral or self-acquired, without the consent of his sons or male gotraja-sapindas. See Panj. Cust. L., Vol. II., pp. 164-166.

(*e*) *Ibid.* 377.

(*f*) Sec. 2, para. 1, *ibid.* 377.

(*g*) *Ibid.* p. 393.

(*h*) See the Smriti Chandrika, Chap. II., sec. 1, para. 22; Dayakrama Sangraha, Chap. VI., paras. 11, 14 (Stokes's H. L. B. 510, 511).

(*i*) See Colebrooke at 2 Str. H. L. 436.

(*k*) Stokes's H. L. B. 373.

(*l*) Stokes's H. L. B. 396; comp. *supra*, p. 192.

(*m*) Stokes's H. L. B. 380.

(*n*) I. L. R. 1 All. 394 and 77.

Chap. I., sec. 1, pl. 29 (*o*) or with sec. 5, pl. 9 (*ibid.* 393) (*p*). The passage quoted from Col. Dig., Book V. T. 433, Comm.: "They (the sons) have not independent dominion, although they have a proprietary right," is a statement of the supposed doctrine of Vachaspati Misra as to self-acquired property, in an argument which construes the text, Yajn. II. 121, Col. Dig., Book V. T. 92, in a sense different from that insisted on in the Mit., Chap. I., sec. 5 (*q*).

Prof. H. H. Wilson observes on this subject, in Vol. V. of his Works, at p. 74: "We cannot admit either, that the owner has more than a contingent right to make a very unequal distribution of any description of his property without satisfactory cause. The onus of disproving such cause, it is true, rests with the plaintiff, and unless the proof were too glaring to be deniable it would not, of course, be allowed to operate. We only mean to aver that it is at the discretion of the Court to determine whether an unequal distribution has been attended with such circumstances of caprice or injustice as shall authorise its revisal. It should never be forgotten in this investigation that wills, as we understand them, are foreign to Hindu law."

As to the attempted validation of such a distribution on the principle of *factum valet*, he says, *ibid.*, p. 71: "It is therefore worth while to examine this doctrine of the validity of illegal acts. In the first place, then, where is the distinction found? In the most recent commentators, and those of a peculiar province only, those of Bengal, whose explanation is founded on a general position laid down by Jimutavahana: 'therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts,'—Dayabhaga, p. 60 (*r*). This remark refers, however, to the alienation of property, of which the alienor is undoubted proprietor, as a father, of immovable property if self-acquired, or a coparcener of his own share before

(*o*) Stokes's H. L. B. 376.

(*p*) See 1 Str. H. L. 122; 1 Macn. H. L. 14.

(*q*) Stokes's H. L. B. 391. See Col. Dig., Book II. T. 15, Comm.; Vivada Chin., pp. 225, 72, 76, 79, 250, 309; *B. Beer Pertab Sahee* v. *M. Rajender Pertab Sahee*, 12 M. I. A. 1; *Bhujangrav* v. *Malojirav*, 5 Bom. H. C. R. 161, A. C. J.; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 1 Bom. 561; 2 Macn. H. L. 210; *Mahasookh* v. *Budree*, 1 N. W. P. R. 57. As to care for a son unborn, see 6 M. I. A., at p. 320.

(*r*) Stokes's H. L. B. 207.

partition; but he himself concludes that a father cannot dispose of the ancestral property, because he is not sole master of it. ' Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.' Nothing can be more clear than Jimutavahana's assertion of this doctrine, and the doubts cast upon it by its expounders, Raghunandana, Sri Krishna Tarkalankara, and Jagannatha are wholly gratuitous. In fact, the latter is chiefly to blame for the distinction between illegal and invalid acts."

IX.—THE TESTAMENTARY POWER.

"In Hindu law," as Sir H. S. Maine says (*s*), "there is no such thing as a true will. The place filled by wills is occupied by adoption." The learned author shows that a will, when invented by the Romans, "was at first not a mode of distributing a dead man's goods, but one amongst several ways of transferring the representation of the household to a new Chief" (*t*). The subordinate position to which amongst the Romans the religious as compared with the civil law was reduced, distinguishes it from the Hindu system. In the latter, too, the *patria potestas* has never, perhaps, been allowed to go the extravagant lengths which were long tolerated by the Romans (*v*). A man's wife and his child are his "own," but in a sense, as Jagannatha explains,

(*s*) Anc. L., Chap. VI., p. 193 (3rd edition). See Col. Dig., Book V., Chap. I., Art. I., Note. See above, p. 182, and the remark of H. H. Wilson, p. 208.

(*t*) *Op cit.* 194. In England the estate seems in early times to have been completely represented by the heir. The system of tenures made a universal succession impossible when different feuds were held from different lords, but the executors still take a qualified "universitas" in the personal estate.

(*v*) See Narada, Part I., Chap. III., 36 ss. Ownership of property was at least very early distinguished by the Hindus from the relation of a father to a son. See Vyav. May., Chap. IV., sec. I., paras. 11, 12; Chap. IX., para. 2. The destruction or exposure of infants, especially of females, was disapproved perhaps, but tolerated without severe censure in both Greece and Rome. The sacredness of the human being as such is a Christian doctrine; but mere humanity has in this respect given to the Hindu ethical system a great advantage over classical paganism or the defective civilisation of China. See Terence, Heaut, IV., I. 22; Schoeman, Ant. Gr., p. 501, 104; Manu. IX. 8, 45; Col. Dig., Book I., Chap. V. T. 188, 219.

quite different from that in which property is his own (*w*). The equal right of sons in the patrimony being recognised, and the right to subsistence of all at any rate who are under the *potestas* or lordship of the head of a family (*x*), he is not allowed, as he was at Rome and at Athens too, to reduce them to want by selling or otherwise disposing of the estate (*y*).

The first intention of wills at Rome was probably to provide successors when natural heirs failed, then to provide for members of the family excluded by the rigorous provisions of the law of inheritance from their due share in a testator's property; it was only as a corrupt abuse that they were employed to disinherit the heirs, a purpose considered so unnatural and unlikely that it had to be expressed explicitly in order to obtain effect (*z*). At Athens there seems to have been full power of alienation by a householder *inter vivos* (*a*); but he could not by will disinherit his heirs—not even his daughter as heiress—though he could practically bequeath her and the estate together to some one who would take her as wife. The English law, a century after the Conquest, disallowed a will or a death-bed gift of the patrimony without assent of the heir (*b*), and regarded it as inseparably united to the family. "Si bocland habeat quam ei parentes dederint, non mittat eam extra cognitionem suam" (*c*). The earlier ideas still prevail amongst the Hindus. They still regard with horror the disinheritance of a son unless he has proved himself an enemy of

(*w*) Col. Dig., Book III., Chap. IV. T. 6, 7, Comm.; Vyav. May. *loc cit.*

(*x*) Col. Dig., Book II., Chap. IV. T. 11, 12, 15, 18, 19, Comm.; 26 Comm.; Yajn. II. 175; 2 Str. H. L. 16. For the case law, see Book. II. Introd.

(*y*) In Attica the older law seems, like the older Hindu law, to have allowed mortgage, or rather a *vivum vadium*, but not sale, and in general "a remarkable recognition was shown of the necessity of guarding against the sub-division of property, of maintaining each family in possession of its ancestral estates." See Schoeman, Ant. Greece, pp. 323, 104. Under the earlier English, as under the Hindu law, an interest of the son even in purchased lands was recognised, so that the father could not wholly disinherit him. See Glanv., p. 142 (Beames's Transl.); Mit., Chap. I., sec. I., para. 27; 2 Str. H. L. 10, 12.

(*z*) Maynz, Cours de Droit Romain, III. 236 ss. Comp. Vyav. May., Chap. IX., paras. 6, 7; Col. Dig., Book II., Chap. IV. T. 15 Comm. Perhaps, as under some of the Barbarian Codes, no mode could be devised for the alienation of the patrimony which did not take the guise of an heirship replacing the real one.

(*a*) See Smith's Dict. of Ant. Tit. Heres.

(*b*) Glanville, pp. 140, 141, 165. Blackstone approved the restrictions, 2 Comm. 373.

(*c*) Ll. Hen. I. Cap. 70.

his father, from whose celebration of the Sradhs no spiritual benefit is likely to arise (*d*). Failing a son by birth, the simple expedient of adoption provides one who can equally rescue his adoptive ancestors from the vexations of "Put." Even in the absence of a son there is an elaborate and far-reaching scheme of succession provided by the law which disposes of the estate and at the same time provides for the sacrifices which it was the part of the deceased owner in his life to maintain, and which after his death he is entitled to share. The need for a universal successor created by appointment having thus not been seriously felt, ingenuity has not been stimulated to furnish the appropriate remedy. It would be seldom indeed that an heir would not be forthcoming; the duties and obligations of the deceased are attached by the law to his representatives and to those who actually take his property (*e*), and a system of free testamentary disposition tends to lessen those pious grants for religious and charitable purposes to which a proprietor resorts rather than leave his estate quite ownerless, and by which he at once improves his own chances of comfort in the other world and the means of comfort in this world for some members of the most revered and influential caste (*f*).

The system of partition at the will of a son or other co-sharer must be admitted as another reason in the pretty wide region in which it was accepted why the necessity for wills did not become pressing. The emancipated son amongst the Romans was wholly

(*d*) Col. Dig., Book V. T. 318, 320, Comm.

(*e*) See Narada, Part I., Chap. III., 22, 25; Vyav. May., Chap. V., sec. IV., para. 12-17; and Comp. Glanv., Chap. VIII.; Bract. 61 a.

(*f*) Col. Dig., Book II., Chap. IV. T. 35, 36, 41, 42, 64.

The English law as to superstitious uses is not in force amongst Hindus. See *The Advocate General* v. *Vishvanath Atmaram*, 1 Bom. H. C. R. IX. App., where this subject is elaborately discussed. Several cases of the enforcement of Hindu charitable trusts are referred to in the preceding article. Reference may be made to *Fatmabibi* v. *Adv. Gen.*, I. L. R. 6 Bom. 42, 50, for the principles governing this class of cases. The Hindu law, like the Mahomedan law, instead of regarding religious grants with jealousy, treats them with special favour (see above, pp. 91, 195); Col. Dig., Book II., Chap. IV. T. 35 ss.; though they are not to be used as a mere cloak for private perpetuities (above, pp. 185, 192, 198); nor must they be made a means of reducing the family to want (above, p. 194; Col. Dig., Book II., Chap. IV., T. 10, 19, Comm.). The interest of the State in religious endowments is asserted (Narada, Transl. p. 115), but no limitation as to time has been imposed on grants by the Hindu law analogous to the English statute 9 Geo. II., Cap. 36, or the Mahomedan law restricting the "marz ul mawt."

severed from the family—was an utter stranger to his father and his estate. In India the separating son must be endowed with a real or at least a fictitious share of the property accepted by him as his fair portion. If a general partition has been made he retains a right of inheritance. Inheriting or not inheriting property, he must offer sacrifices and pay his father's debts (*g*). The looser and less tyrannical constitution of the family which the humaner spirit of the Hindus has framed as compared with that of the fierce Roman spearmen has thus made most of the arrangements possible *inter vivos*, or provided for them after death, which would strike the householder as desirable. Custom, immensely influential even when not consecrated as a law, disapproves contrivances which would set aside its own sufficient rules; and while the nearest successors cannot be excluded from the patrimony and its accretions (*h*), the imposition of conditions and limitations creating rights in favour of persons who do not exist to take them is opposed to Hindu conceptions (*i*). A gift to a class operates in favour of those in existence at the time the gift is intended to take effect (*k*). The now common direction that a property given or devised shall not be divided or alienated cannot be stronger than the ancient law to the same effect (*l*); and as the one is overridden by the conjoint volition of those interested, so too is the other. The immediate passing of a right from the creator of it to the beneficiary is as essential to its passing at all by force of the intention (*m*), as under the English law the absence of any interval between a preceding estate and a remainder was requisite to make the latter good. The estate

(*g*) Narada, Part I., Chap. III., 11. See now *supra*, p. 76.

(*h*) The Mitakshara, Chap. I., sec. I., para. 27, disenables a father from alienating even his own acquisitions of immovable property without the sons' concurrence, as they have a right by birth in both the ancestral and in the paternal estate. See *Tara Chand* v. *Reeb Ram*, 3 M. H. C. R., at p. 55; though this doctrine has not been accepted in Bombay. For the present law see p. 205, and Book II. Introd. § 7 A, 1 *a*, with the cases there cited.

(*i*) See above, p. 180, and *Ram Lal Mookerjee* v. *Secretary of State for India*, L. R. 8, I. A. at p. 61; *Bai Motivahu* v. *Bai Manubai*, I. L. R. 21 Bom. 709 P. C.; *Chundi Charun* v. *Rani Sidheswari*, L. R. 15 I. A. 149; *Manohar Singh* v. *Het Singh*, I. L. R. 32 All. 337.

(*k*) *Bhagbati* v. *Kalicharan*, I. L. R. 32 Cal. 992; *Khimji* v. *Morariji*, I. L. R. 22 Bom. 533; *Rai Bishen Chand* v. *Asmaida Koer*, L. R. 11 I. A. 164; *Ram Lall Seth* v. *Kanai Lal*, I. L. R. 12 Cal. 676.

(*l*) See Col. Dig., Book V., Chap. I., Art. I.

(*m*) Datt. Mim., sec. IV., para. 3.

under the Hindu law, like an English freehold at Common Law, cannot be made to commence *in futuro*, but neither can it be conferred save on some existing subject of the right for whose benefit the entry or acceptance of the taker of the immediate particular estate may enure (*n*). Conditions suspending the completion of a gift on a contingency make it inoperative save as a promise (*o*).

These considerations, as they show that an executory devise as distinguished from a remainder could not properly be received into the Hindu system (*p*), may serve to account for the absence of any general craving for a testamentary power. Such a power is looked on not as a part of the order of nature, as speculative jurists in Europe have regarded it, but rather as opposed to the order of nature (*q*); and the great accumulations of separate property on which a will could safely be made to operate were until recently almost unknown. In *Rajindra* v. *Raj Coomari* (*r*) it has been laid down that a direction in a will as to accumulation will be given effect to "if not unreasonable in its conditions as to be void against public policy, nor given for purposes of carrying out an illegal object, nor in its effect inconsistent with Hindu law." Unless, too, the testator could mould the estate more freely than by a mere remainder of the property acquired by himself, it would but insufficiently serve the purposes which in modern times people try to effect by means of executory devises. He might choose amongst the living the objects of his bounty, but could not, as English equity allowed, create rights opposed to his Common law (*s*). Such a limited power not substantially exceeding what he could do by gift, with or without a reserve in his own favour, was hardly worth striving for.

The Roman law allowed a paterfamilias to name the continuator of his own civil personality. The English law now allows the creation of an estate without actual change of possession.

(*n*) Jagannatha strives to make out that there can be a present gift of property not taking effect until after the donor's death. He employs two arguments for this purpose; but he does not deal with the question, even as a possible one, of whether a bounty can be conferred on a non-existent person. See Col. Dig., Book II., Chap. IV. T. 43, 56, Comm.

(*o*) See above, p. 180.

(*p*) *Norendra Nath Sircar* v. *Kamalbansi*, L. R. 23 I. A. 18.

(*q*) Comp. Plato, Laws, XI., and Grote's Plato, III. 434.

(*r*) I. L. R. 34 Cal. 5, 11.

(*s*) See above, pp. 179, 181, 185.

Both are opposed to Hindu notions; the religious law prescribes who shall perform the sacrifices, who shall be heir or joint-heir: it recognises no actual transfer of an ownership of material objects without a change of the possession in the enjoyment of which the exercise of the right consists. Without this change there is an equitable right, but it avails not against actual delivery to one accepting without fraud (*t*). But in the case of a will there can be no delivery to make the gift effectual (*v*). An entry by a devisee is not the counterpart of a resignation by the preceding holder in which his volition to give up his right is simultaneous with his releasing of the physical detention to the donee. There is hardly even a moral right, as the utterance of the volition has been deferred until it could not amount to a promise or engagement. A will, therefore, in the modern English sense could no more take effect than a gift without delivery. Piety might induce the heirs to conform to it, but there would not be any right *in rem* enforceable against them (*w*). As a will, therefore, could neither serve its earlier purpose under the Roman law nor its modern purpose arrived at by gradual development from that earlier one, it is not surprising that it should not have been invented or developed from the somewhat analogous instruments which were effectual because they conformed to the spirit of the Hindu law. A *donatio mortis causa* is recognised, and on this Jimutavahana has attempted to found heritage as an implied gift by the owner (*x*); but, as Jagannatha observes, the comparison fails, inasmuch as in heritage there is no surrender with a corresponding acceptance of the owner's property.

(*t*) *Lallubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom. 299. See Index, Possession; Yajn. II., 27; and Mit. *ad loc.*

(*v*) Jagannatha argues for a sort of *constitutum possessorium* (see Savigny, Possession § 27) as being sufficient to complete a gift. See Col. Dig., Book II., Chap. IV. T. 13, Comm.; T. 56, Comm. But the right in these cases passes by a consentaneous volition of both parties which extends to a mental transfer and retransfer of the actual possession impossible in the case of a true testament, though effectual in the case of a *Mrityu Patra*, as will be seen below. See Col. Dig., Book V., Chap. I., Art. I. Text cited from Dhaumya, and Commentary.

(*w*) Seisin being requisite to an effectual gift of land under the early English law, a testamentary disposition of it was invalid without the consent of the heir. Glanv., pp. 140, 141. It will be remembered that Tacitus observes on the absence of wills amongst the Germans. Family and tribal rights took instant effect on the death of the late owner.

(*x*) Col. Dig., Book V., Chap. I., sec. I., Art. I.

At present, as we have seen, a Hindu's power to dispose by will of whatever property was absolutely his own, and, according to the Bengal school, both his own as well as his ancestral property (*y*), must be considered as finally established (*z*), provided he is not a minor, when he can only give power to his widow to adopt (*a*). A widow can devise her stridhan only; but a coparcener, although he can alienate his undivided share in the ancestral property both in Bombay and Madras, cannot alienate it by will or by gift (*b*). It is necessary to bear in mind that he cannot defeat by will the rights which subsist independently of his wishes (*c*), and that he cannot create interests or impose restrictions which the Hindu law does not recognise. He can by will give properties to his widow or to his sister absolutely (*d*), although a property given to a female by way of maintenance confers only a limited estate (*e*). He can give power by will to someone to appoint to his property, which appointment may be general or special (*f*). A Hindoo testator cannot defeat the right of a widow taking by survivorship (*g*), nor can he get rid of those claims to subsistence (*h*) as to which he is allowed a large discretion so long as

(*y*) *Nagalutchmee* v. *Gopee*, 6 M. I. A. 309; *Bhooban Moyee* v. *Ram Kishore*, 10 M. I. A. 308.

(*z*) See above, p. 181. This excludes a testamentary disposal of property held by others in common with the testator. *Vasudeo Bhat* v. *Venktesh Sanbhav*, 10 Bom. H. C. R. 139, 157; see also *Vrandavandas* v. *Yamunabai*, 12 Bom. H. C. R. 229, referring to *Gangabai* v. *Ramanna*, 3 Bom. H. C. R. 66 A. C. J.

(*a*) *Bai Golab* v. *Thakorelal*, I. L. R. 36 Bom. 622; *Hardwarilal* v. *Gomi*, I. L. R. 33 All. 525.

(*b*) *Lakshman* v. *Ramchandra*, L. R. 7 I. A. 18; *Chamanlal* v. *Ganesh*, I. L. R. 28 Bom. 453; *Gadadhar* v. *Chandra*, I. L. R. 17 Bom. 690.

(*c*) See *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A., at p. 194; *Vitla Butten* v. *Yamenamma*, 8 M. H. C. R. 6; *Hanmant* v. *Bhimchandra*, I. L. R. 12 Bom. 105; *Lal Bahadur* v. *Kanhya Lal*, I. L. R. 29 All. 244.

(*d*) *Surja* v. *Rabi*, L. R. 35 I. A. 17; *Basanta Kumari Debi* v. *Kanikshya Kumari*, L. R. 32 I. A. 181; *Jojeswar* v. *Ramchand*, L. R. 23 I. A. 37.

(*e*) *Braja Kishore* v. *Kundana*, L. R. 26 I. A. 66; *Radha* v. *Ranimoni Dasi*, L. R. 35 I. A. 118.

(*f*) *Bai Motivahu* v. *Bai Mamoobai*, L. R. 24 I. A. 93; *Javerbai* v. *Kiblibai*, I. L. R. 15 Bom. 492; *Monoram* v. *Kalicharan*, I. L. R. 31 Cal. 166.

(*g*) *Musammat Goolab* v. *Musammat Phool*, 1 Borr. 173; *Uma Deyi* v. *Gokoolanund*, L. R. 5 I. A. 50; S. C. 15 Beng. L. R. 405.

(*h*) See Col. Dig., Book II., Chap. IV. T. 7; H. H. Wilson, Works, V. 68.

he satisfies them at all, but which may be turned into defined charges when there is an attempt to evade them altogether (*i*).

Though wills are unknown to the Hindu law, *mrityu patras* are common. These are of the nature of a conveyance to operate after the death of the grantor (*k*), or immediately subject to a trust in his favour for his life (*l*). Devises of land under the Statute of Wills, 32 Hen. VIII., c. 1, were formerly regarded as of a similar character. The will was of the nature of "a conveyance passing the freehold according to the intent or declaring the uses to which the land should be subject" (*m*). Similarly, under the Roman law, "the mancipatory testament," as it may be called, differed in its principles from a modern will. As it amounted to a conveyance out and out of the testator's estate, it was not revocable. There could be no new exercise of a power which had been exhausted (*n*). Wills were allowed by the XII. Tables, and the essential ceremonies were gradually modified by the exercise of the praetorian equitable jurisdiction, as in England the Court of Chancery showed "unbounded indulgence to the ignorance, unskilfulness, and negligence of testators" (*o*). It is probable that the *mrityu patra* of the Hindus would, under the influence of equitable doctrines, have received a corresponding development from the English Courts. Thus, though Jagannatha insists on a transfer of possession, or at least the sem-

(*i*) See pp. 75, 76, and the section on Maintenance; *Narbadabai* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99, and the references.

(*k*) See Col. Dig., Book II., Chap. IV. T. 43, Comm.; 2 Macn. H. L. 207.

(*l*) The one quoted in *Ragho Govind Parajpe* v. *Balvant Amrit Gole*, P. J. for 1882, p. 341, provides for payment of the grantor's debts, and sets forth a provision for his declining years as a purpose in view, but does not explicitly impose this as an obligation on the grantee. In the one quoted in *Rambhat* v. *Lakshman Chintaman*, I. L. R. 5 Bom. 630, there is a conveyance to the donee coupled with the reservation, "As long as I live I will take the profits and you should maintain me as if I were a member of your family." It was held that this was a conveyance subject to a trust. The grantor afterwards sought to get the deed set aside. He adopted a son *pendente lite*, and the son was allowed to sue the grandson of the donee who had obtained a decree in his favour and possession in the suit brought by the donor. It was held, however, that the gift, as the deed contained no power of revocation, could not be recalled.

(*m*) Spence, Equity Jurisp., Vol. I., p. 469; 6 Cr. Dig. 6.

(*n*) Maine, Anc. Law, Chap. VI., p. 205 (3rd edition). See Clark, Early Rom. Law, p. 117 ss.; Mommsen, Hist. of Rome, Chap. XI. Engl. Transl., Vol. I., p. 164.

(*o*) Spence, *op. cit.*

blance of a transfer, to make the donation good, yet means would no doubt have been found to give effect to the transfer without an entry. That a devise should "import a consideration in itself" would not be necessary according to Hindu notions (*p*), but a change of possession is essential to a valid gift (*q*), and this has to be dispensed with in giving effect to an ordinary will as now construed. But he who takes possession may, conformably to Hindu principles, take it for himself and as agent for another, or in trust for another as by way of remainder; and in this way estates for any life in being, as they could be created by ordinary grant and acceptance, could be created by *mrityu patra* (*r*). In the Presidency towns the ready-made system of England has in a great measure superseded the indigenous instrument. Still even there *mrityu patras* occur, at least in the city of Bombay, and in the mofussil they are common. Many which come into the courts are of an age that negatives the supposition of their being a mere adoption or imitation of the English will (*s*). They are construed with as little regard as may be to technical rules, but the trust or use created by such an instrument is not now deemed void or revocable on failure of the trustee to fulfil his duty (*t*): he is instead made to do the duty he has accepted (*v*). The greater power and expertness of the courts under the British rule make a complete satisfaction of justice possible in this way, or

(*p*) Still an undivided co-sharer cannot dispose of his share by gift or bequest. See *Lakshmishankar* v. *Vaijnath*, I. L. R. 6 Bom. 25; *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 630. But that is on account of the inefficacy of his single will in dealing with what is not his sole property. See Mitakshara, Chap. I., sec. II., para. 30; Col. Dig., Book II., Chap. IV. T. 28, Comm.

(*q*) Yajn. II., 27; Narada, I. Chap. IV., paras. 4, 18; see Transl. pp. 23, 25, and Corrigenda; Col. Dig., Book II., Chap. IV. T. 32, and Comm.

(*r*) Comp. *Ram Lall Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. at p. 61.

(*s*) As some have accounted for the testament used in Bengal. See Maine, Anc. Law, p. 197 (3rd edition). Wills became common in Bengal really because of the view held there that each parcener in a united family had a distinct though undivided portion, and could dispose of it by gift and consequently by will. See Colebrooke in 2 Str. H. L. 431; Dayakrama Sangraha, Chap. XI.

(*t*) This is not in any way inconsistent with the principles of the Hindu law. See the distinction drawn by Jagannatha between the property held by a husband in trust for his wife and the subordinate dependent property of the wife in her husband's ordinary estate. Col. Dig., Book II., Chap. IV. T. 28, Comm.; T. 30.

(*v*) *Nam Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76.

at least a greater approximation to it than by the strictly Hindu method of taking back the property when the promise or alleged promise upon which it was given and taken has been falsified (*w*).

As to the form, a nuncupative will is effectual (*x*), and so is a parol revocation (*y*); so is the birth of a posthumous child, where the will is not of a self-acquired property (*z*). In *Raja Chelikani's Case* (*a*) it has recently been held that actual destruction of a will or its formal revocation is not essential to constitute revocation. His intention not to leave the will as it was would amount to a revocation thereof. But as a will is a unilateral document operating on the principle of a gift, it would seem that where the statute law has not prescribed a mode of authentication the mode followed in analogous cases ought to be followed. In *Radhabai* v. *Ganesh* (*b*) it was ruled that the common direction given in the Vyav. May., Chap. II., § 1, para. 5, does not apply to a Hindu's will, as that is a document not recognised by the Hindu law. That direction is that a document recording a purchase, gift, partition, or the like should either be a holograph of the person to be bound by it or else signed by him and by witnesses, including the writer, who are intended to attest not merely the signature of the party, but the transaction and the writing itself, which is usually, though not always, read out to them (*c*). This was formerly the case in Europe also (*d*). Custom, however, is

(*w*) Narada, II. IV. 10; Col. Dig., Book II., Chap. IV. T. 53 Comm., T. 56 Comm., T. 65 Comm.; Vivada Chintamani, pp. 83, 84; Vyav. May., Chap. IX. 6.

(*x*) *Bhagvan Dullabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641; *Mancharji Pestonji* v. *Narayan Lakshumanji*, 1 Bom. H. C. R. 77 (2nd edition), and the cases there referred to.

(*y*) *Maharaj Partab Narain Singh* v. *Maharanee Soobha Kooer et al.*, L. R. 4 I. A. 228. For the statute law see below.

According to the English Common Law lands devisable by custom might by custom be devised orally, Co. Lit. 111 A., and this continued until, by the Statute of Frauds (29 Car. II., c. 3), writing attesting was made necessary. For personal property a nuncupative will sufficed till long afterwards. The law now regulating English wills is 7 Wm. 4 and 1 Vict. c. 26.

(*z*) *Subba* v. *Doraisami*, I. L. R. 30 Mad. 369.

(*a*) L. R. 29 I. A. 156.

(*b*) I. L. R. 3 Bom. 7.

(*c*) Col. Dig., Book II., Chap. IV. T. 33, Comm. See Mit. in Macn. H. L. 269 ss.

(*d*) See Laboulaye, Hist. du Dr. de Prop., p. 381; Bracton, 38, 396; Co. Lit. 6 A. In Canciani's "Leges Barbarorum," Vol. II., p. 475, are two Lombard formulas, one showing that land could not be sold except under

recognised as governing the mode of proof (*e*), and by mutual assent of the parties a document may be proved by a single attesting witness (*f*).

In the Presidency of Bengal and in the cities of Madras and Bombay, Act XXI. of 1870, by making sec. 102 of the Succession Act, X. of 1865, applicable to the wills of Hindus, has rendered a bequest invalid "whereby the vesting . . . may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong." This contemplates a power of disposition extending further in time than the Hindu law allows, as by that some one in existence at the testator's own death must be the ultimate legatee (*g*). Section 102 of the Succession Act makes inoperative a bequest to a class which may be not finally completed within the prescribed time, and sec. 103 annuls a bequest made to take effect after or on failure of a prior bequest which the Act declares void (*h*). These are not rules of the Hindu law, and are rather opposed to its principles, which, once its conditions have been satisfied, point rather to those who are capable of benefiting by the intended bounty being taken as the class intended rather than to its failing altogether, and to a remoter bounty being accelerated rather than destroyed by the nullity of an intermediate one, as the delivery in a gift to any other than the donee is conceived as made to him as agent for the donee conceived as existing; but the rules must be all the more

absolute necessity, and the other that a conveyance was established by reading it out in Court and calling on the bystanders to witness the transaction.

(*e*) See Col. Dig., Book I., Chap. I. T. XIII. ss.; Book II., Chap. IV. T. 33, Comm.; and the Sastri's response in *Doe* v. *Ganpat*, Perry's Or. Ca. at p. 137.

(*f*) Vyav. May., Chap. II., § III., para. 3.

The Roman *testamentum Comitiis Calatis*, even when oral, as it seems at first to have often been, was a very ceremonious proceeding, checked by the presence of priests and tribesmen. Wills being now recognised, it may be expected that the forms attending them will ere long become uniform, as the statutes intend. See the case cited note (*h*), *infra*.

(*g*) See the *Tagore Case*, L. R. S. I. A. 47; S. C. 9 Beng. L. R. 377; *Sir Mangaldas Nathubhoy* v. *Krishnabai*, I. L. R. 6 Bom. 38.

(*h*) Comp. the observations of Pontifex, J., in *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry*, I. L. R. 8 Cal. at pp. 388 ss., and in *Soudaminey Dossee* v. *Jogesh Chunder Dutt*, I. L. R. 2 Cal. 262, with *Alangamonjori Dabee* v. *Sonamoni Dabee*, I. L. R. 8 Cal. 157.

carefully borne in mind by the student. It has been held (*i*) that the effect of Act XXI. of 1870 is to make the rule of construction laid down in the *Tagore Case* inapplicable to Hindu wills made subsequently to the Act, but this has been reversed. By sec. 3 of Act XXI. of 1870 it is said "that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos* or to deprive any person of any right of maintenance. . . . And that nothing herein contained shall vest in the executor or administrator . . . any property which such (deceased) person could not have alienated *inter vivos*." "And that nothing herein contained shall authorise any Hindu . . . to create in property any interest which he could not have created before the 1st September, 1870" (*k*). By sec. 4 of Act V. of 1881, however, "all the property" of a person deceased vests in his executor or administrator, "but nothing herein contained," it is said, "shall vest in an executor or administrator any property of a deceased person which would otherwise have passed by survivorship to some other person" (*l*). Instead of the power of alienation *inter vivos*, therefore, we must now look to survivorship for determining whether an executor takes the property of a testator . By sec. 4, coupled with secs. 2 and 3, it appears that the estate may be vested in an executor who at the same time cannot obtain probate. The will, too, if made outside the cities of Madras and Bombay, and disposing of property outside those cities, may be truly such within the definition given in the Act, at the same time that none of the provisions of Act X. of 1865 apply to it which under Act XXI. of 1870 apply to wills made in those cities or disposing of immovable property within them. It will hence be necessary in the mofussil to consider what under the Hindu law amounts to "a legal declaration of the intentions of the testator with respect to his property," without regard to the provisions of Act X. of 1865, and apparently to recognise all his property as vesting in the

(*i*) *Alangamonjori Dabee* v. *Sonamoni Dabee*, I. L. R. 8 Cal. 157, 637.

(*k*) These provisions govern secs. 98, 99, 101 of the Succession Act. See the cases note (*h*), *supra*.

(*l*) Previously it was said (for the Presidency towns): "The Statute 21 Geo. III. c. 70 puts an end to the title of the administrator, as such, when set in competition with the right of the heir by Hindu law, and when it is in proof that all the parties are Hindus." *Doe dem Goculkissore Seat* v. *Ramkissno Hazarah*, 1 Mor. Dig., p. 246; and see *ibid*. 245; 1 Taylor and Bell, 10.

executor (*m*) except such as goes to his co-members of a united family or others taking by survivorship.

Within the Presidency towns, or under a will (*n*) made within them, it would seem that the creation of a perpetuity for any purpose whatever is prevented by sec. 101 of Act X. of 1865, while a Hindu or a Mohammedan may create for religious or charitable purposes a perpetuity subject only to the conditions already noticed (*o*). The statute law on the points just discussed is, however, complicated and contradictory in principle. Under these circumstances it is perhaps fortunate that, as lately ruled (*p*), the law does not oblige a person claiming under a will in the mofussil to obtain probate or to establish his right as executor, administrator, or legatee before he can sue in respect of any property which he claims under the will in the mofussil.

The effect of a will on the mutual relations of those taking under it has already been partly considered (*q*). In *Tara Chund* v. *Reeb Ram* (*r*), an illegitimate half-caste devised property which his European father had given to him to his three sons, who took their several shares as separate estates. On this Holloway, J., says: "We can see no ground whatever for doubting that the property which came to the first defendant from his father is, as he himself treats it, ancestral property. It seems to us that there is no reason whatever in the contention that its quality was changed by his choosing to accept it apparently under the terms of his father's will. Still less ground would there be for the contention that his acquiescence in that mode of receiving it would vest in himself a larger estate than he

(*m*) That is, where there is one; and where there is not, in him who obtains administration. Act V. of 1881, secs. 4, 14.

(*n*) *Sookhmoy Chunder Dass* v. *Monohurri Dasi*, L. R. 12 I. A. 103.

(*o*) *Tagore Case*, L. R. S. I. A. at p. 71; *Kumara Aseme* v. *Kumara Krishna*, 2 Ben. L. R. (O. C. J.), 47; *Fatma Bibi* v. *Adv.-Gen. of Bombay*, I. L. R. 6 Bom. 42; *Limji* v. *Bapuji*, I. L. R. 11 Bom. 441; *Krishnaramani* v. *Ananda*, 4 Ben. L. R. (O. C. J.) 321; *Broojosoondery* v. *Luchmee*, 15 Ben. L. R. 176 P. C., note.

(*p*) *Bhagvansang Bharaji* v. *Bechardas Harjivandas*, I. L. R. 6 Bom. 73. If he sues as executor or administrator he must of course set forth his qualification. See Civ. Pro. Cod., sec. 50. As a legatee where probate is possible he will apparently be bound by the condition in sec. 187 of the Succession Act, as probate and administration operate from the moment of the testator's death to vest the property in his representative thus constituted. See Act V. of 1881, § 4, 12, 14.

(*q*) Above, pp. 193, 194.

(*r*) 3 Mad. H. C. R. 50.

would have taken by descent. On what principle can he be conceived capable, by any act of his, of depriving his children of a right given to them by the doctrines of the Mitakshara at the very moment of their birth? The argument, therefore, that this property is unsusceptible of partition, because self-acquired, seems to us to fail entirely."

The property, however, if the Hindu law was properly applicable, as being a gift, ranked as self-acquired property of the half-caste father. It was only as such that he could dispose of it, but as such he could and did dispose of it, and the three sons taking separately instead of jointly took by the will—that is, according to the Hindu law, by a gift recognised by the Courts as effectual, though wanting one of the ordinary requisites. There was no partition amongst the three brothers; that would have indicated inheritance, and their shares would have been inherited property; its absence shows that they took under the will only, and held their shares as property devised or given. Such property ranks for the purposes of the Law of Partition as self-acquired, and it would seem that although the father (defendant) could not dissipate it so as to leave his son (the plaintiff) destitute, he could not be called on to divide it against his will. On his death his sons would inherit equally, and an attempt to disinherit one of them without good cause would expose the will to a risk of being set aside as inofficious according to the recognised principles of Hindu law (*s*). In the case of *Vinayak Wasoodev* v. *Parmanundas* (*t*), Sir C. Sargent, J., held that where two brothers took equal shares in property under their father's will, they constituting with their father an undivided family, there would be great difficulty in holding that they took as heirs an estate different from what in the ordinary course would have descended to them in that character. The father had been one of three brothers carrying on business in partnership, and two of the three had died after making wills by which their shares came to the third. They were held to have been separate in estate, and the survivor of the three to have taken the whole as self-acquired property. He could therefore deal with it at pleasure, and his bequest of a lakh of rupees in charity was upheld. This judgment was affirmed in appeal, and an appeal to Her Majesty in Council has been dismissed.

(*s*) See Mit., Chap. I., sec. II., para. 14.
(*t*) L. R. 9 I. A. 86.

The extent to which a control of the devolution and of the enjoyment of property bequeathed by will is permitted has been already discussed (*b*). The construction of testamentary instruments executed by Hindus is governed by the Hindu law, and on this point the Judicial Committee have said: "The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition, nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances (*c*), and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption" (*d*).

Similar principles are laid down in the *Tagore Case* (*e*), in which it is further said (*f*) "The true mode of construing a will is

(*b*) See above, pp. 179, 181.

(*c*) See *Barlow* v. *Orde*, 13 M. I. A. 277; *Moulvie Mahomed* v. *Shavukram*, L. R. 2 I. A. 7; and comp. *Maniklal* v. *Maniksha*, I. L. R. 1 Bom. 269; *Cheda Lal* v. *Gobind Ram*, I. L. R. 30 All. 455; *Murari Lal* v. *Kundun Lal*, I. L. R. 31 All. 339; *Mangaldas* v. *Narsirdas*, I. L. R. 15 Bom. 652; *Motilal* v. *Adv. General of Bombay*, I. L. R. 35 Bom. 279; *Mudaliar* v. *Ganga Bissen*, I. L. R. 28 Mad. 386; *Lalit Mohun* v. *Chukkan Lal*, L. R. 24 I. A. 76; *Radha Persad Mallik* v. *Dasi*, L. R. 35 I. A. 118; *Subbarayar* v. *Subbarumal*, L .R. 27 I. A. 162.

(*d*) *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 M. I. A. 550-551. A will expressed in English must be construed according to the intention as gathered from the English words, not according to the possible sense of the Vernacular words that may have been used in the instructions. See *Gangbai* v. *Thavar Mulla*, 1 Bom. H. C. R., at p. 75. English expressions are, it would seem, to be construed according to the English law. See *Martin* v. *Lee*, 14 M. P. C. 142. But regard must be had in the case of immovable property to the rule that the language is to be applied according to the law of its place.

(*e*) *Tagore Case*, L. R. S. I. A., at pp. 64, 65, ss.

(*f*) *Ibid.*, p. 79.

to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred." As a will on the principle of furthering a bountiful intention of the testator receives a benignant construction as compared with the narrower construction of a document in which benevolence has had no part (*g*), words primarily importing male lineal succession may be interpreted as conferring an estate of general inheritance, and when it is consistent with the language employed a time will be chosen for the commencement of a future estate which will give effect to it, rather than frustrate the apparent intention (*h*). Effect cannot be given to a devise merely to "dharm," that term being too vague (*i*), but a bequest for specific charitable purposes recognised as beneficial by the Hindu law will be maintained, as *ex. gr.* "for the performance of ceremonies and giving feasts to Brahmins" (*k*). The words "patra pautradi krame" include female heirs as well as male descendants of a female (*l*); the word "malik" confers an absolute estate (*m*). A bequest, however, which has for its object to tie up the corpus and give the profits to male descendants is invalid (*n*). When the intention of the testator cannot be ascertained the will fails (*o*); but in the case of a will in favour of a charity *cy-près* doctrine is usually applied by the Court (*p*). In *Khitish* v. *Radhika* (*q*) it has been held that an administrator *pendente lite* renders himself liable to be sued

(*g*) *Doe dem Cooper* v. *Collis*, 4 T. R. 294.

(*h*) See *Ram Lall Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. 46, 62; S. C. I. L. R. 7 Cal. 304.

(*i*) *Gangbai* v. *Thavar Mulla Mulla*, 1 B. H. C. R. 71; *Ranchordas* v. *Parvatibai*, L. R. 26 I. A. 71.

(*k*) *Lakshmishankar* v. *Vaijnath*, I. L. R. 6 Bom. 24; *Dwarkanath Bysack* v. *Burroda Persad Bysack*, I. L. R. 4 Cal. 443; a *cy près* disposal of a fund bequeathed for charity would be quite in accordance with the Hindu law. Comp. *Mayor of Lyons* v. *Adv. Gen. of Bengal*, L. R. 3 I. A. 32; and the case I. L. R. 4 Cal. 508.

(*l*) *Lalit Mohun* v. *Chukkan Lal*, L. R. 24 I. A. 76.

(*m*) *Motilal* v. *Adv. Gen. of Bombay*, I. L. R. 35 Bom. 279; *Damodár* v. *Dayabhai*, L. R. 25 I. A. 126.

(*n*) *Shookmoy Chunder Dass* v. *Monohari Dassi*, I. L. R. 7 Cal. 269.

(*o*) *Anandro Vinayak* v. *Adv. Gen. of Bombay*, I. L. R. 20 Bom. 450.

(*p*) *In the matter of Hormusji Framji*, I. L. R. 32 Bom. 214; *Runchordas* v. *Parvatibai*, L. R. 26 I. A. 71.

(*q*) I. L. R. 35 Cal. 276.

as *quasi*-executor *de son tort* to pay the debts incurred by the deceased, if he intermeddles with the estate.

X.—MAINTENANCE.

In the frequent changes of fortune which occur under the British rule in India giving a new and wider field to individual activity, the claims of destitute dependants of families become more numerous and pressing, at the same time that the general prosperity is advancing. The loosening of old ties makes some members of the Hindu community less ready than formerly to provide for their indigent relatives, while the latter, advised by persons having some acquaintance with the law and the decisions of the Courts, are led to prefer their claims in a more peremptory and inconvenient form than would at one time have been thought of. The family obligation resting on sacred and affectionate associations could not be shaken or too rigidly defined without a good deal of undue harshness and encroachment being attempted on one side or the other. Hence the litigation arising out of claims for maintenance has become frequent as well as troublesome—troublesome chiefly because of the want of any exact boundary in this province between the duties enforced by the law and those imposed only by positive morality. Widows are the most frequent suitors for maintenance, owing to their helpless position during coverture and the restrictions to which they are subjected in their widowhood, but claims of children on parents as well as of parents on children, and other members of families on their co-members are becoming common enough to make it desirable to bring the principal decisions together and compare them with what can be gathered from the acknowledged sources of the Hindu law on the same class of subjects.

A *wife* is entitled to maintenance from the husband during cohabitation with him, and even when she leaves him to live apart for a justifying cause (*r*), *e.g.*, cruelty on his part, or for not guarding her against ill-usage in his house (*s*), his apostacy (*t*), keeping a Mohammedan or Christian concubine (*v*) until he dismisses his

(*r*) *Kalyan* v. *Dwarkanath*, 6 Cal. W. R. 115; *Nitya* v. *Soondra Dasi*, 9 Cal. W. R. 475.

(*s*) *Matangini* v. *Jogendra*, I. L. R. 19 Cal. 84.

(*t*) *Mansha* v. *Jiwan*, I. L. R. 6 All. 617.

(*v*) *Lala Govind* v. *Dowlat*, 14 Cal. W. R. 451; *Paigi* v. *Sheo Narayan*, I. L. R. 8 All. 78.

mistress and performs the penance, his or her conversion to Christianity. When the husband has given some property to his wife sufficient for her maintenance, she cannot claim from him a separate maintenance besides; but on his death his bounties will not impair her claim to maintenance (*p*). She cannot be deprived of her right to maintenance either by a will or by a disposition *inter vivos*, nor is the right alienable (*q*). Arrears of maintenance may be attached in execution of a decree against the beneficiary and sold (*r*). Conversion to Islam dissolves the marriage and puts an end to her claim to maintenance, but conversion to Christianity of either spouse does not deprive her of the right thereto, unless a divorce has been pronounced under Act XXI. of 1866 and the Court has refused to allow her any maintenance (*s*).

On the subject of the maintenance of widows, three questions have been judicially discussed: (1) Whether the right to maintenance can be asserted by a widow of a separated member? (2) Whether in a united family the right is dependent on the possession by those from whom maintenance is sought of ancestral property or of property inherited from the deceased husband? (3) Whether, when the right exists, the members of the husband's family can in ordinary cases satisfy it by affording board and residence to the widow as a member of their household, or must, at her option, provide her with a separate income?

As to the first of these questions it is to be observed that a partition does not effect such a total severance amongst the members of a Hindu family that they stand thenceforth in the relation of mere strangers to each other. They may reunite again: they have mutual rights of succession in which fuller blood relationship between severed brethren counterbalances the effect of reunion between those of the half-blood (*t*); the obstacles to marriage still subsist between their families; in obsequies,

(*p*) *Joy Tara* v. *Rama Hari*, I. L. R. 10 Cal. 638.

(*q*) Hindu Wills Act (XXI.) of 1870, s. 3; *Narbadabai* v. *Mahadeo*, I. L. R. 5 Bom. 99; *Haridas* v. *Baroda*, I. L. R. 27 Cal. 39; *Comul Money* v. *Ramnath*, 1 Fulton, 203; *Joytara* v. *Ram*, I. L. R. 10 Cal. 638.

(*r*) *Rajerao* v. *Nanarao*, I. L. R. 11 Bom. 528; *Debia* v. *Koroona*, 8 Cal. W. R. 41.

(*s*) *Gunga's Case*, I. L. R. 4 Bom. 330; *Gobardhan* v. *Dasi*, I. L. R. 18 Cal. 252; *In re Ramkumari*, I. L. R. 18 Cal. 264.

(*t*) Yajn. II. 139, and Vijnanesvara's Commentary; Mit. Chap. II., sec. IX. See Col. Dig., Book V., T. 433, Comm., and *Ramappa Naicken* v. *Sithamal*, I. L. R. 2 Mad. 182.

mourning and the ceremonial impurity arising from death: they are still relatives as they were before the partition. A woman by marriage leaves her own gotra of birth to enter that of her husband. Her closest connexion thenceforward is with his family (*v*), whose sacrifices she shares and who succeed ultimately to any property which she as a widow may inherit. With her own family her connexion is altogether of a remote and secondary character. It is not destroyed, as the humane spirit of the Hindus forbids an entire renunciation of the ties of blood, and in practice, at least amongst the lower castes, the strong mutual affection of the wife and her parents is a source of much trouble to husbands, but in the law an inexorable logic supported by sacred sanctions transfers with her person her duties and her protection to the family of marriage. In *Sri Virada Pratap Raghunanda Deb* v. *Sri Brozo Kishno Putta Deb* (*w*) the Privy Council say "The Hindu wife upon her marriage passes into and becomes a member of that (the husband's) family. It is upon that family that as a widow she has her claim for maintenance. It is in that family that in the strict contemplation of law she ought to reside" (*x*). Her brothers therefore must "support her till her marriage, afterwards her husband shall keep her. When the husband is dead his kin are the guardians of his childless widow: in disposing of her, in protecting and maintaining her they have full power" (*y*). The word "isvarah," here translated "power," implies an attribute of superiority which is most conspicuous in the form of active authority, but which has a more comprehensive sense. It sometimes means husband and sometimes the Supreme Being. To say "they are to control, protect and support her as her lords" obviously imposes all these functions as duties on the kindred (*z*), and the duties are in themselves unconditional. All these ideas indeed are involved in guardianship. The perpetual dependence assigned to a woman (*a*) is accompanied by an indefeasible claim to nurture, shelter, and

(*v*) See Vasishtha IV. 19.

(*w*) I. L. R. 1 Mad., at p. 81; S. C. L. R. 3 I. A. 154.

(*x*) See also per Loch, J., in *Khetramani Dasi* v. *Kashinath Das*, 2 Beng. L. R., at p. 20, A. C. J.; Col. Dig., Book IV., Chap. I., T. 39; Book V. 499 and Comm.; and comp. Maine, Anc. Law, Chap. V., pp. 153, 184.

(*y*) Narada, XIII. 27, 28. See also Narada as quoted by Devanda Bhatta below.

(*z*) So in *Ruvee Bhudr* v. *Roopshankar*, 2 Borr., at p. 725.

(*a*) Manu. V. 148 ss.; IX. 2, 3; VIII. 416; Vyav. May., Chap. XX., para. 2.

gentle usage (*b*). Who are to satisfy this claim? Primarily the family she has joined, not the family she has quitted (*c*). The latter comes next in responsibility before the burden arising from utter destitution is thrown upon the caste and the community.

The general *right of a widow to support according to the means of her husband's family* is asserted by Newton and Janardana, JJ., in *Sakvarbai* v. *Bhavani Raje Ghatge Zanjarrav Deshmukh* (*d*). In that case the family property had been transferred by the Satara Government from an improvident father to his son, subject to a charge for the father's maintenance. In extreme age the father married a second wife who on becoming a widow sued her stepson for maintenance. He offered to support her in his house. The Principal Sudder Amin thinking that the parties could not properly be forced to live together and that it would be equally wrong to allow the young widow to reside where she pleased, ordered the stepson to provide her with a separate apartment in his house or in his village and to pay her a monthly allowance for her support. The widow appealed against the amount of the allowance and the order as to her residence, but the District Judge affirmed the decree on the ground that she must be regarded as "living on enforced charity" and entitled only to "what will keep her." This view the learned Judges of the High Court rejected. They approved Sir T. Strange's statement that a widow is entitled to a maintenance proportioned to circumstances of the family (*e*), and sent down for determination the following issue, viz.: "Are the circumstances of the case such as require that a separate residence or an equivalent in money should be awarded to her (the widow) or should she be required to reside with the defendant?"

Here though the father as a prodigal had been deprived of the patrimony, and his second marriage had, it was alleged, been brought about by a trick in order to injure his son, yet the notion

(*b*) Manu. III. 55 ss.; Mit. Chap. II., § 1, paras. 7, 27, 28, 37; § 10, p. 14, 15; Vyav. May. Chap. IV., § 11, para. 12; Col. Dig., Book V., T. 409; Str. H. L., I., 171, 173, 175; II., 291, 297, 299.

(*c*) *Ramien* v. *Condummal*, M. S. D. A. R. for 1858, p. 154; Pr. Co. in *Sri Virada Pratap Raghunanda Deb* v. *Sri Brozo Kishno Putta Deb*, I. L. R. 1 Mad., at p. 81; Vivada Chintamani, 261, 262, 265.

(*d*) 1 Bom. H. C. R. 194; *Raja Pirthi Singh* v. *Raj Koer*, L. R. I. A. Supp. 203; *Nitto Kishoree Dossee* v. *Jogendro Nath Mullick*, L. R. 5 I. A. 55; *Rajendranath* v. *Puttosoondry Dossee*, 5 Cal. W. R. 18.

(*e*) So *Buljor Rai* v. *Mt. Brinja*, N. W. P. S. D. A. R. 1862, Pt. II., p. 96. There, however, the family was united, and had ancestral property.

of the son's repudiating the stepmother's claim to maintenance seems not to have occurred to any one. The only question was as to how the maintenance was to be afforded. In the absence of exceptional circumstances the learned Judges thought that it must be given and accepted in the household of the stepson. Stepmothers may perhaps be regarded as having distinct rights resting on special texts (*f*), but their rights at any rate are recognised by the Sastras (*g*) and by the Privy Council to the extent of ancestral property in stepson's hands (*h*), as on the other hand the stepson's succession to his stepmother's stridhana is also admitted and *vice versa* (*i*).

In *Chandrabhagabai* v. *Kasinath Vithal* (*k*) the widow's husband had separated from his father and brethren. On his death she had received his property and had expended it, as also her mother's property. The Joint Judge in Regular Appeal held that the separation of her husband from his family had deprived the widow of a right to maintenance; but on Special Appeal the High Court rejected this view, reversed the judgment, and remanded the case for trial on these issues—"(1) Are the widow's present circumstances such as to give her a claim to maintenance? (2) If she is possessed of any property, what portion of it is her stridhana?" By stridhana the learned Judges probably meant such as was not productive of an income, such as to relieve the widow from indigence, and so far free the defendant from his obligation. For the rest that obligation in spite of the partition which had taken place is recognised as binding.

In *Timappa Bhat* v. *Parameshriamma* (*l*) it was held that the right of the indigent widow to support is not affected by a partition, though the award of a separate maintenance rests in the discretion of the Court. Reference was made to *Bai Lakshmi* v. *Lakhmidas* (*m*) and to *Mula* v. *Girdharilal* (*n*). In the District

(*f*) Digest of Vyavasthas, Chap. II., sec. 14, I. A. 3, Q. 1, footnote.

(*g*) 2 Str. H. L. 316.

(*h*) *Pirthee Singh* v. *Rani Raj Koer*, 12 B. L. R. 238, P. C.; *Godavribai* v. *Saqunbai*, I. L. R. 22 Bom. 52; *Hemanqini Dasi* v. *Kedarnath*, I. L. R. 16 Cal. 758, P. C.; *Baidaya* v. *Govindlal*, I. L. R. 9 Bom. 279.

(*i*) Digest of Vyavasthas, Chap. II., sec. 14, I. A. 3, Q. 1; *Russobai* v. *Zoolekhabai*, I. L. R. 19 Bom. 707.

(*k*) 2 Bom. H. C. R. 323.

(*l*) 5 Bom. H. C. R. 130, A. C. J.

(*m*) 1 Bom. H. C. R. 13.

(*n*) S. A. 3,937, decided 6th July, 1858.

Court the case of *Mamedala Vencutkrishna* v. *Mamedala Vencutratnama* (o) had been relied on, and local decisions which had shown the law in Canara, where the case arose, to be that the widow of a separated parcener was entitled to subsistence though her husband had died without ancestral property, and though the ex-parceners sued by her had none. The Madras case had ruled that maintenance could under such circumstances be claimed only in the house of the persons liable, but the District Judge had treated this condition as one that the Court in its discretion might dispense with.

The Bombay cases just referred to were reviewed in *Savitribai* v. *Luximbai* (p). The question is stated (q) to be: "Can the plaintiff, not finding it agreeable to live in the house of her husband's uncle, sustain this suit for a money allowance by way of maintenance against him who has separated in estate so far back as 1853, from the branch of the family to which her husband and his father (Sadasiv's brothers) belonged, and who had no paternal estate in his hands at the institution of this suit, and did not, and could not, so long as the plaintiff lived, inherit any property from her husband upon whom the estate (if any) of his father Balcrustna would have devolved?" The judgment proceeds on the two grounds, (1) that the plaintiff's husband and his father were separated from the brother of the latter sued as liable for the plaintiff's maintenance, and (2) that the defendant had not, when the suit was instituted, any ancestral estate or estate of the plaintiff's husband or his father. "Either one of these reasons, the Court say, independently of the other, is we think fatal to the plaintiff's claim to a money allowance."

Though the decision is thus limited to the denial of a right to a money allowance the reasoning extends to the denial of any claim at all by the widow of a separated member upon the other members of his family. Against the *dictum* in *Timappa's Case* that "the whole policy of the Hindu law is not to allow even a distantly related widow to starve" (r) the learned Chief Justice urges that "for that proposition no other authority than the above cases (dissented from in his judgment) was mentioned by the Court." It would seem, therefore, that so far as any legal

(o) M. S. D. A. R. for 1849, p. 5.

(p) I. L. R. 2 Bom. 573. See *Apaji* v. *Gangabai*, *ibid.* 632.

(q) p. 581. See *Madhavrao* v. *Gangabai*, *ibid.* 639.

(r) See 1 Str. H. L. 175.

obligation goes the preservation of a widow from starvation in the case supposed is not now to be recognized as a duty incumbent on any one. Strange's humane interpretation of the Hindu law (*s*) must be received with this restriction. His observations at p. 171 being limited to the maintenance of a widow as a charge on the inheritance (*t*) taken by other heirs, a thing that would not occur in a divided family as to an estate which in the absence of a son she must inherit herself, are not applicable to the point now under consideration. Should the estate prove deficient the learned author says the family of the husband are notwithstanding liable, but he is still contemplating the case of a possible inheritance by the husband's brethren, not that of their postponement to the widow as heirs as in a case of separation.

The rules as to maintenance were probably formulated without any distinct contemplation of the case of partition. In the Bengal case of *Khetramani Dasi* v. *Kashinath Das* (*v*), Loch, J. says "as the law originally stood it appears to me from some of the texts quoted above that no separation was ever contemplated, but that the widow entitled to maintenance was expected to remain in her husband's house and among his relations." This is quite true. "The family is the cherished institution of the Hindus" (*w*) and the "associated aggregate community of the family" (*x*) is as such the principal care of the Hindu law. Property is regarded mainly as a means for fulfilling the duties to the past and present members imposed by the family law. Its characteristics are regarded from the point of view of its capacity or incapacity to subserve the purposes of the perpetual corporate group. Thus though it is movable and immovable, sacred and secular, with powers of disposal or management which vary accordingly, the land itself is not "free" or "unfree" subject to gavelkind or other peculiar tenure. All depends in the private law on personal status and personal relations. These are determined by birth and by the second birth of marriage. They impose according to Hindu ideas duties not as springing from or annexed to property but as inseparably united to the person, though property is the medium through which in many cases

(*s*) Strange's H. L. 67, 68.

(*t*) As to this see *Lakshman Ramchandra* v. *Satyabhamabai*, I. L. R. 2 Bom. 494; and *Natchiarammal* v. *Gopal Krishna*, I. L. R. 2 Mad. 126.

(*v*) 2 Beng. L. R., at p. 30, A. C. J.

(*w*) *Bhyah Ram Singh* v. *Bhyah Ugur Singh*, 13 M. I. A., at p. 391.

(*x*) Comp. Sir H. Maine, Anc. Law, Chap. I., and Chap. V., p. 126.

they must be made effectual and the means by which they must be fulfilled. As the mutual obligations of the family therefore spring from a blood relationship, real or fictitious, and a sacred connexion in sacrifices which is its complement (*y*), so the laws which govern them rest far less on property save as a modal circumstance than on relationship. This is not abolished by partition, though partition modifies the duties arising from it. It is a modern notion to refer these duties, as Devanda Bhatta refers them, merely to cases in which property has been inherited or rather taken by right of participation and survival (*z*). The passage which he quotes says nothing of that kind: it imposes the duty of providing food and raiment for a widow in succession on the deceased husband's brother, on his father, on a gotraja, and any other person (amongst the husband's relatives). It is plain that the last two would not in general take the inheritance of the deceased husband, or where partition prevailed be united with him. The duty is prescribed absolutely, and as Devanda Bhatta quotes the rule with approval, the proper sense of his own remark which immediately follows may possibly be explanatory, not limiting, and imply that when in a family the person immediately responsible resigns to the widow the portion on which her husband and she previously subsisted he need not provide her maintenance too. The treatise being on Inheritance implies generally that there is an estate to inherit, and to this the author's observations are naturally directed, not to the cases of no estate, and of indigence as in itself a ground of right and obligation in a family. The disposition of the property and the provisions for maintenance out of the property would necessarily be the topics to be dealt with directly, others only incidentally, just as in an English treatise dower and equity to a settlement would be considered in their relation to property, without prejudice to the right to protection and sustenance subsisting apart from the possession of property, and from rules which merely determine its form, and how it is to be satisfied in particular cases.

Much has been said in several of the cases on a distinction

(*y*) See Maine, *op. cit*, Chap. VI., p. 191.

(*z*) Smriti Chand. Transl., p. 158. Participation by birth is the typical form of daya. It is obvious, therefore, that the sphere of daya and of inheritance by which it is translated lie outside each other in the most important cases. Hence to deal with daya according to notions exclusively proper to inheritance in the English sense, must needs lead to error and confusion.

between the rules of the Hindu law which are mandatory, as contrasted with those which are simply hortative or preceptive. When the distinction is rested on the imposition of a fine in one of two cases and not in the other, it should rather be regarded as assigning the one to the province of the criminal and the other to that of the civil law; but these departments were by no means clearly demarcated in the early jurisprudence. Still less was any exact boundary drawn between the field of moral and that of strictly legal duties. "Amongst the Hindus the religious element in the law has acquired a complete predominance" (*a*), and Jagannatha, arguing from the absence of any fine annexed to unequal partition by a father, that he may distribute his property of every kind as he pleases amongst his sons (*b*), is landed in a direct contradiction of the Mitakshara and other received authorities.

In Yajnavalkya's laws of civil judicature the subject of a judicial process is said to be a "complaint of being aggrieved contrary to law or usage"; but "law" translates "Smriti," the sacred scripture, as "achar," may be rendered "ordinance" as well as "practice." The rules in the Smritis, as for instance in Yajnavalkya's, are set forth in immediate connexion and with constant reference to this idea, and so expounded by commentators like Vijnanesvara in the Mitakshara (*c*). In chapter VIII. of Manu, "On Judicature and on Law," the connexion is very obvious. The rules for the constitution and government of the Courts are followed by the rules of evidence, and then come those of the substantive law. The 24th distich is identical in sense with the one in Yajnavalkya; disputes are to be determined by a consideration of what is expedient in the view of public policy, but always in subjection specially to the law of "dharm" or religion. Sloka 164 of the same chapter says that no declaration, however well authenticated and supported, can be effectual if opposed to "dharm," or to recognised usage, and sloka 8 that the king is to adjudicate according to the "eternal dharm." So in Narada, Book II. Chap. X. para. 7, it is said, "If wicked acts unauthorised by (= contrary to) the moral law are actually attempted let a king who desires properity repress them."

(*a*) Maine, Anc. Law, Chap. VI., p. 192.

(*b*) Col. Dig., Book V., Chap. II. *ab init.* and T. 77, Comm.

(*c*) See Macn. H. L., p. 141, and Roer and Montriou's Yajn. vol. II. 5, 12, 21, I. 7; and Stenzler's Text, pp. 4, 45.

Whatever precept of the Smritis, therefore, had been violated to the injury of a complainant, whether expressed in terms hortative or prohibitory, and whether a penalty was annexed to the rule or not, the alleged injury might, if the prince or the judges so willed, be remedied or punished without an "excess of jurisdiction" (*d*). No Hindu Austin had written a "Province of Jurisprudence determined" for the lawyers of India; the rules of the substantive law were, as usual in but partly developed systems, not disengaged from the commands of religion. They were but scantily formulated as aids or supplements to the rules of procedure, while the contents of the Vedas were assumed generally to be well known to the learned and to need no statement. The distinction, therefore, on which English judges have relied so much was for the Hindu judges hardly a distinction at all (*e*). They exercised conformably to the Sastras and to custom a jurisdiction as indeterminate as that of the early Chancellors in England (*f*), and would enforce any duty enjoined by a Smriti which either in the class or in the instance seemed of sufficient importance to warrant the exercise of their power.

One class of propositions received an early and comparatively full exposition from the commentators and was applied with strictness by the Indian courts—that relating to ownership, its acquisition, devolution and partition. The needs of society imposed this duty on the Nyayadhish, but for the Brahman commentator the chief attraction of the subject consisted perhaps in its connexion with the law of sacrifices. In what cases property is constituted or extinguished, gained or lost, is minutely discussed. Possession too as a source or element of property has received a pretty full treatment. But the rights and obligations arising from family relations have been but meagrely dealt with in proportion to their importance, great as this is recognised to be. Positive law is incompetent to enforce a complete fulfilment of duty in such cases, and rules of mutual regard, concession and generosity, supersede or blend with those which can be imposed by external authority. Thus the boundary line between moral and legal obligations being in its nature vaguely drawn and not having been arbitrarily defined, precepts of the Hindu jurists in

(*d*) See Yajn. I. 360; *Muttayan Chetti* v. *Sivagiri Zamindar*, I. L. R. 3 Mad., at p. 380.

(*e*) Comp. Maine's Anc. Law, pp. 16, 23, 192.

(*f*) See Spence, Equit. Jurisd. I. 367 ss. and references.

this sphere take every form from stern command and denunciation to mere suggestion or assumption that a law of kindness is to prevail. Whether in any instance a precept construable as a mere counsel or a proposition of moral beauty was to be enforced by a sanction as a law was left to the judges on a consideration of all the circumstances. In discussing the doctrine of *factum valet* put forward to justify a father's alienation of ancestral property, H. H. Wilson says (*g*), "It is absurd to say that the judge is to acknowledge as valid or to permit the validity of that which sacred institutes and universal feeling denounce as immoral and illegal. . . . The only argument of any weight adduced has been this: the law certainly prohibits the practice, but it has not provided for its prevention or punishment, and therefore being done it must be recognised. But this is a very incorrect view of the case and would, as observed by Sir F. Macnaghten, authorise the perpetration of a vast variety of crimes. The law has not been so improvident. It has stated what ought and what ought not to be done; and has left the enforcement of its prescriptions to the discretion of the executive power. We are confident that the question between illegality and validity would never have been agitated under a Hindu administration."

It is plain that under a law thus flexible and discretional, the claims of a widow in a family from which her husband had been separated in estate might be subjected to a rather severer scrutiny than where there had been no partition. A wasting of his substance by the separated brother might be looked on as a kind of fraud which the judges ought to prevent. They would recognise too that the tie of consanguinity was less binding as the relationship was more remote (*h*). The changed conditions of life in modern as compared with ancient days might also be

(*g*) Works, V. 73. A husband's alienation depriving his widow of subsistence is invalid. *Jamna* v. *Muchal Sahu*, I. L. R. 2 All. 315.

(*h*) The recognition of distant relationships in the law treatises has been founded on texts in themselves of much narrower import. Thus Manu's Text, IX. 185, gives the succession to the father on failure of the son, and failing the father gives it to the brothers. Yajnavalkya's text is the widest. Devala, quoted in Col. Dig. Book V., T. 80-82, would seem to have limited the connexion which gave rights of inheritance to four degrees (counting inclusively) in the ascending and descending lines. Thus the seventh degree, the relationship between two second cousins, would be the extreme point of recognized close family connexion. The seven degrees were then transferred to a single ascending line as a source of Gotraja-sapindas, and beyond these were placed seven degrees more of origin for Samanodakas. The want of

fairly taken into account in applying the rule of expediency. Courts under Indian administration could not have found a direct warrant perhaps for leaving any widow of the family to absolute starvation, but they might hold that the rules as laid down contemplated a different state of things from the divided family of the nineteenth century. Without saying, therefore, that the earlier judgments were wrong on the point in question (*i*), it may be admitted that the learned Chief Justice of Bombay has not, in denying the claims of the widow of a separated parcener, transgressed the latitude of construction which the Hindu law itself approves. That law certainly ascribes extraordinary authority to a Court in which three judges of ordinary attainments sit with a chief judge specially appointed for eminent learning by the king (*k*).

The right to maintenance even of a female member of a joint family does not according to Hindu ideas imply a right to a separate allowance in money or in kind. She is considered as

uniformity amongst the different schools of doctrine as to the remoter successions points to their comparatively recent recognition, and the analogy of the bandhu relation, limited to five degrees—first, instead of second, cousinship either to the propositus or to one of his parents—points the same way. So also does the limitation of responsibility for debt to the grandson. The recognition of a right of maintenance arising from family connexion as far as the sixth degree (second cousins), and the lapsing at that point of the nearer relationship into the clan connexion of superior and inferior, is shown to have been common amongst the European branches of the Aryan family by Dr. Hearn (The Aryan Household, Chap. X., § 3). In the Canon Law the seventh degree, as the nearest within which marriage was allowed, became identified at one time with seventh in the ascending line and those descending collaterally from that point, as the Canonists counted the degrees only on the longer of the two lines diverging from the common source (see Jus. Can. by Reiffenstuell, vol. II., pp. 493-5). But the fourth degree was afterwards resumed as the limit of prohibition, and this, taken exclusively not inclusively, would, according to the Roman reckoning, generally count as the seventh degree reckoned inclusively. The recognised names of relationship amongst the Romans extended only to second cousins, *i.e.* to the sixth, or according to the inclusive mode of reckoning the seventh degree (see Poste's Gaius, B. I., § 58), and it seems not unlikely that the range of recognised relationship under the Canon Law and of Gotraja-sapindaship under the Hindu law (see above, p. 113) was extended by a somewhat analogous process. The genealogies preserved by the hereditary purohits readily lent themselves to any desired extension of gentile connexion. As to the variations of the Christian ecclesiastical law, see Zachariae Jus. Graeco-Rom. Li. I., Tit. I., § 4.

(*i*) See also 2 Str. H. L. 16.

(*k*) Manu. VIII. 11. Comp. Mit. on the Adm. of Justice, Chap. I., § 1.

taking her substance in the family abode of her sustainer, and then performing in return her share of the domestic duties. If she is forced by ill-usage to quit the house she may on that ground claim an allowance fairly proportional to her needs and the means of the family or person liable. If she withdraws for little or no reason she may still, according to the decisions, claim an allowance, but not one in excess of what would be the cost of maintaining her in the reduction of the household expenses fairly estimated as arising from her going away with the consequent loss of her services (*l*). There are numerous instances in which maintenance is recoverable, *e.g.*, disqualified persons, concubine, illegitimates (*m*),“ the title to which cannot be said to rest on contract. The proper view seems to be to regard maintenance in its general aspect as a liability created by the Hindu law in respect of the jural relations of the Hindu family, and this would be so even in the case of a continuous concubine; for she is the *dasi* or *sudri* or *serva* of the pater-families. The liability of the husband to maintain his wife is an obligation arising out of the status of marriage amongst Hindus expressly imposed by the law. And generally in such other instances in which maintenance is prescribed by the same law we hold that the right depends on the status to which the law appends it ” (*n*).

Personal inquiries made since the judgment in *Savitribai's Case* in several districts of the Bombay Presidency seem to establish that though a moral claim of every widow to support is recognised even in a divided family, a legal right is hardly admitted. Widows of separated relatives are to be found in the households of many Hindu gentlemen, but it would be a wrong assumption that amongst people thus closely connected no more is conceded than could be enforced. The presence of these ladies whose lot excites pity even in a stranger is, it would seem, to be ascribed to a rule of kindness or at most of positive morality, rather than to one of compulsive customary law. Similar inquiries as to the case of united families led to the conclusion that the right of widows of deceased members to maintenance is almost invariably recognised, though as to the incidence and apportionment of the

(*l*) *Bhagwan* v. *Bindoo*, 6 Cal. W. R. 286.

(*m*) *Khemklor* v. *Umashankar*, 10 B. H. L. R. 381; *Vrandavandas* v. *Yamunabai*, 12 Bom. H. C. R. 229.

(*n*) *Sidlingappa* v. *Sidava*, I. L. R. 4 Bom 628, *per* Westropp, C.J.

burden no exact consensus of opinion could be obtained. Here the passages of Narada already referred to, seem to be applicable, and to make the support of the widow a duty independent of the possession or existence of any estate in which the deceased husband was a sharer, though where this state of things existed he who takes the share is specially liable and the share itself may be allotted to the widow whose relatives are unwilling to receive her (*o*). The expression used by Narada is the same in stating the right of widows as in stating the right to subsistence of members of a family disqualified for inheritance. The Vyavahara Mayukha limits the text of Narada (*p*) to the case of an undivided family, but in such a family it does not make the widow's right to subsistence depend on the possession of ancestral wealth. In the passage from Katyayana (*q*) which Nilakantha quotes immediately afterwards, the particle "tu," translated "or," includes the sense of "but"; so that the sense is "The widow receives food and raiment but (where there is property) may (also) be assigned a share of it for life." The Sastris have uniformly accepted the rule in this sense so far as can be gathered from their omission to set forth the possession of ancestral property as essential; and it is established by authenticated usage as the law of many castes. This is shown below.

That the recognition of the share of a parcener as primarily liable for his widow's maintenance does not imply that she has no right when there was no property, may be gathered from Jagannatha's comment on Yajnavalkya's text providing for the daughters and the childless wives of disqualified members of the family, "since it is directed that daughters must be supported so long as they be not disposed of in marriage, it appears that the nuptial (expenses) shall be defrayed, and that (= that is) if no share be received by a son; but if the son do take a share his sister must be supported and her nuptials defrayed by him alone as is done in common cases by a son whose father is dead" (*r*). The Mitakshara cites a passage from Harita, "If a woman becoming a widow in her youth be headstrong (still) a mainten-

(*o*) Smriti Chand., Chap. XI., sec. I., paras. 34, 35, Transl. pp. 158, 159.

(*p*) Stokes's H. L. B., p. 85.

(*q*) Stokes's H. L. B., p. 85.

(*r*) Col. Dig., Book V., T. 334, Comm. This is in fact a portion of the father's obligations falling on the son subject to his exoneration only when the misappropriation of property actually existing transfers the duty to him who has taken it. See Vyav. May., Chap. IV., sec. V., para. 16.

ance must in that case be given to her for the support of life." The Vivada Chintamani quotes this as " A woman is headstrong; but a maintenance must even (= still) be given to her " (*s*). The right to support is not contemplated as dependent on property, though should there be property it may be satisfied out of it. If the right as Vijnanesvara possibly thinks belongs to a widow of a separated parcener, that affords an *a fortiori* reason for recognising it in the case of a widow of one who has died a member of a joint family. While that family subsists and is capable she must look to it alone for maintenance. The Viramitrodaya lays down this rule for widows and daughters in a re-united family (*t*). The duty of the Hindu householder therefore seems not to have been exaggerated by Sir T. Strange when he described it as " co-extensive with his family " (*v*), or when he said of the widow in a united family " where her husband's property proves deficient the duty of providing for her is cast upon his relations " (*w*). Yajnavalkya, like Narada, assigns the protection of a woman unconditionally to her father, her husband and her son successively, and then " on failure of these, let their kinsmen protect her " (*x*).

Jagannatha, resting on the familiar text of Manu, declares: " The father is bound to support the family of his son, and it is not true that those to the support of whom the master (*i.e.* the son) is entitled from a certain person (the father) are not (themselves) entitled to maintenance from the same person " (*y*). This is said of the family of a student who has not then acquired property. Consistently with this Colebrooke says (*z*), in a case where the son must have died without property, that the father " would have been liable for the reasonable charges of his daughter-in-law's maintenance, had he refused or neglected to support her." Nothing is said of the father's having ancestral property. In a similar case where the father may have had ancestral property, but the son distinctly had no separate estate,

(*s*) Mit., Chap. II., sec. I., para. 37.

(*t*) Viramit. Trans., p. 219.

(*v*) 1 Str. H. L. 67; *Raja Braja Sundar Deb* v. *Srimati Swarna Manjari Dei et al.*, P. C. O. C. 29, 1917.

(*w*) *Op. cit.* 172.

(*x*) Col. Dig., Book IV., Chap. I., sec. I., T. 6.

(*y*) Col. Dig., Book V., T. 379, Comm. See also per Sir M. Sausse, C.J., in *Ramchandra* v. *Dada Naik*, 1 Bom. H. C. R. lxxxiv. Appendix, and Macn. H. L., vol. II., Chap. II., Case 8.

(*z*) *Op. cit.* vol. II. 412.

the son's widow was pronounced entitled to maintenance from her father-in law. In this opinion Colebrooke and Sutherland concur (*a*), as Sutherland did in a similar claim by the son's widow against the father's widow (*b*). In another case (*c*) Colebrooke says that the half-brothers of a widow's deceased husband are bound to maintain her (*d*). It is not even said that the deceased and his brothers were members of a joint family, much less that there was property of the deceased or ancestral property. If there had been separate property Colebrooke must have said that the widow was entitled to it, and if the possession of ancestral property were essential in his view to the existence of the widow's right, he must have mentioned that too.

The same remark occurs as to the opinions of the Sastris given below in the Digest of Vyavasthas, Chap. II. sec. 1. Q. 17; sec. 6. A. Q. 27; sec. 7, Q. 10. In the first of these cases the family was undivided, but whether there was ancestral property is not stated. It would seem that the deceased son left no property solely his own, as there is no reference to it. In the second case the family was undivided or was understood to be so by the Sastri, but it does not appear that there was ancestral property held by the father. In the third case the pre-deceased son may or may not have been separated from his father. There is no suggestion that he left any property, nor is there any limitation of the widows right to the amount of his share. The Sastri evidently regarded the property left by the father as having been solely his own, but the obligation of maintaining the son's widow as one that had been binding on the father and after his death passed to the mother along with the means of satisfying it.

The self-acquired property of a father-in-law in the hands of an heir is thus bound for the maintenance of a daughter-in-law (*e*); but not if he has bequeathed it (*f*) though the Madras and the Allahabad High Courts hold a different view (*g*). In ancestral

(*a*) 2 Str. H. L. 233. So in *Rai Sham Ballubh* v. *Prankishen Ghose*, 3 C. S. D. A. R. 33; *Musst. Himulta Chowdrayn* v. *Musst. Pudoo Munee Chowdrayn*, 4 *ibid*. 19.

(*b*) *Op. cit.* II. 235.

(*c*) *Op. cit.* II. 297; Macn. H. L., vol. II., Chap. II., Case 4.

(*d*) So 2 Str. H. L. 12, 16; Macn. H. L., vol. II., Chap. II., Case 7.

(*e*) *Adhirbai* v. *Nathu*, I. L. R. 11 Bom. 199; *Yamunabai* v. *Manubai*, I. L. R. 23 Bom. 608; *Jankibai* v. *Nundram*, I. L. R. 11 All. 194.

(*f*) *Bai Paravati* v. *Tarwadi*, I. L. R. 25 Bom. 263.

(*g*) *Rangammal* v. *Echammal*, I. L. R. 22 Mad. 305; *Becha* v. *Mothina*, I. L. R. 23 All. 86.

property the son's right to a share comes into existence and dies along with him (*h*), so that it could not be as annexed to an inheritance in the English sense that the father's obligation attached to him. The father and son having been joint tenants if not tenants by entireties, the son could not even charge the common estate according to the principle *jus accrescendi praefertur oneribus*, except under circumstances specially provided for (*i*).

In the case of a disqualified person no ownership generally comes into existence at all over the ancestral estate (*k*). He is entitled merely to maintenance which is accorded to him by the texts in the same terms as to wives and widows (*l*), and which they forfeit by unchastity (*m*). His right is a charge or an equity to a settlement on the property when there is property (*n*), but the duty of maintaining him is not therefore limited to what but for his incapacity would have been his share (*o*). It is on relationship that the right is founded, and the right of the widow of a member, herself a member of the family, rests equally on relationship, not on property once shared by the deceased, though should such a share have passed into the hands of any particular member of the family the obligation will primarily rest there too (*p*). In the cases at pp. 83 and 90 of vol. 2 Strange's Hindu Law, the widow left destitute by her husband is recognised as having a right to maintenance from her brother's widows. Her brother

(*h*) *Udaram Sitaram* v. *Ranu Panduji*, 11 Bom. H. C. R., at p. 86.

(*i*) Mit., Chap. I., sec. I., paras. 28, 29; *infra*, Digest of Vyavasthas, Chap. II., sec. 6 B.; *Radhabai* v. *Nanarav*, I. L. R. 3 Bom. 151.

(*k*) See Digest of Vyavasthas, Chap. VI., sec. 1.

(*l*) *Bai Kanku* v. *Bai Jadhav*, I. L. R. 8 Bom. 15.

(*m*) *Slonnbhoy* v. *Manjamma*, I. L. R. 9 Bom. 108.

(*n*) *Khetramani Dasi* v. *Kashinath Das*, 2 Ben. L. R., at p. 52, A. C. J.

(*o*) Digest of Vyavasthas, Chap. VI., sec 1 Q. 5.

(*p*) In the MS. Collection of Caste Laws gathered by Mr. Borradaile there are many instances in which the caste declare that the helpless person is entitled to his share on a partition; and others in which it is said that he is entitled to maintenance out of his share, or alternatively, his proper share; but along with this it is stated in some instances that his brethren must support him where there is no estate. This shows that a mere reference to the property where there is property does not imply an absence of right where there is no property, or none chargeable with the maintenance. The questions as to widows were put with reference to property, but still some answers, as in Book G, sheet 25, state an unqualified duty to support the widow in the family house, her resort to her pulla even being (*ibid.* 32, 49, 55) [*Ibid.* Koombars 8, Machee Gudrya 25, Vaghree 30, Khalpa Khumbarta 48] necessary only in the absence of relatives of her husband.

could not have held ancestral property along with her husband, or inherited from him, and the obligation arising as against a brother only on the incapacity of the husband's family cannot, it would seem, be made absolutely dependent as to the latter any more than as against the former on any conditions of property taken by inheritance.

The Smriti Chandrika, true to the principle "To him that hath shall be given," says that even in the case of helpless kinsmen the duty of supporting them rests only on those who have taken the patrimony of the disqualified member's father (*q*). For this Devanda Bhatta cites a passage of Katyayana ending:—"The kinsmen shall not be compelled to give the wealth received by them not being his patrimony." Here there is nothing about subsistence. The rule given is that the person in question shall not obtain property not his patrimony. But the passage is not quoted by either the Mitakshara or the Mayukha, though many other passages of Katyayana are quoted by both; and the reason is obvious. The whole of it is given at Chap. V. para. 16 of the Daya Bhaga; and it is plain that it refers to a case which does not now occur, that of a competition between the offspring of persons of different castes. "He," Katyayana says, "is not heir to the estate . . . except . . . on failure of the kinsmen. They shall not be compelled to give him the wealth [it] not being his patrimony." There is a various reading "svapitryam" (= it being their patrimony) which leaves the result unaltered. On the point for which Devanda uses it, the text says nothing. In *Mamedala Venkutkrishna* v. *Mamedala Venkutratnamah* (*r*) the Sudder Court of Madras set aside Devanda's rule in the province where his authority is highest by pronouncing in favour of the widow's right to maintenance by her husband's brothers where there was no proof of their possession of paternal estate; and it cannot be considered as of any great weight in Bombay.

Under the Mitakshara a daughter-in-law in addition to her right to support by the surviving co-parceners (*e.g.* father-in-law) (*s*) acquires a right to maintenance out of the ancestral property in consequence of her marriage (*t*) and this right cannot be defeated by devise or gift made by the holder of such property (*v*).

(*q*) Smriti Chan., Chap. V., paras. 23-25.
(*r*) Mad. S. D. A. R. for 1849, p. 5.
(*s*) *Surampalli* v. *Surampalli*, I. L. R. 31 Mad. 338.
(*t*) *Jamna* v. *Machul*, I. L. R. 2 All. 315.
(*v*) *Becha* v. *Mothina*, I. L. R. 23 All. 86.

Even the self-acquired property of the father-in-law in the hands of an heir (*w*) is liable for her maintenance, and though the Bombay High Court holds the view that such property is not so burdened if bequeathed by the father-in-law (*x*), the Madras High Court has laid down that her right to maintenance is not affected by any testamentary disposition in favour of volunteers (*y*). The Bengal School regards the father-in-law bound to support a daughter-in-law, even though he has only self-acquired property (*z*).

Yet in a case at Allahabad the High Court ruled that a daughter-in-law had no right to maintenance from her father-in-law when he had sold the ancestral property (*a*). If the right of the son's widow to maintenance depends on the bare fact of the retention of the ancestral property, this decision must be accepted, and a father can get rid of the burden properly incumbent on him by merely selling the patrimony though he may keep the proceeds, or obtain the fruits of his unprincipled conduct in some other form; but this would so obviously be a fraud on the dependants that the Hindu law would interfere to prevent its success (*b*). The case is discussed in *Luximan Ramchandra* v. *Satyabhamabai* (*c*), and the authorities there quoted seem conclusive of the daughter-in-law's right, and by implication of the right of every coparcener's widow. The passage of the Viramitrodaya quoted by the Allahabad Court seems to be the one at p. 154 of Mr. Golapchandra's translation. It says, "By reason (= force) of the text 'The heir to the estate of a person shall liquidate his debts'—he alone who takes the estate is declared liable to discharge the debts." This is said by Mitramisra to illustrate the proposition that if any one improperly deprives the grandson of the estate, such person shall pay the grandfather's debts, and yet in the absence of all estate the grandson's liability is not disputed (*d*). So also as to the passage of Narada and the comment on it given at p. 174. Mitramisra indeed takes the

(*w*) *Siddesury* v. *Jonardan*, 5 Cal. W. N. 549; S. C. 6 Cal. W. N. 530; S. C. I. L. R. 29 Cal. 569.

(*x*) *Bai* v. *Tarwadi*, I. L. R. 25 Bom. 263.

(*y*) *Rangammal* v. *Enchammal*, I. L. R. 22 Mad. 305.

(*z*) *Siddesury* v. *Jonardan*, 6 Cal. W. N. 530; *Khetra* v. *Kasi*, 10 W. R. 89; S. C. 2 Ben. L. R. 15.

(*a*) *Gangabai* v. *Sitaram*, I. L. R. 1 All. 170.

(*b*) Book II., Introd. § 4 F.

(*c*) I. L. R. 2 Bom., at p. 579.

(*d*) See Vyav. May., Chap. V., sec. IV., para. 14.

command to support the widows as specially applicable to those of a separated coparcener of a rank lower than the "patni," and says that "whoever takes the estate" must afford them maintenance "by reason of succession to the estate." Such is the rule, he says, when there is an estate to succeed to: he who takes the benefit must take the burden. He takes the property whether movable or immovable with a legal obligation to maintain the persons whom the late proprietor was morally bound to support, as for instance, a pre-deceased brother's widow when property is inherited from the father (*e*). But where there is no estate the precept remains unqualified by anything which can transfer the obligation from those immediately subjected to it, just as in the case of the father's debt.

Looking then to the constitution of the Hindu family, to the restrictions placed on a woman's activity, to the prohibition in a united family against her making a hoard, and the maledictions pronounced on those who fail to provide for the helpless members of their family, the conclusion may be hazarded that Colebrooke and others had sufficient grounds for opinions to which the actual practice of the people generally conforms. In a united family it would seem that in some form maintenance may be claimed by the widow of a deceased member as a right not dependent on property though in a measure regulated by it (*f*), but on the capacity only of her relatives in the order of nearness to her husband. It must be admitted, however, that the decisions in recent times go rather to limit the responsibility for maintenance, to the property taken by succession to the deceased husband. Where the widow had made away with her husband's property and then sought maintenance from his two brothers solely dependent on their profession as schoolmasters, the rejection of the claim (*g*) might be referred to the principle of the repression of fraud in the comprehensive sense given to it in the Hindu law (*h*), but in other cases (*i*) it has been said that a widow's

(*e*) *Kamini Dassee* v. *Chandra Pode Mondle*, I. L. R. 17 Cal. 373; *Janki* v. *Nandram*, I. L. R. 11 All. 194; D. B., Chap. XI., sec. VI., para. 13; *Raja Braja Sundar Deb.* v. *Srimati Swarna Manjari Dei et al.*, P. C .O. C. 29, 1917.

(*f*) *See Narhar Singh* v. *Dirgnath Kuar*, I. L. R. 2 All. 407.

(*g*) *Ganesh* v. *Yamunabai*, Bom. H. C. P. J. 1878, p. 130.

(*h*) Comp. *Paro Bibi* v. *Guddadhar Banerjee*, 6 C. W. R. 198. In the case of *Bai Lakshmi* v. *Lakhmidas*, 1. Bom. H. C. R. 13, the widow had taken a share of her deceased husband's estate, but when after thirty-four years she became destitute the Sastri and the Court pronounced her stepson and his sons

claim extends only to the interest of her deceased husband in the undivided property.

In close connexion with the right to maintenance, forming part of it indeed, stands the *widow's right to a residence* in the family house. That such residence must be afforded to her when there is a family dwelling has been uniformly held by the Sastris (*k*). Should her residence in the family dwelling be extremely inconvenient she may be lodged elsewhere (*l*), but the obligation cannot be shaken off by a sale of the dwelling (*m*), unless it be in execution of a decree for a family debt (*n*), or a debt contracted by the husband (*o*). The head of the family is still bound, and the property itself (*p*) unless taken by a circumspect purchaser without notice of the widow's right (*q*). Her

liable for her maintenance. In that case there had been no fraud. Comp. Bom. H. C. P. J. 1878, p. 139.

(*i*) See *Madhavrao* v. *Gangabai*, I. L. R. 2 Bom. 639; the *F. B. Case*, 7 N. W. P. R. 261; *Visalatchi Ammal* v. *Annasamy Sastry*, 5 M. H. C. R. 150; *Ganga Bai* v. *Sita Ram*, I. L. R. 1 All. 170; *Narhar Singh* v. *Dirgnath Kuar*, I. L. R. 2 All. 407. Bom. H. C. P. J. 1878, p. 131.

(*k*) See above, p. 75, Dig. Vyav., Chap. I., sec. 2, Q. 7, 11, 12, 25, 26. See Index, Tit. Residence; *Gauri* v. *Chandramani*, I. L. R. 1 All. 262; *Bhikham Das* v. *Pura*, I. L. R. 2 All. 141; *Mangal Debi* v. *Dinanath Bose*, 4 Ben. L. R. 73, O. C. J.; *Bai Devkore* v. *Sanmukhram*, I. L. R. 13 Bom. 101; *Jogindra* v. *Fulkarni*, I. L. R. 27 Cal. 77; *Mahalakshamma* v. *Venkata*, I. L. R. 6 Mad. 83.

(*l*) *Ibid.*

(*m*) See *infra*, Dig. Vyav., Chap. I., sec. 2, Q. 9; *Lakshman Ramchandra* v. *Satyabhamabai*, I. L. R. 2 Bom. 494, 506.

(*n*) *Ramanadan* v. *Rangammal*, I. L. R. 12 Mad. 260.

(*o*) *Soorja Koer* v. *Natha Baksh*, I. L. R. 11 Cal. 102.

(*p*) *Mangala Debi* v. *Dinanath Bose*, 4 Ben. L. R. 73, O. C. J.; *Srimati Bhagabati Dasi* v. *Kanailal Mitter*, 8 Ben. L. R. 225; *Gauri* v. *Chandramani*, I. L. R. 1 All. 262; *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353.

(*q*) See *Lakshman Ramchandra* v. *Satyabhamabai*, I. L. R. 2 Bom., at pp. 514, 518, 519. In *Parwati* v. *Kisansing*, Y was a widowed daughter-in-law of X. She occupied a house allowed to her as residence by X. This was attached in execution of a decree against X by his creditor C; Y then sued X for maintenance and residence in the house occupied by her. This was adjudged to her. In the meantime X's interest in the house had been sold in execution and purchased by C, who sought to expel Y. It was declared, however, that X's ownership was subject to Y's right of residence, and that C could not take possession until Y's "life estate fell in."

On the remark of the District Judge that debts take precedence of maintenance, the judgment observes "We may assume that this is correct," but found it no ground for disturbing Y. This if laid down without regard to the nature of the debt contracted by X to C, would go to make Y's title to residence a complete life-tenancy of the house occupied by her. This puts her right rather higher than *Satyabhamabai's Case*, but the proceedings may have suggested to

general right to sustenance is guarded against fraud in one taking the family property when there is such property, but it does not constitute an interest in the estate unless it has been limited by a decree or a legal transaction (*r*). Her own resignation of her right cannot be effectual, seeing that as a wife she is incapable of contracting (*s*) except with reference to her stridhana (*t*), that during her husband's life her right is a mere expectancy (*v*), and that afterwards she cannot deal by anticipation with her right to subsistence, which is a personal relation between her and her husband's heirs, though she may dispose of that to which by allotment in partition she has acquired a right *ad rem* (*w*).

the Court that there had been collusion for the purpose of getting rid of the daughter-in-law Y.

(*r*) *Lakshman Ramchandra* v. *Satyabhamabai*, *supra; Kalpagathachi* v. *Ganapathi Pillai*, I. L. R. 3 Mad. 184, 191.

(*s*) Manu. VIII. 416, says her property becomes her husband's, like a wife's chattels under the English common law. Her earnings are her husband's: Vyav. May., Chap. IV., sec. X., para. 7, and even the presents of friends except in special cases, *ibid.* Col. Dig., Book V., T. 470.

(*t*) S. A. 261 of 1861; *Nathubhai Bhailal* v. *Javher Raiji*, I. L. R. 1 Bom. 121; *Govindji Khimji* v. *Lakhmidas Nathubhoy*, I. L. R. 4 Bom. 318; *Nahalchand* v. *Bai Shiva*, I. L. R. 6 Bom. 470; *Narotam* v. *Nanka*, *ibid.* 473; Col. Dig., Book V., T. 475; Col. on Oblig., Book II., Chap. III. 54.

(*v*) The Judicial Committee declined to affirm the principle that an expectant interest can be the subject of a sale under the Hindu law. *Baboo Dooli Chand* v. *Baboo Brij Bhookan Lall*, decided 4th Feb., 1880; S. C. 6 Cal. R. 528, P. C.; *Amrit Narayan Singh* v. *Gaya Singh et al.*, P. C. Nov. 22, 1917.

(*w*) See on the woman's general dependence, below, sec. 11; Yajn. I. 85; Vyav. May., Chap. IV., sec. V., para. 17. That she is always under tutelage see Steele, L.C., 177; especially a widow, per Grant, J., in *Comulmoney Dossee* v. *Rammanath Bysack*, 1 Fult., at p. 200, and per Seton, J., *ibid.* 203. As to her general incapacity to contract, Narada, Pt. I., Chap. III. 27, Chap. IV. 61; Vyav. May., Chap. II., sec. I., para. 10; Col. Dig., Book I., Chap. I., T. 8; Ellis in Madras Mirasi Papers, 198; that she may like an infant be represented by a next friend, Vyav. May., Chap. I., sec. I., para. 21. That her right as mother or wife is untransferrible, see *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho*, 5 C. W. R. 111; *Ramabai* v. *Ganesh Dhonddev Joshi*, Bom. H. C. P. J. 1876, p. 188, except perhaps where a specific charge has been decreed; *Gangabai* v. *Khrishnaji*, Bom. H. C. P. J. 1879, p. 2. But the right is doubtful even then, see *Seith Gobin Dass* v. *Ranchore*, 3 N. W. P. R. 324; *Bai Lakshmi* v. *Lakhmidas Gopaldas*, 1 Bom. H. C. R. 13; *Ramabai* v. *Trimbak Ganesh*, 9 Bom. H. C. R. 283. As to the share given on partition, see *Bhugwandeen Doobey* v. *Myna Baee*, 11 M. I. A., at p. 514. The contracts which have sometimes been relied on even if consistent with the relation of husband and wife must in nearly all cases fail through the operation of the principles embodied in secs. 14 and 16 of the Indian Contract Act IX. of 1872 and the Indian Evidence Act I. of 1872, sec. 111. See *Narbadabai* v. *Mahadev*

The question remains of *how the right to maintenance* where it exists *is to be satisfied*. On this point the Mitakshara is silent, which, however, shows only the fragmentary manner in which as a running commentary on a particular Smriti it deals with the body of the law. In the Vyavahara Mayukha (*x*) it is said that in an undivided family the widow "obtains food and raiment or else a share so long as she lives" (*y*). As a condition, however, she is to be assiduous in service to her "guru" that is "to her father-in law and other (head of the family supporting her). At his pleasure she may receive a share; otherwise merely food and raiment." The "anna vastra," translated "food and raiment," means a direct supply of necessaries as distinguished from a money allowance (*z*). Katyayana's Smriti (*a*) on which this precept rests contains the further direction as given in the Vivada Chintamani (*b*). "If he (the husband) leave no estate let her remain with his family." The same Smriti goes so far even as to say that "what has been promised to a woman by her husband as her stridhana is to be delivered by his sons provided she remain with the family of her husband, but not if she live in the family of her father" (*c*). A various reading in Varadraja (*d*) supports her right to her stridhana in either of the cases supposed but leaves the condition as to maintenance untouched.

The condition of residence and performance of household duties may, however, be dispensed with on proper occasions. Thus after providing for a wife's support during her husband's life by a kind

Narayan, I. L. R. 5 Bom. 99, and the references. In England there can be no contract between a husband and his wife, *Legard* v. *Johnson*, 3 Ves. 352, 358, nor can any agreement between them alter her legal capacities as a married woman, *Marshall* v. *Rutton*, 8 T. R. 545. The same rules hold under the Hindu law by which the wife's dependence, and the husband's dominion and obligations are as strongly recognised as by the English law, and in a way remarkably analogous to it. See Vyav. May., Chap. IV., sec. X., para. 7 ss.; Chap. V., sec. IV., para. 20; Chap. XX.; Col. Dig., Book V., T. 470; *Nathubai Bhailal* v. *Javher Raiji*, I. L. R. 1 Bom. 121; *Ramabai* v. *Trimbak Ganesh*, 9 Bom. H. C. R. 283; S. A. 94 of 1873. [As to the English law, see now 45 & 46 Vict. c. 75.]

(*x*) Chap. IV., sec. 8, para. 7.

(*y*) See Viramit. Transl., pp. 173, 174.

(*z*) See the Sastri's answer in *Ichha Lakshmi* v. *Anandram*, 1 Borr. R., at p. 130.

(*a*) See Viramit. Transl. 173, 174.

(*b*) Transl. p. 261.

(*c*) Col. Dig., Book V., T. 483

(*d*) Transl. p. 50.

of distraint in cases where food, apparel, or habitation is withheld, Katyayana says (*e*), " She may take it also (if refused) from his heir . . . but when she has obtained it (*i.e.* maintenance = food, apparel and lodging) she must reside with the family of her husband. Yet if afflicted by disease or in danger of her life she may go to her own kindred " (*f*). Apart from this Katyayana, as we have seen, says property promised by her husband as stridhana—a promise specially sacred (*g*)—may be withheld by the sons if she choose to withdraw to her own family (*h*). Various readings of the Smritis give a different sense (*i*), but the ones adopted by Jagannatha were approved by Colebrooke, whose opinion, confirming that of the Sastri, is given at 2 Strange H. L. 401. The widow, it is said, may visit her own relatives but is to reside with those of her husband, who must provide her with a suitable allowance. The Sastris in the Bombay Presidency have always given similar opinions, making the widow's right one to maintenance as a member of the household in the husband's family (*k*). The Judicial Committee also say, " The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family that as a widow she has her claim for maintenance. It is in that family that in the strict contemplation of law she ought to . . . reside " (*l*).

Consistently with these authorities it was said in *Udaram* v. *Sonkabai* (*m*) that " the ordinary duty of a Hindu widow is to reside with her husband's family, who in return are charged with the duty of maintaining and protecting her " (*n*), but it was in the same case ruled that for a failure in kind usage the widow might leave her father-in-law's house and obtain a separate main-

(*e*) Vivada Chint., p. 265.

(*f*) Col. Dig., Book V., T. 481; Col. in 2 Str. H. L. 401; *Raja Braja Sundar Deb.* v. *Srimati Swarna Manjari Dei et al.*, P. C. O. C. 29, 1917.

(*g*) Viram. Transl., p. 228.

(*h*) Col. Dig., Book V., T. 483; Vivada Chint. 265.

(*i*) See Varadraja, pp. 50, 51.

(*k*) *Kumla Buhoo* v. *Muneeshunkur*, 2 Borr. 746; *infra*, Dig. Vyav., Chap. I., sec. 2, Q. 12, 25; Chap. II., sec. 1, Q. 6; sec. 6, A. Q. 2; Sp. Ap. 5 of 1862; see *Rango Vinayak* v. *Yamunabai*, I. L. R. 3 Bom., at p. 46, and see 2 Macn. H. L. 111, 118; 1 Str. H. L. 244, 245; 2 *ibid.* 272.

(*l*) *Sri Raghunadha* v. *Sri Broze Kishore*, L. R. 3 I. A., at p. 191.

(*m*) 10 Bom. H. C. R. 483; *Khetra* v. *Kasi*, 10 W. R. 89; S. C. 2 Ben. L. R. 15.

(*n*) " A widow's nearest guardian, if there be no dower, will maintain her." Answers of Castes (Brahmans) to Borradaile's questions, Book E., p. 13 MS.

tenance. In *Rango Vinayak* v. *Yamunabai* (o) it was held that although in the discretion of the Court a separate maintenance might be awarded to a widow quitting her husband's family, yet this could not ordinarily be claimed. "All she can strictly demand," it was said, "is a suitable subsistence when necessary and whatever is required to make such a demand effectual." In the absence of any special cause for her withdrawal a separate allowance was refused (p). In a previous case (q) it had been said by Sir Michael Westropp, C.J., "If he (the father-in-law) ill-treated her and expelled her from the family house the Civil Court would, we think, have been warranted in awarding to her a residence and a separate maintenance out of the family estate in his hands." The mention of the condition implies that it was thought essential.

In a Bengal case, however, that of *Cassinath Bysack* v. *Hurrusoondaree Dosse* (r), it was said by the pundits who were consulted that a widow removing from her husband's family for other than unchaste purposes does not forfeit her right of succession to her husband's estate. This was made the foundation of the decision of the Judicial Committee in appeal (s). The Hindu widow in Bengal, it must be borne in mind, takes her husband's share even in an undivided family (t), and there being no text to deprive her of the estate on her withdrawing from the family abode she retains it (v), as does even a widow who becomes incontinent (w). In the subsequent case of *Jadumani Dasi* v. *Khetra Mohun Shil* (x), Sir L. Peel said that the right of a widow to maintenance was a charge on the late husband's property in the hands of the heir. As the property did not descend to the

(o) I. L. R. 3 Bom. 44.

(p) Loss of right to maintenance by removal from her father-in-law's is set forth as a customary law by many castes in answer to Mr. Borradaile's inquiries. See Lithog., pp. 53, 74, 82, 83, 160 (177) (211), 194, 475-6, 498; MS. C. 50, 155; F. sheet 36, 40, 44; G. Sootar Goojar Talabda, Lohar Sootar, Pardesi Sootar, Lohar Surati; Sh. 16, 25, 49, 55; Koombar 8, Mochi 20, Khalpa Khimbatta 48. The only case to the contrary is one in Book F, Broach Brahmans.

(q) *Savitribai* v. *Luximibai*, I. L. R. 2 Bom., at p. 590.

(r) 2 Mor. Dig. 198.

(s) See 12 Ben. L. R., at p. 242, 243.

(t) Dayabhaga, Chap. XI., sec. 1, para. 46.

(v) See Viram. Transl., p. 236.

(w) Viram. Transl. 253. See *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A. 115.

(x) Vyav. Darp. 384.

widow the case must have been one under the law of the Mitakshara, not of the Dayabhaga. The learned Chief Justice, however, applies the former decision to the new case under a different law, and gives it an extension beyond the matter to which the earlier decision applied, which certainly could not have been expected by the pundits whose opinions formed the ultimate basis of the judgment. "The freedom of choice (of residence)," his Lordship observes, "had respect to causes as applicable to a widow not an heiress as to one who inherited." "There are certainly texts," he continues, "which speak of the right of the relatives of the husband to have the widow resident under their roof," but these he thinks may be controlled by reference to the needs of modern society, and as a forfeiture of maintenance is not prescribed as a penalty for withdrawal, the widow is equally entitled to it whether she resides at her father's house or with her deceased husband's family.

It does not seem to have occurred to the learned Judge that "the right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession" (y), and that the converse is equally true. The widow does not forfeit her right by withdrawing from her husband's family, but then the right itself is a right to be supported there not elsewhere. Its enjoyment is lost simply because that enjoyment is essentially local. It is only when the husband's family are unable or unwilling to maintain the widow that her right to a separate allotment of property arises (z). Strictly it is only in the patni or principal wife that this latter right can become vested. She is answerable for sacrifices to her husband's manes, and ought to have the means of performing them when she cannot share in the united family sacrifices: the wife of inferior class is not a subject of the duty or the right (a). It is not in any case strictly a charge on the estate constituting a property. The widow's maintenance is a personal right (b) to be made good by the heir taking the property (c), but the corresponding duty

(y) Judicial Committee in *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A., at p. 151.

(z) Vyav. May., Chap. IV., sec. VIII., p. 7; Smriti Chand. Chap. XI., sec. I., pp. 33, 46; Vivada Chint. 265.

(a) See Smriti Chand., Chap. XI., sec. I., paras. 9, 10, 12, 15, 21, 35.

(b) *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho*, 5 C. W. R. 111; *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C. W. R. 311.

(c) What the Roman law called a *modus*.

does not necessarily and in all cases adhere to the property itself (*d*). It is not a right which can be assigned or attached (*e*). The father's debts take precedence of the mother's subsistence, and even these are not a charge in such a sense as to prevent the sons giving a clear title to a purchaser (*f*). Although therefore the maintenance of a widow of a coparcener is in a sense a charge on the estate (*g*), it does not seem to be one necessarily attended with the incidents of ordinary property until at least a special lien has been created by agreement or by judgment of a Court. In *Baijun Doobey* v. *Brij Bhookan Lall Awasti* (*h*) the phrase "charge upon inheritance" seems to be used in the sense of a liability passing with the estate to successors: the claim in that case was realised against the personal interest of the holder of the estate, herself a widow. In *Narayanrao* v. *Ramabai* (*i*) the Judicial Committee recognises that "an obligation . . . to make allowance for the support of the widows analogous to the maintenance to which widows by Hindu law are entitled," does not "create a right which [is] a specific charge on the inheritance." The assumption, therefore, that the right to maintenance is an estate like that taken by a widow on succession seems to be unwarranted, and thus the ground originally taken for giving to the minor right the absoluteness of the other fails (*k*).

But however questionable the origin of the doctrine we are considering, it has been so frequently acted on that it must now

(*d*) *Lukshman* v. *Sarasvatibai*, 12 B. H. C. R. 69; *Adheranee Narain Coomary* v. *Shona Malee*, I. L. R. 1 Cal. 365; *Johurra Bibee* v. *Sreegopal Misser*, *ibid.* 470. See *Lakshman* v. *Satyabhamabai*, I. L. R. 2 Bom. 494.

(*e*) *Bhyrub Chunder Ghose* v. *Nubo Chunder*, 5 C. W. R. 111; *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C. W. R. 311; *Ramabai* v. *Ganesh*, Bom. H. C. P. J. 1876, p. 188.

(*f*) *Lukshman Ramchandra* v. *Satyabhamabai*, I. L. R. 2 Bom., at p. 505; *Jamiyatram* v. *Parbhudas*, 9 B. H. C. R. 116; *Lakshman Ramchandra* v. *Sarasvatibai*, 12 B. H. C. R. 69; *Natchiarammal* v. *Gopala Krishna*, I. L. R. 2 Mad. 126.

(*g*) *Ramchandra* v. *Savitribai*, 4 Bom. H. C. R. 73, A. C. J.

(*h*) L. R. 2 I. A., at p. 279.

(*i*) L. R. 6 I. A., at p. 118. Comp. *Koomaree Dabea's Case*, 1 Marsh. 200.

(*k*) The husband's obligation under the English law to settle lands on his wife is not forfeited even by elopement and adultery. It is a legal right vested in her and is not divested though dower is barred by similar misconduct: *Sidney* v. *Sidney*, 3 P. Wms. 268; and the wife keeping apart from her husband cannot claim a separate maintenance: *Manby* v. *Scott*, 2 S. L. C. 375; *Marshall* v. *Rutton*, 8 T. R. 545, 547.

probably be considered as finally established (*l*). The duty of residence with the family of the deceased husband has been reduced to a mere moral obligation (*m*). In the case of *Pirthee Singh* v. *Ranee Rajkooer* (*n*), an appeal from the High Court at Allahabad, the widow was entitled under her husband's will to maintenance and provision for charities. There was no direction as to residence. The Judicial Committee finding this, relied on the general principle laid down by Sir L. Peel in *Jadumanis Case* (*o*), and declared the right of the widow to an allowance not impaired by her withdrawal from the family of her husband. The case of *Narayanrao* v. *Ramabai* (*p*) from Bombay was very similar to that of *Pirthee Singh*, and there being no condition as to residence in the will, the Judicial Committee held that the widow "was to be left in this respect in the ordinary position of a Hindu widow, in which case separation from the ancestral house would not generally disentitle her to maintenance." The law thus laid down was followed in *Kasturbai* v. *Shivajiram* (*q*) and it must now be taken that when the members of a deceased husband's family have family property it lies not on the widow claiming separate maintenance to show that her withdrawal was necessary or proper, but on them to show that it was improper or else "that the family property is so small as not reasonably to admit of an allotment to her of a separate maintenance" (*r*), or that the husband by will has made maintenance dependent on her dwelling with his family (*s*).

The different incidence of the burden of proof thus established will not probably produce much variance in practice. Under the British rule, a widow could make herself so disagreeable that the members of her husband's family would be glad to part with her

(*l*) See *Subsoondaree Dossee* v. *Kisto Kisore Neoghy*, 2 Tay. and Bell, 190; *Shurno Moyee Dassee* v. *Gopal Lall Dass*, 1 Marsh. 497; *Visalatchi Ammal* v. *Annasamy Sastri*, 5 M. H. C. R. 150.

(*m*) *Koodee Monee Dabea* v. *Tarrachand Chuckerbutty*, 2 C. W. R. 134; *Ahollya Bhai Debia* v. *Luckhee Monee Debia*, 6 C. W. R. 37; *Ganga Bai* v. *Sita Ram*, I. L. R. 1 All. 170, 174; *Parvatibai* v. *Limbaji*, I. L. R. 36 Bom. 131.

(*n*) 12 Ben. L. R., p. 238.

(*o*) V. Darp. 384.

(*p*) L. R. 6 I. A. 114; *Gokibai* v. *Lakhmidas*, I. L. R. 14 Bom. 490.

(*q*) I. L. R. 3 Bom. 372.

(*r*) See *Ramchandra* v. *Sagunabai*, I. L. R. 4 Bom. 261; *Godavribai* v. *Sagunabai*, I. L. R. 22 Bom. 52.

(*s*) *Mulji* v. *Bai Ujan*, I. L. R. 13 Bom. 218.

on any reasonable terms, and mere disagreement has in some instances been thought by the Sastris a sufficient ground for approving a separate maintenance.

The right to maintenance is by the common law one "accruing from time to time according to the wants and exigencies of the widow" (*t*). The limitation to a suit for a declaration of the right is now 12 years under Act. IX. of 1908, Sched. I., Art. 129, so that decisions under the preceding Acts limiting the claim to 12 years from the husband's death are no longer applicable (*v*). But though limitation arises on a time to be counted from the application and refusal, the right is not to be referred to that demand as its origin so as to prevent the award of arrears in a proper case (*w*). A decree fixes the payments awarded as a charge on the estate (*x*), and though future sums to become due are still inalienable (*y*) the amount decreed for arrears recoverable as a debt (*z*) may be attached by the widow's judgment creditors (*a*).

Maintenance may be awarded for the future, subject if necessary to a variation on a change of circumstances (*b*). The award or refusal of arrears rests in the discretion of the Court; but they may properly be awarded when it appears they have been with-

(*t*) *Narayanrao* v. *Ramabai*, L. R. 6 I. A., at p. 118; S. C. I. L. 3 Bom. 415. It cannot be attached: *Ramabai* v. *Ganesh*, Bom. H. C. P. J. 1876, p. 188; *Rangubai* v. *Ramchandra*, I. L. R. 36 Bom. 383; *Girianna* v. *Honana*, I. L. R. 15 Bom. 236; *Siddesury* v. *Jonardan*, I. L. R. 29 Cal. 569.

(*v*) *Ibid.*

(*w*) *Jivi* v. *Ramji Valji*, I. L. R. 3 Bom. 207; *Binda* v. *Kunnsilla*, I. L. R. 13 All. 126.

(*x*) *Ram Kullee Koer* v. *The Court of Wards*, 18 C. W. R. 473; *Koomaree Debia* v. *Roy Luchmeeput Singh*, 23 C. W. R. 33; *Gangabai* v. *Krishnaji Dadaji*, Bom. H. C. P. J. for 1879, p. 2; *Nithokissoree* v. *Jogindra*, L. R. 5 I. A. 55.

(*y*) This is recognised generally by the customary law of castes, as in Borradaile, C. Rules, MS. G. Sheet 32.

(*z*) *Pajerav* v. *Jahagirdar*, I. L. R. 11 Bom. 528.

(*a*) *Musst. Duloon Koonwur* v. *Sungum Singh*, 7 C. W. R. 311; and see *Kasheeshuree Debia* v. *Greesh Chunder Lahoree*, 6 C. W. R. 64 M. R.; and *Hoymobutty Debia Chowdhrain* v. *Koroona Moyee Debai*, 8 C. W. R. 40 C. R.

(*b*) *Ram Kullee Koer* v. *The Court of Wards*, 18 C. W. R. 473; *Nubo Gopal Roy* v. *Sreemutty Amrit Moyee Dossee*, 24 C. W. R. 428; *Narbadabai* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99. The successor of a zamindar, it was said, might readjust the terms of the grant made for maintenance to his predecessor's mother: *Bhavanamma* v. *Ramasami*, I. L. R. 4 Mad. 193; *Rangubai* v. *Ramchandra*, I. L. R. 36 Bom. 383; *Vishnu* v. *Manjamma*, I. L. R. 9 Bom. 108.

held (*c*), and refused where the widow has chosen to live apart without good cause and without asserting her right (*d*). In determining the amount to be awarded, besides the value of the husband's estate, the position and status of the deceased husband and of the widow must be considered (*e*). A bequest of jewellery clothes, etc., to a wife or a daughter as stridhan will not affect her right to proper maintenance (*f*). She cannot be deprived of maintenance even when she has surrendered this right for valuable consideration (*g*). These decisions are obviously inconsistent with the sum payable for maintenance being a charge on the property in the strict sense of a real right in it. A wife's right to maintenance has been attributed to a kind of identity with her husband in proprietary right, but then her right is quite subordinate (*h*). She cannot deal with it nor can she effectively release her husband and his heirs from her right to subsistence (*i*) by a document executed in the husband's lifetime, though the amount of her subsistence may thus be defined in case of a disagreement in the family.

A gratuitous transfer, or one made with the intention of defrauding the widow of her maintenance and when the transferee has notice of the intention, will not defeat her rights (*k*), except when it has been made by a deed or a decree (*l*); nor will a devise

(*c*) See *Jadumani Dossee's Case, supra*; *Raja Pirthee Singh* v. *Ranee Raj Kooer*, 12 Ben. L. R., at p. 248; *Narayanrao* v. *Ramabai*, I. L. R. 3 Bom. 415; S. C. L. R. 6 I. A. 114; *Venkopadhyaya* v. *Kavan Hengasu*, 2 Mad. H. C. R. 36; *Malikarjuna* v. *Durga Prosad*, I. L. R. 17 Mad. 362; *Motilal* v. *Bai Kashi*, I. L. R. 17 Bom. 45; *Sheshamma* v. *Subarayadu*, I. L. R. 18 Mad. 403.

(*d*) *Raghubans Kunwar* v. *Bhagwant*, I. L. R. 21 All. 183. *Cf. Gokibai* v. *Lakhmidas*, I. L. R. 14 Bom. 490.

(*e*) *Sreemutty Nitto Kissoree Dossee* v. *Jogendro Nath Mullick*, L. R. 5 I. A. 55; *Raja Pirthee Singh* v. *Raj Koer*, 12 Ben. L. R. 283, P. C.; *Moniram* v. *Kolitany*, L. R. 7 I. A. 115, 150; *Rajendranath* v. *Puttosoondry*, 5 Cal. L. R. 18; *Narhar* v. *Koer*, I. L. R. 2 All. 407.

(*f*) *Joytara* v. *Ramhari*, I. L. R. 10 Cal. 638.

(*g*) *Ratonji* v. *Morlidhar*, Bombay, April 30, 1874, per Westropp, C.J., and Green, J., referring to Norton's Leading Cases, 31.

(*h*) *Jamna* v. *Machul Sahu*, I. L. R. 2 All. 315.

(*i*) *Lakshman Ramchandra* v. *Satyabhamabai*, I. L. R. 2 Bom. 494, 503; *Narbadabai* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99.

(*k*) *Biharilalji* v. *Bai Rajbai*, I. L. R. 23 Bom. 342.

(*l*) *Ram Kumar* v. *Dai*, I. L. R. 22 All. 326.

of the estate if ancestral, for it ranks as a gratuitous disposition (*m*).

The *maintenance of parents* (*n*) and *of children* in a united family is provided for by the law which determines their several interests. This is discussed under the head of Partition. Apart from property or after a partition the parents are always entitled to subsistence from their sons (*o*). A mother is entitled to maintenance from her son independent of his possession of paternal property (*p*), which she does not forfeit for unchastity (*q*). An unmarried daughter is entitled to maintenance and to her marriage expenses (*r*) and the obligation to provide for the wedding expenses of a deceased co-parcener's daughter extends to the surviving member (*s*). In Bengal she is legally entitled to be supported by her father's successors; she may even leave the family home without losing her right to maintenance (*t*). In *Bai Mangal* v. *Bai Rukhmini* (*v*) the Bombay High Court has held that a woman has no claim at all on her father's family; but the Calcutta High Court has taken the view that she is so entitled to be supported by the father's heir when her family of marriage is in destitute circumstances (*w*). This appears quite conformable to the sound texts (*x*). The adult son is not usually entitled to support by his father (*y*), but in extreme indigence the right arises in favour of one who is incapable of maintaining himself (*z*). These rights cannot, however, be considered as charges on the property held by those subject to them, though the extent

(*m*) *Becha* v. *Mothina*, I. L. R. 23 All. 86; Transfer of Property Act of 1882, sec. 39.

(*n*) A son must always support his parents, his mother even though she be an outcaste. Baudh. Tr. 230; Gaut. Tr., p. 279.

(*o*) See Manu. quoted Col. Dig., Book V., Chap. VI., T. 379, Comm.; *Srimati Hemangini Dasi* v. *Kedar Nath*, L. R. 16 I. A. 115.

(*p*) *Subbarayana* v. *Subbakka*, I. L. R. 8 Mad. 236.

(*q*) *Bai Daya* v. *Govindlal*, I. L. R. 9 Bom. 279; Mit., Chap. II., sec. X, 15; Baudh. II., 2, 3, 4, 6; Gautama, XXI. 15.

(*r*) *Tulsee* v. *Gopalrai*, I. L. R. 6 All. 632.

(*s*) *Vaikuntam* v. *Kallapiram*, I. L. R. 23 Mad. 512.

(*t*) *Kamini* v. *Chandra Pode*, I. L. R. 17 Cal. 373; *Siddesury* v. *Jonardhan*, I. L. R. 29 Cal. 557.

(*v*) I. L. R. 23 Bom. 291.

(*w*) *Mokhada Dasi* v. *Nundu Lal*, I. L. R. 28 Cal. 278.

(*x*) Narada, XII. 29.

(*y*) *Premchand Pepara* v. *Hoolaschand Pepara*, 12 C. W. R. 494.

(*z*) Col. Dig., Book V., Chap. I., T. 23; Smriti Chand., Chap. II., sec. I., para. 31 ss.; Steele, L. C. 40, 178.

of the corresponding obligation depends very much on the means by which it can be satisfied. *Illegitimate children* not taking a share of the estate are entitled to maintenance (*a*) but not in general as a charge on the property, though the father of a Sudra may allot a share to him (*b*), and in the higher castes may make a grant (*c*).

In families in which a rule of primogeniture prevails that is generally in families holding estates granted for the support of some public service of importance, the younger members are entitled to a provision by way of appanage in the shape either of an assignment of the revenue of particular villages or lands, or else of an income out of the general revenue of the impartible estate (*d*). It often happens that a family which has an estate of this kind has also property apart from its watan or estate appropriated to public purposes. When that is the case there may be a partition if there is not a family usage to the contrary, in which the "service lands" are taken into account along with the other property in the aggregate for partition. They are assigned to one of the sharers, and if impartible may make that share larger than the others. The lands, however, though subject to provide for a public service may still be partible within the family, and this is a very common case. When the partible estate is insignificant, the holder of the impartible estate is subject to claims for maintenance of the junior branches of the family so far as he can support them. No precise limit has as yet been set to the degree of family connexion on which the right and obligation depend (*e*). An allotment of land or revenue seems to continue to lineal descendants in the branch, and on their *extinction* to revert (*f*). But sometimes it is absolute (*g*).

(*a*) *Rahi* v. *Govind*, I. L. R. 1 Bom. 97; *Sri Gajapathi Radhik* v. *Sri Gajapathi Nilamani*, 13 M. I. A., at p. 506; *Roshan* v. *Balwant*, L. R. 27 I. A. 51; *Rajah Parichab* v. *Zalim Singh*, L. R. 4 I. A. 159.

(*b*) Col. in 2 Str. H. L. 68. See below, Digest of Vyavasthas, Chap. VI., sec. 2, Q. 2, Rem.; *Inderum* v. *Ramasawmy*, 13 M. I. A. 141.

(*c*) *Raja Parichab* v. *Zalim Singh*, L. R. 4 I. A. 159.

(*d*) Steele, L. C. 229; *Shidhojirav* v. *Naikojirav*, 10 B. H. C. R. 228; *Narsinh Khanderav* v. *Yadaorav*, Bom. H. C. P. J. 1882, p. 345; *Chowdhry Hureehur Pershad Doss* v. *Gocoolanund Doss*, 17 C. W. R. 129, C. R.; comp. Imperial Gazetteer of India, Art. Rajputana, vol. VII., p. 520.

(*e*) See Sleeman, Journey through Oude, vol. I., pp. 169, 173; above, p. 235; and *Savitriava* v. *Anandrao*, 12 Bom. H. C. R. 224.

(*f*) *Raja Woodoyaditto Deb* v. *Mukoond Narain*, 22 C. W. R. 225; *Ekradeshwar Singh* v. *Bahuasin*, L. R. 41 I. A. 275.

(*g*) *Salur Zamindar* v. *Pedda Pakir Raju*, I. L. R. 4 Mad. 371.

When a share is unsuccessfully sued for by a widow or a member of a junior branch of a family, it is the practice of the Courts to award maintenance if the right to it is established in the course of the trial (*h*).

An allowance for maintenance fixed by a decree "is ordinarily liable to be varied if the party ordered to pay it shows that there are circumstances which render it equitable to vary the amount," and "no Court," it was said, "would pass a decree fixing a grant of maintenance in perpetuity" (*i*).

XI.—ON STRIDHANA OR WOMAN'S PROPERTY.

The simple etymology of the word "Stridhana," "woman's property," affords little or no guidance towards determining its exact comprehension. The principal divergencies of view indeed amongst the Hindu commentators may perhaps be ascribed to their efforts to get more out of the term than it really contains, to find a sufficient and decisive direction in that which in itself is essentially ambiguous (*k*).

(*h*) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 193, A. C. J.; *Razabai* v. *Sadu Bhavani*, 8 Bom. H. C. R. 99, A. C. J.; *Shidhojirav* v. *Naikojirav*, 10 Bom. H. C. R. 228, 234.

(*i*) *Narsinh Khanderav* v. *Yadavrav*, Bom. H. C. P. J. 1882, p. 345.

(*k*) The principles of interpretation professedly followed by the Hindu lawyers are closely connected with their philosophical systems. See above, pp. 14, 16; Col. Essays, vol. II., page 239. In practice, "the interpretations of Indian commentators, even if traditional, are chiefly grammatical and etymological, explaining every verse, every line, every word by itself, without inquiring if the results so obtained harmonised with those derived from other quarters." Roth, quoted 2 Muir's Sanscrit Texts, 169 Note, 200, though an isolated construction of the texts is condemned, *ibid.*, page 177. Though the hairsplitting habits of the commentators are very puzzling to a European, and they constantly appeal to standards which he cannot accept, their conclusions are generally wrought out with rigorous logic from the data assumed by them. Many of their rules of construction are identical with those of the English law. Thus the more general, it is said, yields to the more particular, and the determination of which is the more general and which the more particular in any case is to be made by an application of trained experience. See Vijnanesvara in Macn. H. L., p. 188. Instances of an expression, taken by some literally and by others as a "dikpradarsana," or indication of a principle, are discussed in this volume. For the use of "Ganas," suggestions of class, see Burnell's Introduction to Varadraja's Vyavahara-Nirnaya, p. xiii. The Vedic Commentator Vallabha propounds the perfectly correct principle: "A vedic text cannot be interpreted by itself: its context must be considered and the interpretation must harmonize with other texts of the Veda bearing on the same subject." See the Mimansadarsana, p. 371.

The expression " Stridhana " may obviously connote:—

(1) A limitation of woman's proprietary competence to certain kinds of things amongst those regarded as generally admitting of ownership.

(2) Special limitations or extensions of the rights and competencies of the woman, as compared with the man, in transactions concerning things her ownership of which is recognised.

(3) A special course of devolution, on woman's death, of the property owned by her while living.

Thus we have—(1) the ordinary enumerations of the six or more kinds of Stridhana; (2) the woman's unlimited right to deal with Saudayakam, coupled with the restrictions imposed by some lawyers on her dealings with immovable property; and (3) the rule, referred to by Ellis (*l*), that " sons shall succeed to the father, and daughters to the mother." Jimutavahana (*m*) defines Stridhana as that which a woman may alien or use independently of her husband (*n*). Vijnanesvara defines it as property which a woman may have acquired by any of the ordinary modes. What property she is capable of owning, if there be any discrimination between this and the property of males, is not a point embraced within either definition, though if any difference exists, the definition ought apparently rather to have rested on this than on the particular rules which could apply only when the character of the property had been first established. Nilakantha, in the Vyavahara Mayukha (*o*), does attempt to define Stridhana by an enumeration of its several constituents; but accepting the word ' other ' (*p*), in a text of Yajnavalkya, as allowing an indefinite extension of the objects of woman's ownership; he is led to divide Stridhana into two classes, according to its devolution, either as prescribed by texts bearing on particular elements of it, or under a residual rule, which he (*q*) draws from another passage of Yajnavalkya, and which brings the inheritance to all other kinds of Stridhana under the rules applicable to a male's estate.

(*l*) 2 Str. H. L. 405; see Col. Dig., Book V., Chap. IX., sec. 1, T. 461; and Narada, Vivadapada, Chap. XIII. 7, 2, Transl., p. 94.

(*m*) Dayabhaga, Chap. IV., sec. 1, p. 18; Stokes's H. L. B. 240.

(*n*) Col. Dig., Book V., T. 470.

(*o*) Chap. IV., sec. 10; Stokes's H. L. B. 98.

(*p*) " Adhivedanika adyam "=" a gift on supersession and so on," Yajn. II. 143, Stenzler.

(*q*) See para. 26; Stokes's H. L. B. 105.

The notion set forth by Apastamba (*r*), as held by some, is that, though the wife, being identified with her husband in the fruits of piety, and the acquisition of wealth, might during his absence expend the common funds without being guilty of theft, yet in a partition, her share comprises only her ornaments and the wealth given to her by her relations. From this to the liberal rule of Yajnavalkya, as construed by the Mitakshara, it is possible to trace in the Smritis something like a gradual development of the recognised capacity of women for property, which may have corresponded in a measure to the successive generations in which the texts were framed, but which at any rate indicates by its progressive reception and influence a growing predominance of personal regard towards wives and daughters over the harsher regulations of the earlier Brahmanical law. Baudhayana indeed (*s*) provides only for the succession, in the case of woman's property, of daughters to their mother's ornaments, consistently with his rule that women are excluded generally from inheritance. In Vasishtha (*t*), daughters are admitted to divide the nuptial presents of their mother. Manu enumerates (*v*) [1] gifts at the bridal altar, [2] in the bridal procession, [3] as a token of affection, or [4] from a father, [5] mother, or [6] brother, and to these Vishnu adds gifts by sons, the present on supersession, the wife's fee, and the gift subsequent. The gift subsequent [by parents and relatives] may be considered as included in Manu's "pritidatta" or gift as a token of affection (*w*), and then the real additions are the son's gift, the fee (sulka), and the gift on supersession through the husband's marrying another wife (*Adhivedanika*). Narada, who presents some indications, according to Dr. Jolly, of modern influences, merely repeats the rule of Manu (*x*), with a substitution of a gift from the husband in place of the "gift as a token of affection," which might be taken more extensively (*y*). Devala goes much further. He says that a gift to a woman for her maintenance, her fee (sulka), and her gains (labha) shall be

(*r*) See Prasna II., Patala. 6, Kan. 14, Sl. 9.
(*s*) Prasna II., Kan. II. 27.
(*t*) Chap. XVII. 24.
(*v*) Chap. IX., Sl. 194.
(*w*) See Col. Dig., Book V., Chap. IX., T. 465, 468, Comm.
(*x*) See Narada, Vivadapada, Part II., Chap. XIII. 8, Transl., p. 95.
(*y*) See Mit., Chap. II., sec. 11, p. 5; Stokes's H. L. B. 459; Col. Dig., Book V., Chap. IX., T. 462, Comm.

her separate property or Stridhana (*z*). The Viramitrodaya limits the *labha* to "gains received in honour of Gauri and other deities," but this restriction seems to be arbitrary (*a*).

Lastly, comes the passage of Yajnavalkya (II., 144) quoted by Mitramisra in the Viramitrodaya. As quoted by Jagannatha and by Jimutavahana (*b*), the passage seems not to have the word "Adyam," on which Vijnanesvara in a great measure builds his construction (*c*). This is in itself vague, since the words "and the rest" or "the like" may be translated by reference to the preceding enumeration so as to extend only to property acquired in a way similar to those specified (*d*). The Smriti Chandrika adopts the reading "Adyam" (*e*), yet in the section on Stridhana makes no mention of property inherited by women, whence the translator of that work (*f*) and the High Court of Madras have concluded that inherited property is not Stridhana. Yet a widow according to the same authority takes the property of her deceased husband in a divided family (*g*), and a daughter on failure of the widow succeeds as a *dayadi* or sharer of the inheritance (*h*). The Mitakshara, an earlier work, but under the influence of more advanced views, or as an easier solution of the questions arising on Yajnavalkya's text, takes "Adyam" as meaning "any other separate acquisition," and indicates, by enumerating "inheritance, purchase, partition, seizure, or finding (*i*), that a woman may acquire property in precisely the

(*z*) See the Viramitrodaya on Stridhana, and Col. Dig., Book V., Chap. IX., T. 478.

(*a*) See the Smriti Chandrika, Chap. IX., sec. 2, p. 15.

(*b*) See also Col. Dig., Book V., Chap. IX., T. 463; Dayabhaga, Chap. IV., sec. 1, para. 13; Stokes's H. L. B. 239; Mit., Chap. II., sec. 11, para. 2, note; Stokes's H. L. B. 458; Smriti Chandrika, Chap. IX., sec. 1, para. 3, note (2).

(*c*) Stenzler, Yajn. 143, translates this "*und ahnliches.*"

(*d*) See the Madhaviya, p. 41.

(*e*) Chap. IX., sec. 1, para. 3.

(*f*) Translation, p. 110, note (1).

(*g*) Smriti Chandrika, Chap. XI., sec. 1, para. 24.

(*h*) *Ibid.*, sec. 2, p. 9; sec. 4, p. 19.

(*i*) Mit., Chap. II., sec. 11, para. 2; Stokes's H. L. B. 458. By adi (= and the rest) Vijnanesvara must have known that the passage quoted by him from Yajnavalkya would remind his readers of the instances of female inheritance which he had already given (see Stokes's H. L. B., pp. 383, 427, 440, 441, 446). He could not but have excepted these expressly had he intended to except them. He found a varying enumeration of the constituents of Stridhana in Smritis, all of which had a sacred authority, and adopted a generalization that embraced them all. This was an application of the received principle that where different

same ways as a man (*k*). As to inheritance from her husband, Vijnanesvara supports the complete right of the widow by reference to Brihaspati's text, in her favour (*l*), without the exception contained in another passage of the same Smriti, excluding her from succession to Nibandha or fixed property (*m*). The daughter too inherits from her father, and thus inheriting becomes complete owner, as when she takes her one-fourth share in a partition (*n*). See Digest of Vyavasthas Chap. II. sec. 7.

Whether Vijnanesvara has not given to the text of Yajnavalkya a comprehension going much beyond the intention of its writer may reasonably be doubted. If we look back to the state of Brahmanical feeling as the expression of which the principal Smritis were composed, we find the position of women regarded as essentially dependent. Those who on account of their weakness had a claim to be protected and maintained by their male relatives in their family of marriage (*o*), or of birth (*p*), were not likely to excite the commiseration out of which might spring the moral and eventually the legal recognition of their right to take the estate dedicated equally to the celebration of sacrifices (*q*) to the dead as to the support of the living members of the family. Such a recognition was wholly opposed to the earlier

objects are named as of a particular class by different Smritis, all are to be included in it in order to preserve consistency (*ekavakyata*). Inheritance he specifies, and names it first; the comprehensive final term shows that it is not used in any restricted sense. Such words as *adi* are constantly used in the Smritis which were learned by heart to suggest a statement or a class by a single term. Vijnanesvara, commenting on Yajnavalkya's smriti, interprets the other smritis by means of that, and of Gautama's, which also (Chap. XXVIII. 24) gives but a single general rule for the descent of Stridhana and a single exception in the case of the sulka or fee. Other lawyers take other texts, as Manu. IX. 192-4, 198, as the leading authority, and construe Yajnavalkya and Gautama by them, but without any precise general agreement as to details.

(*k*) *Ibid.*, Chap. I., sec. 1, para. 8; Stokes's H. L. B. 366.

(*l*) Mit., Chap. II., sec. 1, paras. 6, 30, 31, 39; Stokes's H. L. B. 428-439.

(*m*) See Smriti Chandrika, Chap. XI., sec. 1, para. 23; Mit., Chap. II., sec. 2, para. 1; Stokes's H. L. B. 440. This incapacity seems to be still recognised in the Sialkot district of the Panjab. See Panj. Cust. Law, II. 210.

(*n*) *Ibid.*, Chap. I., sec. 1, paras. 3, 8; Stokes's H. L. B. 365, 366; sec. 7, para. 14; Stokes's H. L. B. 401.

(*o*) See Vyasa quoted Varadraja, p. 39, and the Comment. p. 42; Vivada Chintamani, p. 261, 262; above, p. 245 ss.

(*p*) See Narada, Pt. II., Chap. XIII., Sl. 28; above, p. 239.

(*q*) Manu. IX. 142; Col. Dig., Book V., T. 413, 484, Comm.; and compare Coulanges La Cité Antique, Book II., Chap. VII.

ideas as to the ownership of land. Yajnavalkya himself regarded the inheritance as absolutely impartible and inalienable. Usanas says that such property is indivisible " among kinsmen even to the thousandth degree," and Prajapati is to the same effect (*r*). Under such a law there would be no immovable property for the widow or the daughter to take on the decease of the husband or father, and Brihaspati says (*s*) distinctly that a widow shall take her husband's wealth " with the exception of fixed property," as, " even if virtuous, and though partition has been made, a woman is not fit to enjoy fixed property." In this latter passage partition of the immovable inheritance is as elsewhere in the same Smriti recognised, but the older note of exclusion of females as owners is still retained. Katyayana, fully recognising partition, yet declares that immovable property is not to be given to a woman (*t*); and Vyasa says that the husband even is not to make her a present of more than a limited amount, apparently out of the movable wealth (*v*). So jealous was the Brahmanical law of any impairment of the family estate. The wife being, along with the son and the slave, in this ancient constitution of Hindu Society, " Nirdhana " or without capacity for property (*w*), and her competence in that respect having been extended by steps, which seem to have been always jealously watched and restricted, the rather sudden and indefinite expansion, which the Mitakshara supposes Yajnavalkya to have given to it seems opposed to all probability. Apart from Vijnanesvara's authority we should rather construe the words " and the rest " by reference to the context, and explain them as meaning " other kinds sanctioned by express scripture or by custom that may be

(*r*) Smriti Chan. *loc. cit.*, p. 44, 46.

(*s*) *Ibid.*, Chap. XI., sec. 1, para. 23.

(*t*) Vyav. May., Chap. IV., sec. 10, para. 5; Stokes's H. L. B. 99.

(*v*) Vyav. May. *loc. cit.;* Dayabhaga, Chap. IV., sec. 1, para. 10; Stokes's H. L. B. 238. Compare Coulanges, La Cité Antique, Book II., Chap. VI.

(*w*) See Manu. and Narada as quoted below. The Smriti Chandrika tries to explain away " Nirdhana " as incompetent for transactions, not as incapable of holding property. See Transl., Chap. IX. In China all property owned or inherited by a wife passes to the husband in consequence of the *potestas* with which he is invested, as under the earlier Roman Law. See Journ. of N. China Br. of the R. A. Society, Part XIII., p. 112. Women were regarded by the Teutonic laws as necessarily dependent, and traces of this order of ideas still remain in the English law. The proper guardian was the husband, father, brother, or son, the nearest agnate or the King's Court. Lab. *op. cit.* 394. So under the early Roman Law. See Mommsen, Hist. of Rome, vol. I.

referred to it." That Vijnanesvara himself accepted the text in its widest signification cannot reasonably be doubted (*x*).

It is this construction which underlies his whole subsequent treatment of the subject of inheritance. This is the construction which the Viramitrodaya (*y*) adopts and which Jimutavahana understands while he combats it (*z*).

By what precise course the Hindu woman, from the condition of complete dependence, from being *Nirdhana*, rose in the estimation of the Brahman lawyers to the high position assigned to her by Vijnanesvara, cannot probably, upon the existing sources of information, be determined with any certainty. Sir H. S. Maine, tracing her right to property to the Bride-Price paid for the damsel taken in marriage and in which she shared, remarks (*a*):—

"If then the Stridhan had a pre-historic origin in the Bride-Price, its growth and decay become more intelligible. First of all it was property conferred on the wife by the husband 'at the nuptial fire,' as the sacerdotal Hindu lawyers express it. Next it came to include what the Romans called the *dos*, property assigned to the wife at her marriage by her own family. The next stage may very well have been reached only in certain parts of India, and the rules relating to it may only have found their way into the doctrine of certain schools; but still there is nothing

(*x*) A conclusive confirmation of this being the sense of the Mitakshara may be drawn from an exceptional case. Inheritance is by Vijnanesvara named as first amongst the sources of ownership (see Mit., Chap. I., sec. I., para. 12). There is a passage of Baudhayana which says, "the uterine brothers take the property of a deceased damsel." Here is a special rule of inheritance to Stridhana in the particular case. Vijnanesvara, amongst the rules on Stridhana, says that under it the brothers take the property "inherited by her." Thus the inheritance constitutes Stridhana, and the heirs of the woman, not heirs of the former owner, take it on her decease.

Similarly in the Vyavahara Mayukha, Chap. IV. sec. 10, para. 26, property taken by inheritance is distinctly ranked as Stridhana by the distinction drawn between it and Stridhana of the less important specified kinds to special texts apply.

(*y*) Section 1, p. 4 ff, below.

(*z*) Dayabhaga, Chap. IV. sec. 2, p. 27 (Stokes's H. L. B. 250); sec. 3, p. 4 (*ibid.* 251), compared with Mit. Chap. II. sec. 11, p. 11 (*ibid.* 460). So also the Smriti Chandrika, which, though it does not allow inheritance as a source of stridhana (see Transl. Chap. IX. sec. I.), yet admits that the Mitakshara does so (Transl. Chap. IV. para. 10). The Vivada Chintamani and the Sarasvati Vilasa follow the Mitakshara. See below.

(*a*) The "Early History of Institutions," pages 324, 333.

contrary to the analogies of legal history in the extension of the Stridhan until it included all the property of a married woman. The really interesting question is, how came the law to retreat after apparently advancing farther than the Middle Roman Law in the proprietary enfranchisement of women, and what are the causes of the strong hostility of the great majority of Hindu lawyers to the text of the Mitakshara, of which the authority could not be wholly denied? There are in fact clear indications of a sustained general effort on the part of the Brahmanical writers on mixed law and religion, to limit the privileges of women which they seem to have found recognised by elder authorities."

And again (*b*):—

"On the whole the successive generations of Hindu lawyers show an increasing hostility to the institution of the Stridhan, not by abolishing it, but by limiting to the utmost of their power the circumstances under which it can arise. . . . The aim of the lawyers was to add to the family stock, and to place under the control of the husband as much as they could of whatever came to the wife by inheritance or gift, but whenever the property does satisfy the multifarious conditions laid down for the creation of the Stridhan, the view of it as emphatically 'woman's property' is carried out with a logical consistency very suggestive of the character of the ancient institution on which the Brahmanical jurists made war. Not only has the woman singularly full power of dealing with the Stridhan—not only is the husband debarred from intermeddling with it, save in extreme distress—but, when the proprietress dies, there is a special order of succession to her property, which is manifestly intended to give a preference, wherever it is possible, to female relatives over males."

That the institution of Bride-purchase existed amongst the Hindus, and for a time amongst all classes, seems almost certain. Manu recognises it (Chap. VIII., 204) and guards against fraud on the purchaser by giving to him both of the young women when an attempt is made to substitute one for another. Apastamba says (*c*):—

"It is declared in the Veda that at the time of marriage a gift for (the fulfilment of) his wishes should be made (by the bride-

(*b*) *Op. cit.* p. 333.

(*c*) Prasna II. Patala 6, Kan. 13, para. 12; see also Manu III. 51; and Vasishtha I. 36, 37.

groom) to the father of the bride, in order to fulfil the law. 'Therefore he should give a hundred (cows), besides a chariot; that (gift) he should make bootless (by returning it to the giver).' In reference to those (marriage rites) the word 'sale,' (which occurs in those Smritis is only used as) a metaphorical expression; for the union (of the husband and wife) is effected through the law."

This shows at once the former prevalence of the practice and the abhorrence with which at a later time it came to be looked on by the Brahmanical community (*d*). It had then become peculiar to, and therefore distinctive of, the lower castes, Vaisyas and Sudras (*e*), though in the approved Arsha form of marriage, a gift of a bull and a cow, to the bride's father was still prescribed (*f*), a remnant, probably of a practice amongst a pastoral people, of compensating the family which lost the daughter in the most usual and valuable form of property then recognised. The formula prescribing the gift survived the circumstances in which it originated, but still exacted observance through the associations with which it was connected (*g*). Manu (*h*), who condemns the Asura form of marriage, recognises it as still in vogue, and as distinguished by a consent gained by a liberal gift on the part of the bridegroom to the bride's father

(*d*) See Baudhayana, Transl. p. 208.

(*e*) Apastamba, Prasna II. Patala 5, Kandika 12, para. 1; Gaut. IV. 11; Yajnavalkya I. 58, 61; Col. Dig. Book. V. T. 499. At 2 Borr. R. 739, there is a case, *Massamat Rulivat* v. *Madhowjee Panachund*, of a mother (a widow) receiving Rs. 700 for consenting to her daughter's marriage which "was deemed disgraceful and was only done secretly," but which did not invalidate the betrothal made in consequence. Secret sales of girls are, it is believed, still very common in Gujarat even amongst the classes which publicly condemn the practice.

(*f*) Apast. Pras. II. Pat. 5, Kand. 11, para. 18; Manu III. 53; Vasishtha I. 32.

(*g*) That kine were a common form of gift in the Vedic period, see 5 Muir's Sanskrit Texts, 467. In the Huzara district it is noted that the bridegroom gives his bride a milch cow and some jewels as a premium when their cohabitation begins; and that she is persuaded to forego the rest of her promised dower. By a complete inversion of the ancient ideas a price is given nominally to buy jewels for the bride at betrothal, but usually to the father, who appropriates it. Panj. Cust. Law, II. 220. On the important place of cows in the wealth of a family amongst the ancient Irish, see O'Curry's Lect. I. 172, &c.

(*h*) Chap. III., paras. 25, 31, 51.

and the bride herself (*i*). This gift is not, however, by Manu identified with that "gift before the nuptial fire" (*k*), which may accompany the most approved marriages. Vyasa (*l*) defines the *Sulka* as the bribe given to the bride to induce her to go to her husband's house. Vijnanesvara (*m*), commenting on Yajnavalkya II., 143, 144, who enumerates the nuptial gift as distinct from the '*Sulka*,' or 'fee,' calls the latter 'the gratuity for which a girl is given in marriage'; and the Vishnu Smriti also (*n*) distinguishes the *Sulka* from the gift at the nuptial fire. Katyayana distinguishes the nuptial gift (*o*) from the *Sulka*, which latter he defines as "what is received as the price of household utensils, of beasts of burthen, of milch cattle (*p*), or ornaments of dress, or for works" (*q*). This definition, though passed by in silence by the Mitakshara, is adopted by the Vyavahara Mayukha (*r*), by the Vivada Chintamani (*s*), and with a somewhat different reading is adopted by Jimutavahana in the Dayabhaga (*t*). This writer insists that the gift of the ordinary *Sulka* may accompany a marriage in any form (*v*), and is to be carefully distinguished from the *Sulka* presented in marriages according to the disapproved forms to the father or brothers giving the damsel in marriage. The latter, he says, belongs to them alone (*w*).

(*i*) So the Ratnakara. See the Smriti Chandrika, Chap. IX., sec. 1, para. 4, note.

(*k*) Manu IX. 194; III. 54.

(*l*) Dayabhaga, Chap. IV., sec. 3, para. 21; Stokes's H. L. B. 255.

(*m*) Mit. Chap. II., sec. 11, para. 6; Stokes's H. L. B. 459.

(*n*) Chap. XVII., 18.

(*o*) Mit. Chap. II., sec. 11, para. 5; Stokes's H. L. B. 459.

(*p*) De Gubernatis, Storia Comparata Degli Usi Nuziali, Book I., Chap. XV., p. 95, points to "il dono d'una vacca che lo sposo Indiano faceva alla sposa e al prete maestro." Compare Yajn. I. 109; Manu XI., 40.

(*q*) Smriti Chandrika, Chap. IX., sec. 10, para. 5; Madhaviya, p. 41.

(*r*) Chap. IV., sec. 10, para. 3; Madhaviya, p. 41.

(*s*) p. 228.

(*t*) Chap. IV., sec. 3, para. 19; Stokes's H. L. B. 254. See also Col. Dig. Book V. T. 468; Varadaraja, p. 46.

(*v*) Dayabhaga, *loc. cit.* para. 22 ff; Stokes's H. L. B. 255.

(*w*) Amongst the Jews "a dowry or purchase money was usually given by the bridegroom to the bride's father." Milman, History of the Jews, I. 174. The ancient Germans purchased their wives, and the form remained after the reality had passed away. See Guizot, Hist. de la Civ. Fr. Lec. VII. The *co-emptio* of the Roman law was in form a purchase of the bride. Gaius I. 113.
To buy a wife remained in the Middle Ages the common expression for an

Varadraja, page 48, admitting the two kinds of *Sulka*, says that the "Bride-Price" goes to the mother or the brother, while the gift made for the purchase of ornaments and furniture reverts on the woman's death to its giver. Mitramisra says there is a *Sulka* given in the form of ornaments for the bride to her parents, and another as a present to her on her going to her husband's house (*x*).

This perplexity of the Smritis and the commentators over "*Sulka*," as a gift to the parent or brothers, and as a gift to the bride, as a gift at the marriage, at the time of the bride's change of residence, and as a fund for procuring household goods and ornaments, shows that at a very early date the word had

engagement to marry. No bargain being complete without a change of possession, the suitor paid money for the *mundium* or guardianship and control of his intended bride, or earnest, on account of it, and this payment completed the marriage contract. (This payment of earnest, and the deposit of valuables as security, is still common in Bombay.) The sum stipulated was in progress of time always secured as a provision or part of the provision for the wife, and the pledging of the husband and his estate was in early times the wedding. As the bride assumed greater independence the earnest-money came to be paid to her, and in the English ceremony was eventually appropriated by the priest as a fee. The effacement of the guardian brought about the marriage *per verba de praesenti*, which may be compared with the Hindu Gandharva rite, but which was never received as sufficient in England. The confusion between betrothal or marriage, or the variance of opinion in regarding the one or the other as the essential ceremony, has prevailed alike in Europe and in India. See Baring Gould, Germany, Chap. V.; Narada II., XII., 32-35. If the bridegroom had failed to purchase the *mundium* or guardianship of his bride from her father, the latter, according to the Code of the *Allemanni*, could reclaim her with damages, and if meanwhile she died leaving children, these ranked as illegitimate. Lab. *op. cit.* 393. The purchase money becoming by degrees the *dos legitima* or marriage gift of the bride herself, was subject to the husband's *mundium* and fell to him on his wife's predecease; but it belonged to her inalienably in case of her survival. Lab. *op. cit.* 403. The Weotuma or Witthum by which parents provided against their daughter's being absolutely dependent on her husband consisted of land, money or stock (see below), and it was regarded as essential to a true marriage, so that when there was nothing to give, the bridegroom went through a form of receiving. In return he used to settle lands or houses on his bride. It was only when she was poor that she had to depend wholly on the *morgengabe*, and hence an unequal marriage acquired the name of "Morganatic."

In China the betrothal or marriage contract is made by the heads of the families, but before matrimonial union the bridegroom has to buy the potestas of the father. This is not reduced to a mere form like the Roman *co-emtio*, but is a serious and expensive transaction. The wife thus passes into her husband's agnatic connexion and forsakes her own.

(*x*) See Viramit. Tr. p. 223.

lost the definite sense of "Bride-Price," if it had ever been confined to it. Stenzler translates *Sulka* as "*Morgengabe*" (*y*), but this gift on the morning after the completed nuptials, an important institution amongst many nations (*z*), seems not to have obtained special recognition amongst the Hindus. It would indeed be incompatible with the spirit of modesty with which, according to their law-givers, the relations of the spouses are to be governed (*a*). All the Smritis which deal with the subject agree that this *Sulka* goes on the woman's death childless to her brothers or her parents (*b*), for which no good reason could easily be found, unless the more primitive idea, attached to the word, had been that which it really expressed during the formation of the law. All agree too that the property of a woman married by

(*y*) Yajnavalkya, II. 144.

(*z*) In Ireland the Coibche (= *morgengabe*) gradually absorbed the bride-price as Christianity softened the manners of the people, and then a part of the gift (called Tindscra) was handed to the father as a consideration for his resigning at once the person and guardianship of his daughter. See O'Curry, Lec. I. 174 ss. See De Gubernatis Storia Comparata, Lib. III. Chap. VII., Ancient Laws of Wales, p. 47, §§ 62, 63. A practice prevails amongst some castes in Western India which may possibly have originated in the same way as the "Morgengabe." On the first night of cohabitation the elder women of both families conduct the married pair to their chamber, and seat them together on the nuptial bed. The bridegroom then puts a gold ring on the bride's finger, and ties in her *sari* or scarf two gold coins. The analogy of this to the use of the wedding ring, the gift of money now taken by the priest, and the concurrent declaration "with all my worldly goods I thee endow" (Bl. by Kerr, vol. II. p. 114), in the English marriage service is curious and interesting. The gift makes the property Stridhana. The male parents also are present in some cases. The bride's mother retires telling the bride by all means to insist on the agreed *præmium pulchritudinis*. The door is then closed; but outside it the sisters or cousins of the married pair sit in opposite lines, and for two or three hours sing alternately on love and marriage.

(*a*) The morning gift of favour became in time a matter of contract, and marriage articles eventually stipulated as a rule for a settlement as *morgengabe* of one-fourth of the bridegroom's property by way of dower on the intended bride. This, however, does not seem to be the gift intended by Sulka in the Smritis. See Lab. *op. cit.* 407; Baring Gould, Germany, &c., p. 89. Where a husband had failed to present the *morgengabe*, the wife, if left a widow, could claim generally one-third of all acquired lands. The dower and *morgengabe* thus became confused, and in the English law were not distinguished. See Digest of Vyavasthas, Chap. II., sec. 6 A. Q. 7.

(*b*) See the Transl. of Gautama XXVIII. 23; Katyayana, quoted Dayabhaga, Chap. IV., sec. 3, para. 12; Stokes's H. L. B. 253; Yajnavalkya, *ibid.* paras. 10, 26; Stokes's H. L. B. 253, 256.

the Asura rite goes to her own family (*c*) on her death without children. According to most of the commentators the same rule is prescribed by Yajnavalkya as to a gift by her own kindred (*d*). Vijnanesvara himself, while he converts the rule in favour of the woman's kinsmen generally into one favouring her husband's kinsmen (*e*), as the necessary complement of the wide extension that he had given to Stridhana, is forced to set aside his own construction in favour of the brothers, who take the *Sulka* not only as relatives, but under a special text in their favour (*f*). The Vyavahara Mayukha (*g*), adopting the Mitakshara's doctrine as to Stridhana, defined by special texts, admits the brothers' rights to the *Sulka*, and in the case of an *Asura* marriage the right of the woman's own family to property arising from gifts made by them.

This identity of rules in cases which the modern Hindu law widely distinguishes must probably have originated in some common cause. The form of capture recognised for soldiers as the Rakshasa rite (*h*) still subsists as an essential part of the marriage ceremony amongst several of the uncivilised tribes of India (*i*). The resistance of the bride's relatives was an

(*c*) Dayabhaga, Chap. IV., sec. 2, para. 24; Stokes's H. L. B. 249; Mit. Chap. II., sec. 11, para. 11; Stokes's H. L. B. 460; Manu IX. 197; Yajnavalkya, II. 145.

(*d*) Dayabhaga, Chap. IV., sec. 3, paras. 10, 29; Stokes's H. L. B. 253, 257; Col. Dig., Book V. T. 503 ff. The Teutonic Codes provided for a gift by way of advancement on the part of a father or brother at a maiden's marriage. This, which the Lombard law called *faderfium*, was inherited by the bride's children, in default of whom it returned to her family. Lab. *op. cit* 409; Gans, Erbrecht, III. 176.

(*e*) Mit. Chap. II., sec. 11, paras. 9, 14; Stokes's H. L. B. 460; Col. Dig., Book V. T. 508, 509, 512, Comm.

(*f*) So the Smriti Chandrika, Chap. IX., sec. 3, paras. 27, 29, 33.

(*g*) Chap. IV., sec. 10, paras. 27, 32; Stokes's H. L. B. 105, 106.

(*h*) Manu III. 26, 33. An allusion to it seems to be made in the passage from the Rig. Veda X., 27, quoted in Muir's Sanskrit Texts, vol. V., p. 458. The authority exercised by brothers is alluded to, *ibid*. This in Vasishtha, I. 34, is called the Kshatra rite.

(*i*) See Lubbock's Primitive Condition of Man, pp. 76, 86; Transactions of the Literary Soc. of Bom., vol. I. 285; Tupper, Panj. Cust. Law, vol. II. 90 ss; Rowney, Wild Tribes of India, p. 15 (Gonds); p. 37 (Bhils); p. 46 (Kathis, amongst whom as amongst the Pahanas and others the niyoga or levirate prevails); p. 68 (Kholls); p. 76 (Santhals, who before a maid's marriage require her to take part in a week's sexual orgy like the Babylonian feast of Mylitta); p. 81 (Oraons); p. 147 (Koches, amongst whom the bridegroom becomes a dependent of the wife's mother); p. 177 (Cacharis).

assertion, until it became a mock assertion, of rights (*k*), which seems to have been exercised by the ancient Britons amongst many other nations. It is a step in advance when marriages resting on contract, and distinct exogamous families are formed, as in India they seem to have been at a very early period (*l*), and the legend of Draupadi can be looked on as remote from national experience. This advance is, in some instances, accompanied by a development of ancestor worship, which gives a sacred character to the head of the family (*m*), and the father or eldest brother is found exercising despotic power over its other members. He will not part with his daughter or sister except for a reward (*n*). Natural affection leads to his endowing the bride

(*k*) See, however, McLennan's Studies in Ancient History, p. 425 ff.

(*l*) The story of Yama, Rig. Veda, X. 10, 1, marks the abhorrence with which an incestuous connexion was looked on already in the Vedic period. See 5 Muir's Sanskrit Texts, p. 289. In some tribes, as amongst the Jats of Rohtak, a marriage is not allowed to a woman of the father's mother's or father's mother's clan. See Rohtak Settlement Report, p. 65.

(*m*) See Muir's Sanskrit Texts, vol. V., p. 295; Tylor's Primitive Culture, vol. II., 103, 109; Coulanges la Cité Antique, Book I., Chap. II.; Book II., Chap. VIII. The dependence of sons under the early Brahmanical law may be gathered from Manu I. 16, and Narada, Pt. I., Chap. II., para. 36; "Women, sons, slaves, and attendants are dependent, but the head of a family is subject to no control in disposing of (or dealing with) his patrimony," as well as Pt. II., Chap. V., para. 39. In Chap. IV., para. 4, it is said that a son or a wife can no more be given away than a thing already promised to another; which indicates, as does Yajnavalkya III. 242, how far the *patria potestas* has been pushed. See too Vasishtha, Chap. XV. A similar superiority is assigned to the eldest brother by the Smriti cited in Col. Dig., Book II., T. 15. Manu IX. 105, directs the eldest brother "to take entire possession of the patrimony," and the others to "live under him as under their father." The modifications introduced at a later time appear from Kulluka's comment, and the following verses of Manu, as also from Narada, Pt. II., Chap. XIII., para. 5; and the modern law from Jagannatha's remarks, in Col. Dig., l. c. The cases of *Duleep Singh et al.* v. *Sree Kishoon Panday*, 4 N. W. P. R. 83; *Ajey Ram* v. *Girdharee et al.*, *ibid.* 110; and *Musst. Bhowna et al.* v. *Roop Kishore*, 5 *ibid*, 89, may be compared with *Jugdeep Narain Singh* v. *Deen Dyal Lall et al.*, L. R. 4 I. A. 247; and *Mohabeer Pershad et al.* v. *Ramyad Singh et al.*, *ibid.* 192. The absence of ownership in a wife and son is insisted on in a way which shows that its existence had once been recognised. See Vyav. May., Chap. IV., sec. 1, pp. 11, 12 (Stokes's H. L. B. 45); Chap. IX., sec. 2, para. 2 (*ibid.* 133); Col. Dig., Book II., Chap. IV. T. 5, 7, 9, Comm. The Hindu law on this point may be compared with the Roman law as to the *patria potestas* in its original and its mitigated forms. See Bynkershoek's treatise on this subject.

(*n*) As to the sale of wives amongst the Kholes and other tribes, see

with some portion of the gain; it becomes a point of honour and ostentation to do this (*o*), and on her death it seems reasonable that the gift, in early times still retaining its original shape, should return to the stock from which it proceeded (*p*). At a still later point of progress the sale of women, retained by the uncivilised tribes, comes to be looked on as an opprobrium by those more advanced, and especially where, as amongst the Brahmanical community, the wife has been admitted to a share with her husband in the performance of the most sacred household rites (*q*). A concurrent elevation of feeling amongst the warrior caste brings about the Svayamvara (*r*), the choice of her favoured suitor by the high-born maiden, or at least a state of manners and ideas akin to that of the age of chivalry in Europe, in which the beautiful pictures of female character presented by the Hindu epic poetry and drama could be conceived and appre-

Rowney's Wild Tribes, pp. 47, 177, 200. The wife thus acquired being not unnaturally looked on as property, he who took her on her husband's death became answerable, as having received the estate, for the debts of the deceased. See Narada, Pt. I., Chap. III., paras. 21—24. In his account of the Himalyan Districts of the N. W. P., p. 19, Mr. Atkinson says: "the practice of accepting a sum of money for a daughter is gaining ground." This is probably an indication that the tribes least amenable to Brahmanical influence are improving in their pecuniary circumstances.

(*o*) In the Odyssey the ἕδνα presented by the bridegroom are returned with a favourite daughter. Compare Dr. Leitner's account of a Ghiljit marriage, *Indian Antiquary*, vol. I., p. 11; and Plautus Trinummus, III. 2, quoted in De Gubernatis, Storia Comparata, p. 106; Str. H. L. I. 37; II. 33—35; Col. Dig. Book IV. T. 175, 184; Manu VIII. 227; IX. 47, 71 72; Jolly, Ueber die rechtliche Stellung, &c. p. 11 n. 25. Stinginess on the part either of the son-in-law or of the bride's brother was already a reproach in the Vedic era. See Rig Veda, 1. 109, quoted 5 Muir's Sanskrit Text, 460; Vedarthayatna, Book II., 737; and Comp. Col. Dig., Book V. T. 119, Comm. The reference appears to be to a connexion formed by purchase. The profuse expenditure at Hindu weddings thus finds a kind of warrant in the earliest traditions of the race.

(*p*) It was found necessary at Athens to limit the paraphernalia which a bride might take to her husband's house. The dowry given with her had to be restored on her death. See Grote, Hist. of Greece, vol. III. 140.

(*q*) Apastamba, Pr. II. Pat. I. Kan. 1, para. 1; Pat. V. Kan. 2, para. 14; Baudhayana, P. 2, Adh. 1, K. 2, Sutra 27; Col. Dig., Book IV. T. 414; Book V. T. 399. Compare Max. Müller's Hist. San. Lit., pp. 28, 205. Land in moderate quantity is sometimes settled on a daughter for her sole and separate use at her marriage even amongst tribes which most strictly prohibit lands leaving the family or tribe. See Panj. Cust. Law, II. 221.

(*r*) See Mon. Williams, In. Wis. 438.

ciated (*s*). At this point the rules and the ceremonies which pointed to a ruder age, would be explained away; and the recollection of their true origin dying out as a newer system acquired consistency, the texts would be subjected to such manipulation either in the way of change or of exegesis as we find they have in fact undergone (*t*). The right of women to marriage gifts continued while the rules still retained became anomalous.

Side by side with this source of women's property, however, there was another which has received less attention (*v*). The total severance from her own family, which in a particular form of civilisation the woman undergoes when she marries and thus enters that of her husband, is still unknown to some Indian tribes (*w*). Many traces of custom remain to show that a connexion through the mother was till recently recognised, and

(*s*) A svayamvara seems to have been occasionally allowed even in the Vedic times; see 5 Muir's San. Texts, 459.

(*t*) See Burnell, *op. cit.* Introduction, p. xiv.

(*v*) Amongst the Anglo-Saxons a wife did not enter her husband's "maegth" or family by marriage. Her own kindred remained responsible for producing her or making compensation in the event of her committing a crime. Schmid, Die Gesetze-der Angl. Sax., cited Taswell-Langmead, Const. Hist., p. 35. The dotal marriage or *matrimonium sine conventione* of the Romans was attended with a similar effect as to property. The bride remained a member of her father's family. See Tom. and Lem. Gaius, p. 102 ss; Smith's Dic. Ant., Art. Matrimonium, Divortium.

(*w*) "In Spiti, if a man wishes to divorce his wife without her consent he must give her all she brought with her, and a field or two besides by way of maintenance. On the other hand if a wife insists on leaving her husband she cannot be prevented," but in this case or in case of her elopement he may retain her jewels. Panj. Cust. Law, II. 192. As to the Nayars, see Buchanan's Mysore, vol. II. pp. 418, 513. The polyandry formerly universal amongst this tribe has almost disappeared under the British rule. In some families it has taken the intermediate form of a limitation to biandry, not more than two husbands being allowed. In Cochin and Travancore the older institution subsists in its loosest form. A quasi-matrimonial ceremony having been celebrated by a Brahman or Kshatriya the woman thenceforward associates with anyone she pleases. Where the family is one of position the woman does not leave her own tarwad, and her husband has to visit her at her family residence. Amongst the Thiyens there is a fraternal partnership in the wife formally married to one of the brothers. On this one's death the other marries the widow in an undivided family and all the children inherit in common. A separated brother has not the same privilege or obligation. There is a class of Nambudri Brahmans in N. Malabar who follow the regular law of marriage but the Nayar rule of inheritance. (They are probably a race of mixed origin, or who have assumed a higher caste rank than they are entitled to, as it is virtually impossible that Brahmans with indissoluble mar-

indeed still is in some places recognised, as superior or as running parallel to that through the father, and as in some degree regulating the devolution of property (*x*). The custom of *patnibhag* still prevailing in Madras and in some parts of the Punjab (*y*) is traceable to this source. In Bengal Jimutavahana founds the law of devolution on Visvarupa's statement that all the property of a woman dying childless goes to her brother (*z*). The rule indeed under which, according to the Bengal law, patrimony taken by a daughter from her father, instead of passing to her husband and his family, returns to the family stock from which it was severed, may be referred to this principle. So as to the effect of Asura marriages and as to succession amongst Sudras; so as to pritidatta, the Sm. Chan. quoting Katyayana. Even in Manu, the text (IX. 185) in favour of a father's succession is balanced by one (IX. 217) which says "of a son dying childless the mother shall take the property," and on a mother's death all her sons and daughters are to share her property equally (IX.

riage and known paternity should adopt the Nayar law of succession). The manager of a Nayar tarwad tries to get his own children married to his sister's in order to benefit by the same estate as himself. Marriages between cousins through their mothers or grandmothers as sisters are considered incestuous. (These particulars are gathered from a letter from Mr. C. Sankaram Nair to the Hon. Dr. W. W. Hunter, dated 8th Oct. 1882.) In Canara there is a quasi-permanent connection not with the husband but with a paramour; yet though this identifies the children as the offspring of a particular man, his heritage goes not to them but to his sister's children by her paramour. Amongst the Bants there is a conflict between the older law, which favours the nephews and the natural tendency of fathers to enrich their own children, which now requires legislative sanction to give it full effect. Among this tribe there is a polygamy without polyandry; each wife's children and goods are regarded as specially her own; and on her divorce or the death of her husband, go with her to the joint family dwelling of her brothers. The eldest brother manages the estate; but his heir in that capacity is the eldest son of his eldest sister, his own children, like the other offshoots of the family, being entitled only to subsistence. Buchanan's Mysore, vol. III, p. 16, &c. The conflict between paternal affection and duty to the tarwad in Malabar is referred to in *Tod* v. *P. P. Kunhamud Hajee*, I. L. R. 3 Mad. at p. 175, where, too, it is recognised that estates and acquisitions belong wholly to the tarwad or female *gens*, though the manager may grant leases and the mortgages called Kanam and Otti not subject to foreclosure. See Rev. and Jud. Selections, vol. I., p. 891; Fifth Rep. App. 23, p. 799; *Edathil Itti* v. *Kopashon Nayar*, 1 M. H. C. R. 122.

(*x*) See Rowney, Wild Tribes of India, p. 147, as to the Koches.

(*y*) *Infra*, Book II., Chap. II., sec. 1, Q. 6; Tupper, Panj. Cust. Law, vol. I., p. 72.

(*z*) Dayabhaga, Chap. IV., sec. 3, p. 13 (Stokes's H. L. B. 254).

192). Yajnavalkya (II. 117) says the daughters, and failing them the issue (*a*). In the Mitakshara (Chap. II. sec. 4, p. 2; Stokes's H. L. B. 444) a passage is cited from Dharesvara, which, failing the mother, assigns the son's heritage to his grandmother in preference to his father, in order that it may not pass to his brothers of another class. This rule, rejected in the later law, may well have come down from a time when the clan connexion through the mother was thought more close than that of mere half-brothership through the same father (*b*). Many instances of this are to be found in different parts of the world. In India the distinctive marks of an exclusive female gentileship are generally wanting even among the ruder tribes; but the separate subsistence of the wife's property as belonging to her and her own family of birth is still recognised. In a recent case on the Kattiawar frontier the brothers of a woman who had died childless came and took possession of the whole household stuff (*c*). Varadaraja, page 52, refers that part of Brihaspati's text (*d*), which says that "the mother's sister . . . [is] declared equal to a mother," to the case of an Asura marriage attended with the consequence of the succession to the wife, not of her husband and his family, but of her own parents and their family (*e*). And in this latter case he says, "When the mother and father would succeed, then in their default, of the three relatives through them the deceased woman's sister's son takes first. In his default her brother's son takes it. In his default the son-in-law takes it." This preference of a sister's son to a brother's son, which is not confined by other writers to the case of an Asura marriage (*f*), points probably to a time when female

(*a*) At Athens a husband enjoyed only the fruit of his wife's dowry. On her death or divorce it went to her family. Her marriage gifts remained her own, but she could not dispose of them freely, being looked on as under guardianship except as to petty transactions. Schoe. Ant. of Greece, 516.

(*b*) Compare the case of the Lycians (Herod. I, 173,) and the other similar cases referred to in L. Morgan's Ancient Society, p. 347 ff.

(*c*) *Ex relatione*, J. Jardine, Esq., late Judicial Assistant in Kattiawar, and now Judicial Commissioner in Burmah.

(*d*) Col. Dig., Book V. T. 513; Vyav. May., Chap. IV., sec. 10, p. 30; Stokes's H. L. B. 106.

(*e*) See Manu, IX. 197; Yajn. II. 145; Dayabhaga, Chap. IV., sec. 2, p. 27; Stokes's H. L. B. 250; sec. 2, p. 6; *ibid.* 252.

(*f*) Smriti Chandrika, Chap. IX., sec. 3, p. 36; Col. Dig., Book V. T. 513; Dayabhaga, Chap. IV., sec. 3, p. 31 (Stokes's H. L. B. 257); Vyav. May., Chap. IV., sec. 10, p. 30 (*ibid.* 106). As to the close connexion subsisting amongst the ancient Germans between nephew and maternal uncle, see Tac.

had not yet become quite superseded by male gentileship. A trace of the same state of things is to be found in Nilakantha's preference of these collateral, and, according to modern ideas, but slightly connected, relatives to the husband's sapindas as heirs to a woman's *paribhashika* Stridhana. Amongst the Brahmans in the Surat district the custom as stated by the caste gives the succession to a maternal heritage taken by a son first to the widow of the propositus, then to his sister, sister's son and maternal aunt and her son in succession. Only on failure of these it goes to the maternal grandfather (*g*). Similar rules prevail amongst some of the lower castes, instances of which are recorded (*h*).

The patriarchal constitution of the family, which grew up amongst the Brahmanical section of the Indian people, was logically connected with a set of ideas, with which those, to which we have just adverted, were incongruous. Accordingly we find, in the development of the now prevailing system, not only that "women, sons, slaves, and attendants are dependent" (*i*), but also (*k*) that "three persons, a wife, a slave, and a son, have no property; whatever they acquire belongs to him under whose dominion they are." This is the *Patria potestas* in almost its full development; and starting from this point some writers (*l*) set

de Moribus German, c. 20. In some parts of Germany "the land always travels through a female hand. It goes to the eldest daughter; if there be no daughter, to the sister or sister's daughter." Baring Gould, Germany, I. 96. The succession to lands amongst the cultivating class is still traced through females. In some places a widow even transmits the farm of her first husband by her remarriage to the family of the second. See Baring Gould, Germ. Pres. and Past, Chap. III., and the authorities cited in the Appx. to the same work. Mr. Cust reports the existence of the custom of succession of sisters' sons in the Assam hills as well as in Travancore. Mr. Damant says it is in full force amongst the Garoo and Khasias, north of Assam. The succession of the chiefs is entirely through females. See Ind. Ant. Vol. VIII., p. 205; also Rowney, Wild Tribes of India, p. 190. The Khasya earns his wife by service to her father. A Garoo husband has to submit to a mock capture by his bride and her friends, and plays the part of reluctance and grief as well as if he belonged to the other sex. *Ib.* As to the custom of Ilatom (= affiliation of a son-in-law) in Madras, see *Hanumantamma* v. *Rama Reddi*, I. L. R. 4 Mad. 272.

(*g*) Borrad. C. Rules, Lith. p. 401.

(*h*) As in Book G. Sheet 17 of the same Collection.

(*i*) Narada, Pt. I. Chap. V. Sl. 36.

(*k*) *Ibid.*, Pt. II., Chap. V. Sl. 39; Manu VIII. 416.

(*l*) As Dr. Jolly, in his Essay, Ueber die rechliche Stellung der frauen bei

down the woman as originally uninvested with any rights at all. Whether she had rights in the full sense of that term may indeed be doubted; but the law of her complete absorption in the family of her marriage was only by degrees and partially adopted by the community at large; and does not afford a sufficient source for the peculiar and varied rules in her favour with which in historical times it has always been blended. Amongst the polyandrous classes indeed, who are still much more numerous in India than is generally supposed (*m*), it is obvious that, as the chief connecting links between successive generations, craving some ideal continuity, are the females, and they the sole centres of any certain identity of blood, the patriarchal constitution of the family, and its ordinary concomitants, are practically out of the question. Such classes, though not within the operation of the stricter Hindu law, have yet obtained a place in the Hindu com-

den alten Indern, p. 4, and Dr. A. Mayr, Das Indische Erbrecht, p. 152, "Die Weiber waren in ältester Zeit keine Rechts-subjecte."

(*m*) In Kamaun, the Rajputs, Brahmans, and Sudras all practise polyandry, the brothers of a family all marrying one wife like the Pandavas. The children are all attributed to the eldest brother alive. None of the younger brothers are allowed to marry a separate wife. When there are in a family but one or two sons it is hard to procure a wife through fear of her becoming a widow. Bhagvanlal Indraji Pandit, in Ind. Ant. March 1879, p. 88. The Khasias usually have but one wife for a group of brothers. (Rowney, Wild Tribes of Ind., p. 129.) Polyandry even is exceeded by the Booteah women, *ibid.* 142. As to the Duflas, *ibid.* 151; the Meeris, *ibid.* 154. Amongst the Sissee Abors, a group of brothers have a group of wives in common, *ibid.* 159. See as to the mountain tribes of the Himalyan frontier, Panj. Cust. Law, II. 186 ss. The reason assigned in some of these cases for the polyandrous household is deficiency of means, as in the case of a similar arrangement amongst the Spartans, recorded by Polybius, XII. 6 (*b*), Ed. Didot. The rules, preserved in Manu IX. 58 ff, for regulating the intercourse with the childless wife or widow of a brother, point back to a previous institution which the gradual refinement of sensibility had thus ameliorated. The limitation of the practice to the lower castes mentioned by Manu does not occur in Narada, who further allows this connexion even with a woman who has had children, if she is "respectable and free from lust and passion" (Narada, Pt. II. Chap. XII. para. 80 ff). Yajnavalkya assigns the duty to any kinsman of the deceased descended from the same stock. The male offspring of this kind of union was variously regarded either as the son of the deceased husband only, or of both him and the actual father. See Col. Dig., Book IV. T. 149, Comm.; Mitakshara, Chap. I. sec. 11, pp. 1, 5, note; Stokes's H. L. B. 410, 412; Baudhayana, Pr. II. Kan. 2, Sl. 23; Vasishtha, Chap. XVII. 8-11, ss.; Translation, p. 85; Smriti Chandrika, Chap. X. That the practice, not subject apparently to severe regulations, obtained in the Vedic period, see Rig Veda, X. 40, quoted 5 Muir's Sanskrit Texts, 459.

munity, and have brought into it notions, which, on account of their harmonising with some natural feeling or some need of the society, have obtained a more or less general acceptance (*n*).

It is still the custom amongst some castes for the father of the bride to present with his daughter a household outfit, which is carried in procession at the wedding (*o*). In others this is becoming superseded by a gift in money, which, however, is still regulated by the prices of the different equipments for which it is meant as a substitute. The husband who comes into possession in this way of a sum of money, and hands it to his wife to purchase household utensils, provides her with "Sulka" in the second sense. The *Adhyagnika* or gift at the altar, and the *Adhyavahanika* or gift during the procession or at *Dviragamana* or *Gamana* in Bengal or the *Gowna* in Behar and the North-Western Provinces (*p*) are probably to be referred, like the "Sulka," to a state of things really anterior in its prevalence to the patriarchal system, out of which some suppose it to have grown by a gradual extension of the wife's proprietary capacity. So also as to the Pritidatta or token of affection, which was at first a gift from the woman's own family. She would be incapable of holding this, except through a capacity which Narada's text denies. But that capacity not having been really extinguished in practice, the gift subsequent, *Anvadheyika*, from her husband's relatives had a definite body of property, real or potential, to which it could adhere; and the *Adhivedanika* or com-

(*n*) See Burnell's Introd. to the Madhaviya, p. 15; Introd. to Varadaraja's Vyavahara Nirnaya, pp. 7, 8; Ward's Survey Account, and the Madura Manual quoted by Mr. Nelson in his "View of the Hindu Law, &c.," pp. 141, 145.

(*o*) Amongst the Brahmans of the Southern Maratha Country the provision includes a couch with bedding or carpet, two silver or metal plates, two cups, &c. These are carried in procession to the bridegroom's house as an important if not essential part of the ceremony. In Germany it may be observed that the contribution of the bride towards the furnishing of the home in the shape of beds, linen, &c., becomes joint property of the spouses. Clothes and ornaments remain as we might say the Stridhana of the bride, free from any right of the husband. An early instance of a simple trousseau is that in the Rig Veda, X. 85. See De Gubernatis, St. Comp., Book I., Chap. XVII.

(*p*) In Bengal gifts (*Yautuka*) are given to the bride when she goes to her father-in-law's house for the first time. She is also given gifts at the Gamana when she goes to his house finally on attaining the age of puberty. In Behar and the North Western Provinces she goes to her father-in-law's house only on coming of age, when she is given gifts at the ceremony called the *Gowna*.

pensation for supersession, in the form of a gift to make the first wife's position, as to paraphernalia, equal to that of the second (q), if it was ever, as probably at first it was, a mere pacificatory present, easily took the character of a legal obligation, when other sources of exclusive female property were familiar to the people.

It seems at least probable then that the woman's distinctive ownership of property was not merely a development within the sphere of the Brahmanical law itself, but in part a tradition from earlier times, or from an alien race, adopted as a process of amalgamation, blended the older and the newer inhabitants of India into a single people. The Hindu literature preserves many testimonies, that whatever may have been the strictly religious view of women's inferiority and dependence, they in fact retained a position of real influence and freedom down to the time when Mohammedan ideas began to permeate the community. Vijnanesvara, whose literary activity is to be assigned to the eleventh century, was a stranger to these ideas. He had himself, it would seem, a tolerably high conception of female character and capacity; he looked on the union of the husband and wife as establishing an almost complete moral identity between them; and probably availed himself of a pretty widespread popular feeling, derived from the sources to which we have adverted, to propound his theory of female ownership (r). That theory seems not to have been adopted without some misgiving or reserve by any of his numerous followers. Katyayana and Vyasa are quoted by the Viramitrodaya (s) and by the Smriti Chandrika (t) to the effect that separate property bestowed upon a woman is not to exceed two thousand karshapanas (v), and is to exclude immovable property. It is there explained that as the gift might be repeated annually so a single endowment to produce the same amount may be given once for all even in the form of immovable

(q) Mit. Chap. II., sec. 11, paras. 33, 35; Stokes's H. L. B. 466.

(r) In this respect, as in his conception of Sapindaship as resting on sanguinity, and in establishing property as a matter of secular, not of religious, cognisance, Vijnanesvara showed a boldness and reach of mind which it is hard for Europeans of the 19th century to appreciate. It was by these qualities, however, that his works became the chief authorities on the Hindu Law.

(s) See below, sec. 1, para. 13.

(t) Chap. IX. sec. 1, paras. 6-11, 16. The passage of Vyasa is by Varadaraja (p. 34) construed as a limitation on a widow's right of inheritance.

(v) Copper coins of small value, Viramitrodaya, Trans. p. 224.

property (*w*). The Vyavahara Mayukha repeats these rules (*x*), and the further one that what the woman earns belongs to her husband; as also those gifts, from friends other than near relatives, which, if she could retain them herself, would afford a means of withdrawing her gains from her husband's control. Ornaments given to her for ordinary wear become her property, but in those handed to her for use only on extraordinary occasions the ownership of the nominal donors and of their families remains (*y*). The Vivada Chintamani (*z*) follows the Mitakshara in laying no restriction on the woman's capacity to take immovable property. The "labham" or gain which Devala assigns to the woman (*a*) is unrecognised or cut down by all the commentators, except Vijnanesvara, who does not himself expressly cite this authority.

A daughter, unmarried, or married, may take immovable property by gift, from her parents, according to the Dayabhaga (*b*), which imposes no restriction on the amount, but Katyayana there quoted is understood, as we have seen, by other commentators, as confining what may be given to married women within narrow limits (*c*). Even that restriction would be disregarded in the case of property acquired by the donor (*d*), and all gifts by parents proceeding from natural affection are to be respected (*e*), unless they are of such a character as to be a fraud on other members of the family (*f*). As to property which is free from

(*w*) Instances are given in the Panj. Cust. Law, vol. II. of the gradual recognition of small gifts of land to daughters amongst the tribes which generally restrict land-ownership to males. Compare the Smriti Chandrika, Transl. Chap. IX., sec. I., para. 10.

(*x*) Chap. IV., sec. 10, paras. 5, 6, 7; Stokes's H. L. B. 99, 100.

(*y*) 2 Str. H. L. 55, 241, 370. See below as to such gifts from a husband; *Ashabai* v. *Haji Tyeb*, I. L. R. 9 Bom. 118; *Gojabai* v. *Bhosle*, I. L. R. 17 Bom. 114.

(*z*) pp. 259, 260.

(*a*) See above and Viram. Transl. p. 226.

(*b*) Chap. IV., sec. 3, paras. 12, 15, 29; Stokes's H. L. B. 253, 254, 257. See also Col. Dig., Book V. T. 354.

(*c*) So also the Madhaviya, p. 41.

(*d*) *Supra*, page 208; 2 Str. H. L. 6, 9, 10; *Muttayana Chetti* v. *Sivagiri Zamindar*, I. L. R. 3 Mad. at p. 378.

(*e*) Col. Dig., Book II., Chap. IV., sec. 2, T. 49, 50; Narada, Pt. II., Chap. IV. Sl. 7; Vyav. May., Chap. IV., sec. 7, para. 11; Stokes's H. L. B. 76; Mit. Chap. I., sec. 6, para. 13, 16 (*ibid.* 396, 397).

(*f*) Narada, Pt. II., Chap. IV., Sl. 4; Vyav. May., Chap. IV., sec. 10, p. 6; Stokes's H. L. B. 99; Viramitr., sec. 1, para. 5, *infra*; *Sivarananja Perumal*

the claims of co-owners a woman may take by gift from her father, mother, or brother, without limitation according to the modern law, which in this respect has become as liberal as the Mitakshara would make it (*g*). A devise is put practically on the same footing as a gift *inter vivos* (*h*).

A gift even of immovables by a husband to his future wife vests in her absolute estate of inheritance, and in the event of her dying childless the co-widow is entitled to succeed to her in preference to her husband's brother or nephew (*i*); but it appears that according to the Mithila School of the Hindu law her stridhan would have gone to her husband's brother's son (*k*).

A wife may take gifts from her husband of any kind of property and to any amount, subject only to the rights which others may have in what is thus given to her (*l*).

The commentators (*m*), who carefully provide against her alienation of immovable property thus acquired, thereby acknowledge at least with the Mitakshara her competence to receive it. The limitation imposed by Katyayana's text above quoted applies in terms to a husband's gifts as well as to others, but where property ranks as separate estate, no one now has a right on which he can challenge the owner's disposal of it (*n*). Colebrooke says (*o*) without qualification that "land may be given by the husband to his wife in Stridhan, and will be her absolute property." The last words must, as to Bengal at least, be qualified

v. *Muttu Ramalinga et al.*, 3 Mad. H. C. R. 75. An interdiction may be obtained by a son or a brother against dealing with the heritage which would deprive him of his rights. Q. 1735, MS.; Viram. Tr. p. 74; Mit. Chap. VI., sec. VI., p. 10.

(*g*) See Col. Dig., Book V. T. 482, Comm., quoting Chandesvar.

(*h*) See above, p. 181, 212 ss.; *Judoo Nath Sircar* v. *Bussant Coomar Roy*. 19 C. W. R. 264; S. C. 11 Beng. L. R. 286.

(*i*) *Bai Kesserbai* v. *Morariji*, I. L. R. 30 Bom. 431, P. C.; S. C. L. R. 33 I. A. 176; *Mayukha, Bai Narmada* v. *Bhagwantrai*, I. L. R. 12 Bom. 505; *Thakur Dayhee* v. *Bulak Ram*, 11 M. I. A. 139.

(*k*) *Bachha Jha* v. *Jugmon*, I. L. R. 12 Cal. 384.

(*l*) See the passages referred to in notes at p. 205. As to the essentials of the gift, see *G.* v. *K.*, 2 Mor. Dig., 234; *S. Pabitra Dasi et al.* v. *Damudar Jana*, 7 Beng. L. R. 697; *Kishen Govind v. Ladlee Mohun*, 2 Cal. S. D. A. R. 309. *Venkatachella* v. *Thathammal*, 4 Mad. H. C. R. 460, recognises the competence of the husband to make a gift, while exacting delivery to complete it.

(*m*) See the Smriti Chandrika, Chap. IX., sec. 2, p. 10.

(*n*) See above, p. 206.

(*o*) 2 Str. H. L. 19; *Bai Kesserbai* v. *Morariji*, I. L. R. 30 Bom. 431, P. C.

by the restriction set forth in the Dayabhaga (*p*) against alienation of immovable property given by a husband, but as to the wife's capacity to take such property by gift, they represent the modern law (*q*). Ornaments given by the husband merely to be worn occasionally remain his property, but otherwise they become fully hers (*r*). It follows from what has been said that a member of an undivided family, residing apart, is not at liberty, by converting his gains into costly ornaments, to deprive the other members of their share in his acquisitions (*s*); and if the wife under cover of that position appropriates what belongs to her husband, she subjects herself to punishment (*t*). On the other hand the general sacredness of a promise (*v*) is upheld in the case of one made to a wife. The sons must fulfil it (*w*). In this respect the modern treatises go beyond the text of the Mitakshara, though not probably beyond its intention, as Vijnanesvara was a stickler for the literal fulfilment of the mental act in cases of gift without delivery of possession (*x*).

Gifts to mothers, sisters, daughters-in-law, and to other female relatives occur not unfrequently in practice (*y*). No difficulty is raised to the reception of such presents even of immovable property, where the title of the donor is unincumbered; but the subject is not so dealt with in the modern commentaries as to afford a ground for a profitable comparison with the Mitakshara. Gifts even from strangers may be accepted; though these, according to the moderns, become the property of the husband when the donee is under coverture; but according to the Vyav Mayukha a

(*p*) Chap. IV., sec. 1, para. 23; Stokes's H. L. B. 241. See *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R. 5 Cal., 684. For Bombay see the case of *Kotrabasapa* v. *Chanverova*, 10 Bom. H. C. R. 403.

(*q*) See above, p. 204 ss.

(*r*) 2 Str. H. L. 55, 241; *Musst. Radha* v. *Bisheshur Dass*, 6 N. W. P. R. 279. See above p. 186. Actual gift without fraud, of ornaments to a wife, passes the property to her, but not a mere handing of them to her for use on ceremonial occasions. *Kurnaram* v. *Hinibhay*, Bom. H. C. P. J. 1879, p. 8; see Smriti Chandrika, Transl. Chap. IX., sec. I., 11 ss.; *Ashabai* v. *Haji Tyeb*, I. L. R. 9 Bom. 115; *Gojabai* v. *Bhosle*, I. L. R. 17 Bom. 114.

(*s*) Q. 315 MS., Ahmednuggur, 13th June 1853.

(*t*) Narada, Pt. II., Chap. XII. Sl. 92; compare Manu IX. 199.

(*v*) Narada, Pt. II., Chap. IV., Sl. 5; Manu IX. 47; Vyav. May., Chap. IX., para. 2; Stokes's H. L. B. 133.

(*w*) See the Smriti Chandrika, Chap. IX., sec. 2, para. 25; Viramitr., sec. 1, para. 21, below; Vyav. May., Chap. IV., sec. 10, para. 4; Stokes's H. L. B. 99.

(*x*) See the Mit. on the Administration of Justice; 1 Macn. H. L. p. 203, 217.

(*y*) See *Chattar Lalsing et al.* v. *Shewukram et al.*, 5 Beng. L. R. 123.

house given to a married woman by a stranger to the family and her own earnings had been held to be her stridhan devolving on her death, as if she had been a male, on the daughter-in-law as a gotraja sapinda in preference to the daughters of a deceased daughter (*z*). So are the ornaments given to her on her own marriage, and a house purchased by her out of her own income (*a*).

That women may take property generally by inheritance has been shown in the foregoing pages of this work (*b*). Baudhayana's quotation from the Veda (*c*), though supported by Brihaspati (*d*), is no longer allowed to disqualify them. That text, as we have seen, may be differently construed (*e*). Manu's Text IX. 18, misquoted by the Viramitrodaya (*f*), points indeed to an essential inferiority of women as incapable of pronouncing expiatory formulas (*g*), and Gautama (*h*) seems by omission to exclude even a mother from a share on a partition, but Katyayana's Srauta Sutra, the only one on the White Yajurveda, gives to women the right to sacrifice as allowed by the Vedas (*i*). The Dayabhaga (*k*) and the Smriti Chandrika (*l*) admit the wife's succession on the special ground of her association with her husband in sacrificial rites (*m*). Kulluka Bhatta, commenting on the text of Manu XI., 187, which assigns succession to the nearest sapindas, says that a wife must be considered a sapinda, because she assists her husband in the performance of religious

(*z*) *Bai Narmada* v. *Bhagwantrai*, I. L. R. 12 Bom. 505. Cf. Vyav. May., Chap. IV., sec. 10, p. 7. *Thakur Deyhee* v. *Bulak Ram*, 11 M. I. A. 139.

(*a*) *Gojabai* v. *Bhosle*, I. L. R. 17 Bom. 114, Cf. Vyav. May., Chap. IV., sec. 10, p. 7.

(*b*) To note (*n*), p. 120, add a reference to Dayabhaga, Chap. XI., sec. I., p. 49 (Stokes's H. L. B. 318); Vyav. May., Chap. IV., sec. 8, p. 2 (*ibid.* 84)

(*c*) See Baudh. Pr. II. Ka. II. 27.

(*d*) See the Smriti Chandrika, Chap. XI., sec. 1, p. 27; Vyav. May Chap. IV., sec. 8, p. 3 (Stokes's H. L. B. 84).

(*e*) *Supra*, p. 118 ff.

(*f*) Viram. Tr. p. 244.

(*g*) Manu XI. 194, 252 ff.

(*h*) Adhyaya 28, 1 ff.

(*i*) See Mon. Williams, In. Wis. 159.

(*k*) Chap. XI., sec. 1, p. 47 (Stokes's H. L. B. 316).

(*l*) Chap. XI., sec. 1, p. 10; Max Müller, Hist. San. Lit. 28, 205.

(*m*) Smriti Chand. Chap. XI., sec. 1, p. 12; Mit. Chap. II., sec. 1, p. 5 (Stokes's H. L. B. 428).

duties (*n*). The Viramitrodaya (*o*) adopts the less generous construction of the Smriti Chandrika (*p*), and the Dayabhaga (*q*) that a woman's capacity to inherit can arise only under special texts in her favour; but the Mitakshara (*r*) and the Vyavahara Mayukha do not recognise any general disability. The latter indeed (*s*), as we have seen, treats a sister with special favour (*t*).

The nature of the estate, which a woman takes in the property in any way acquired by her, seems to have been regarded by Vijnanesvara as standing on the same footing as the estate of a male. To this he mentions only one exception, "a husband is not liable to make good the property of his wife taken by him, in a famine, for the performance of an (indispensable religious) duty, or during illness, or while under restraint" (*v*). The Vyavahara Mayukha (*w*) and the Viramitrodaya (*x*) repeat this text. The Smriti Chandrika (*y*) quotes one to the same effect from Devala. Devanda Bhatta goes so far even as to say:—"In a husband's property, the wife by reason of her marriage possesses always ownership, though not of an independent character, but the husband does not possess even such ownership in his wife's property" (*z*). The Hindu notion of ownership

(*n*) Col. Dig., Book V. T. 397, Comm. *ad fin.*

(*o*) See Transl. p. 244.

(*p*) Chap. IV., p. 5.

(*q*) Chap. XI., sec. 6, p. 11; Stokes's H. L. B. 346.

(*r*) Chap. II., sec. 1, paras. 14; 22-24 (Stokes's H. L. B. 489, 490).

(*s*) Chap. IV., sec. 8, para. 19; Stokes's H. L. B. 89; above, p. 181.

(*t*) The daughters take absolutely and so do the sisters. *Vinayak Anundrao* v. *Lakshmibai*, 1 Bom. H. C. R. 124; *Bhagirthibai* v. *Kahnujirav*, I. L. R. 11 Bom. 285; *Jankibai* v. *Sundra*, I. L. R. 14 Bom. 612; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739. *The daughters take absolute and several estates*—*Vithappa* v. *Savitri*, I. L. R. 34 Bom. 510; *Ranimoni Dassi* v. *Radha Prosad*, L. R. 41 I. A. 176.

(*v*) Mit. Chap. II., sec. 11, p. 31; Stokes's H. L. B. 465. In case of misconduct on the part of the wife of a flagrant kind the husband may take posession of her Stridhana. Viramit. Transl. p. 226.

(*w*) Chap. IV., sec. 10, p. 10; *ibid.* 101.

(*x*) Sec. 1, p. 20.

(*y*) Chap. IX., sec. 2, paras. 14, 15. In para. 26, Devanda insists on the mother's exclusive ownership of her Stridhana as against any claim to partition advanced by her sons. But this must be understood by reference to his conception of Stridhana, and, as to property formerly her husband's, by reference to his notion that the widow's share is not heritage and not partible property. See the Smriti Chand. Chap. IV., p. 11; Chap., VII., p. 22.

(*z*) Col. Dig., Book V. T. 415, Comm.; "A man, his wife, and his son are co-proprietors of the estate." Reply of the Sastri at Ahmednuggur, 30th

seems to be not incompatible, either with this right springing up on particular occasions, or with the woman's general dependence (*a*). No limitation is prescribed by Vijnanesvara to the wife's or widow's use of the share taken by her in a partition (*b*). It is shown in the Smriti Chandrika (*c*) that this share falls within Vijnanesvara's conception of inheritance, and thus becomes property in the fullest sense. An unmarried daughter, who on such an occasion "shares the inheritance" (*d*), is similarly unfettered as to the disposal of it by any rule in the Mitakshara (*e*). It accepts the doctrine of the general dependence of women, but without working it out to any practical result. It omits the prohibitions referred to by the modern commentators, against the wife's expending even her separate property without the assent of her husband (*f*), and in making no special provision as to

March, 1878, MS. No. 39. *According to the law of Western India a woman has full ownership of her pallu or Stridhana, Reg.* v. *Natha Kalyan et al.*, 8 Bom. H. C. R. 11, Cr. Ca. The Roman law, like the English Equity, strove to guard a woman's property against dissipation by many provisions. See Goudsm. Pand. § 26, p. 55.

(*a*) Mit. Chap. II., sec. 1, para. 25; Stokes's H. L. B. 435, and the cases cited above.

(*b*) Mit Chap. I., sec. 2, para. 8; sec. 6, para. 2; sec. 7, paras. 1, 14 (Stokes's H. L. B. 379, 394, 397, 401); Dayabhaga, Chap. III., sec. 2, para. 37 note (*ibid.* 233); *Durga Prosad* v. *Broja Nath Bose*, L. R. 39 I. A. 121.

(*c*) Chap. IV., para. 10, Comp. Col. Dig., Book V. T. 420, 515, Comm.

(*d*) Compare Col. Dig., Book V. T. 399, Comm. *sub fin.*; Mit. Chap. II., sec. 1, p. 25, (*ibid.* 435).

(*e*) Mit. Chap. I., sec. 7, para. 14; Stokes's H. L. B. 401. See above, p. 98, note (*m*); *Tukaram* v. *Narayan*, I. L. R. 36 Bom. 339, F. B.

(*f*) See the Viramitrodaya, sec. 1, paras. 14, 15, below; Vyav. May., Chap. IV., sec. 10, para. 8; Stokes's H. L. B. 100; Dayabhaga, Chap. IV., sec. 1, para. 23 (*ibid.* 241); Smrit. Ch. Chap. IX., sec. 2, para. 12. Under the Teutonic laws the property of a girl remained her own after her marriage subject to the guardianship (*mundium*) of her husband and his use of the fruits during coverture. Of acquisitions made during the coverture the wife was entitled to an aliquot part fixed variously by different laws. The Saxon law gave her a moiety. But though her ownership subsisted her power of disposal was during coverture made subject to the assent of her husband. Lab. *op. cit* 400. Under the English common law the wife's real estate remained hers, notwithstanding her marriage, subject to her husband's seisin in right of the wife and consequent assignment of the profits. On her death it belonged to her heirs subject only to the husband's tenancy for life by courtesy. But she could not dispose of the property without his assent (which is still required under the St. 3 & 4 Wm. IV. Cap. 75) except in the case of property vested in trustees for the wife's separate use without restraint on alienation. See Bl. by K., Book, I. C. 15, Book II., Chap. 8.

Saudayikam it may probably have intended to leave the full ownership constituted by its texts to their natural operation on the whole of a woman's estate (*g*).

This liberality was quite in accord with Vijnanesvara's general tendency to carry principles out to their logical consequences without regard to the exceptions and contradictions established by actual practice. It may be doubted whether the equality of a woman with a man as an heir and owner of patrimony was ever generally accepted as a customary law. The ancient Smritis did not contemplate it, and caste rules, so far as they have been investigated, are almost uniformly against it. This advance in the position of women, moreover, seems never to have quite commended itself to those even who are in a general way followers of the Mitakshara. The Smriti Chandrika limits the woman's right of disposition to Saudayika, defined as wealth received from her own or her husband's family, and excluding immovable property given by her husband (*h*). The "patni" wife's dependent ownership over her separated husband's property becomes, on his death, according to this authority, independent, yet without power to give, mortgage, or sell the estate, except for religious or charitable purposes (*i*) or with the consent of the presumptive reversioners (*k*). The Viramitrodaya (*l*) gives full power of disposition over Saudayika only. So too does the Vyavahara Mayukha (*m*), and as to property taken by the widow on her husband's death, it limits her strictly to a life enjoyment subject only to exceptions in favour of religious gifts (*n*), or of her (or

(*g*) See above, pp. 134, 259; *Govindji Khimji* v. *Lakshmidas Nathubhai*, I. L. R. 4 Bom. 318. In a note to the case of *Doe dem Kullammal* v. *Kuppu Pillai*, 1 Mad. H. C. R., at p. 90, the principal passages are collected, which bear on a woman's power to deal with her separate property. In *Brij Indar et al.* v. *Rani Janki Koer*, L. R. 5 I. A. 1, a grant to a widow and her heirs of her husband's confiscated estate was contrued in favour of her daughter as against her husband's heirs, a grandson through a daughter by another wife and distant collaterals. The restrictive construction of the Mitakshara's rule, Chap. II., sec. XI., paras. 1 ff. is denied as to grants made to a widow.

(*h*) Sm. Ch. Chap. IX., sec. 2, paras. 6, 11.

(*i*) Chap. XI., sec. 1, paras. 19, 28, 29.

(*k*) *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*, I. L. R. 30 All. 1, P. C.; *Radha* v. *Joy*, I. L. R. 17 Cal. 896; *Nobokishore* v. *Hari*, I. L. R. 10 Cal. 1102. *As to mode of consent*, see *Sham* v. *Achhan*, L. R. 25 I. A. 189.

(*l*) Sec. 1, paras. 14, 15, below.

(*m*) Chap. IV., sec. 10, para. 8 (Stokes's H. L. B. 100).

(*n*) *Ibid.* para. 4 (Stokes's H. L. B. 99). In the case of *Chooneena* v. *Jussoo Mull Deveedass*, 1 Borr. R. 60, it was decided on the Vyav. May.

her mother's) power to dispose of movables during her lifetime (*o*) or to wil it away if permitted by the husband (*p*). The Vivada Chintamani is to the same effect (*q*). Jimutavahana (*r*), while denying the wife's ownership of gifts from strangers (*s*), says that over all property, really hers, her power of disposition is unfettered, save in the case of her earnings and of immovables bestowed by the husband (*t*). These she is only to enjoy by way

that a widow could not devise property inherited from her husband to her family priest so as to deprive the next heir, her nephew's widow. In *Jugjeerun Nuthoojee et al.* v. *Deosunkur Kaseeram*, 1 Borr. R. 436, on the other hand, a widow was allowed to bequeath by way of *Krishnarpana* the property inherited from her husband, except the family house and the sum requisite for her obsequies, to the exclusion of her husband's cousin. The decision rested on the sacred character of such a gift; as in the Vyavastha in *Dhoolubh Bhaee et al.* v. *Jeevee et al.*, 1 Borr. R. 75, the Sastri says, (p. 78) "Goolal Bai was not authorized to assign to the children of her brethren the house of her husband Pitamber (which after his demise had descended to her) without the sanction of the heirs." In *Poonjeeabhaee et al.* v. *Prankoonwur*, 1 Borr. 194, it was ruled that a woman who had a son could not in discharge of her deceased husband's debts alienate property, which she had inherited from her father, without the assent of the son, after he had attained 16 years of age. This is referred to the passages from Brihaspati and Katyayana, quoted in the Vyavahara Mayukha, to show that a woman is generally unfit to enjoy fixed property, and that a widow cannot dispose of it except for special purposes. Her son enjoying according to the Mayukha an unobstructed right of inheritance (Chap. IV., sec. 10, p. 26; Stokes's H. L. B. 105), was probably regarded by the Sastris as having a joint ownership in the property, which thus became inalienable without his assent. "A son," says the Pandit at 2 Mor. Dig., 243, "inherits the estate of his mother in the same manner as that of his father." See p. 140. The Smriti Chandrika, Chap. VIII., para. 11; Chap. IX., sec. 11, para. 26; sec. III., para. 4, denies the unobstructed ownership of a son in his mother's property. See also the Mit. Chap. I., sec. VI., para. 2; *Sheo Shankar* v. *Debi Sahai*, L. R. 30 I. A. 202, in which the whole law on the subject is exhaustively dealt with; *Bai Devkore* v. *Amritram*, I. L. R. 10 Bom. 372; *Haribai* v. *Lakshmibai*, I. L. R. 11 Bom. 573; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739.

(*o*) *Harilal* v. *Pranvlabdas*, I. L. R. 16 Bom. 299; *Bai Jamna* v. *Bhaishankar*, I. L. R. 16 Bom. 233.

(*p*) *Motilal* v. *Ratilal*, I. L. R. 21 Bom. 170; Cf. *Gadadhar* v. *Chandrabhagbai*, I. L. R. 17 Bom. 690, F. B.—*A widow governed by the Mitakshara cannot bequeath movables inherited from her husband.*

(*q*) Pp. 262, 263. See *B. Gunput Sing* v. *Gunga Pershad*, 2 Agra R. 230.

(*r*) Dayabhaga, Chap. IV., sec. 1, paras. 20, 23; Stokes's H. L. B. 240, 241.

(*s*) Col. Dig., Book V. T. 420, Comm. II.

(*t*) Col. Dig., Book V. T. 470, Comm.; 420 Comm. As to a gift for maintenance by a son, see *Musst. Doorga Koonwar* v. *Musst. Tejoo Koonwar et al.*, 5 C. W. R., 53 Mis. R.; and the Dayabhaga, Chap. IV., sec. 1, p. 18 (Stokes's

of use; and similarly when she takes his estate on his death, which, according to the Dayabhaga, she does, whether he was separated or unseparated from his brethren (*v*), she "must only enjoy her husband's estate after his demise. She is not entitled to make a gift, sale, or mortgage of it," except in the fulfilment of a pious duty, under the pressure of necessity, or with the sanction of the paternal uncles and other near relatives of her deceased husband (*w*). Jagannatha, being forced to admit that the widow has independent power over *daya* as her husband's gift or as heritage (*x*), says in one place that, as to such property,

H. L. B. 240); *Bai Jamna* v. *Bhaishankar*, I. L. R. 16 Bom. 233; *Mohima Chunder Roy* v. *Durga Monee*, 23 W. R. 184, P. C.

(*v*) *Op. cit.* Chap. XI., sec. 1, paras. 6, 46 (Stokes's H. L. B. 305, 316). See *Keerut Singh* v. *Koolahul Sing et al.*, 2 M. I. A. 331; *Ghirdharee Sing* v. *Koolahul Sing et al.*, 2 *ibid.* 344; *Rao Karun Sing* v. *Nawab Mahomed Fyz Alli Khan et al.*, 14 *ibid.* 187; *The Collector of Masulipatam* v. *C. Vencata Narrain Appah*, 8 *ibid.* 500; *Gobind Monee Dossee* v. *Sham Lall Bysack et al.*, C. W. R., Sp. No., p. 165; East, C. J., in *Cossinaut Bysack et al.* v. *Hurroosoondry Dossee et al.*, 2 Mor. Dig., at p. 215.

(*w*) *Op cit.* Chap. XI., sec. 1, paras. 56, 62, 64 (Stokes's H. L. B. 320-322); *Deo dem Ramanund Mookopadhia* v. *Ramkissen Dutt*, 2 Mor. Dig., 115. For the case of an estate taken jointly under this law by two widows, see *Gobind Chunder et al.* v. *Dulmeer Khan et al.*, 23 C. W. R. 125; *Sreemuttee Muttee Berjessory Dossee* v. *Ramconny Dutt et al.*, 2 Mor. Dig. 80; and compare p. 95 of this work. A wife having a joint interest with her husband may after his death sell her own share, *Madavaraya* v. *Tirtha Sami*, I. L. R. 1 Mad. 307. "In respect of gifts by a husband to his wife she takes immovables only for her life and has no power of alienation, while her *dominium* over movable property is absolute," per Jackson, J., in *Koonjbehari Dhur* v. *Premchund Dutt*, I. L. R. 5 Cal. at p. 686. The rule was applied to a bequest by a will which imposed restrictions on a widow's absolute dealing with movables, but none as to the immovable property. Comp. *Brij Indra* v. *Rani Janki Kooer*, L. R. 5 I. A. 1; *supra*, p. 93. If a widow turns funds given to her by her husband into land she may dispose of such land as of the money by gift or devise, *Venkata Rama Rao* v. *Venkata Surya Rao*, I. L. R. 2 Mad. 333. A gift by a widow to her daughter's son was held valid as against the heirs of her husband's cousin whose share before the husband's decease had been sold in execution. *Gokul Singh et al.* v. *Bhola Singh*, Agra S. R. for 1860, p. 222; *The same limitations apply to a mother's estate*, *Sorola* v. *Bhuban*, I. L. R. 15 Cal. 292; *Contra*, *Chhiddu* v. *Naubat*, I. L. R. 24 All. 67 and *Sri Pal* v. *Suraj*, I. L. R. 24 All. 82.

(*x*) In the case at 2 Str. H. L. 21, ejectment seems to have been maintained by a woman against her husband for a house which he had given to her on his second marriage. So also in the case CXXIX. of East's notes, *G.* v. *K.*, 2 Mor. Dig., 234. A suit for jewels was maintained, *Wulubhram* v. *Bijlee*, 2 Borr. R. 481. See Col. Dig., Book V. T. 481, Comm. Col. on Oblig., Book II., Chap. III., recognises this right. The answer at 2 Mor. Dig. 68

if immovable, "her enjoyment only of it is authorised" (*y*)—a rule which applies to movables also (*z*). He thinks, however, that her alienation of the property, though blameable, may be valid (*a*), yet he quotes Narada (*b*) against any such alienation, and says that all the authorities concur in forbidding it as to property devolved on a widow by the death of her husband (*c*). Property acquired by inheritance by a woman before her marriage he regards as at her independent disposal (*d*); if acquired during coverture it is subject to her husband's control like her other acquisitions, so long as the husband lives (*e*). To a daughter he assigns full power over Stridhana which devolved on her from her mother (*f*). But, with the exception of the Bombay

(*Jushadah Raur* v. *Juggernaut Tagore*), denies to a mother any power to dispose by will of the personalty inherited from her son, which she might have expended. It escheats to the crown. As to realty, see *ibidem*; and p. 100 (*Gopeymohun Thakoor* v. *Sebun Cower et al.*); at p. 131 (*Doe dem. Sibnauth Roy* v. *Bunsook Buzzary*). At p. 155 (*Doe dem. Gunganarain Bonnerjee* v. *Bulram Bonnerjee*), the opinion of the Pandits, given by Macnaghten, is that in Bengal a widow's estate being only usufructuary and untransferable, her sale of the property is invalid even as to her own interest. This principle might operate where something had been allotted merely for maintenance, as a right to future maintenance cannot be assigned, *Ramabai* v. *Ganesh Dhonddeo*, Bom. H. C. P. J. F. for 1876, p. 188. A widow and mother's right to maintenance out of her deceased husband's estate inherited by her son is a purely personal one and cannot be transferred or sold in execution. *Bhyrub Chunder* v. *Nubo Chunder Gooho*, 5 C. W. R. 111, unless perhaps where it has been made a specific charge on some part of the estate *Gangabai* v. *Krishnaji Dadaji*, Bom. H. C. P. J. 1879, p. 2.

Compare the case of dower under the English law which cannot be aliened to a stranger, only released to the tenant of the land so as to extinguish it. *Colston* v. *Carre*, 1 Rolle, Abridgm. 30, Langdell, Contracts, 419. But as to a widow's estate properly so called, see *supra*, p. 285, and the further cases cited below.

(*y*) Col. Dig., Book V. T. 515, Comm.

(*z*) *Ibid.*, T. 402, Comm.

(*a*) *Ibid.*, T. 399, Comm., T. 420 Comm.; as to this see above p. 208.

(*b*) *Ibid.*, T. 476.

(*c*) *Ibid.*, T. 402, Comm., *sub fin.* See Colebrooke, cited 2 Mor. Dig., p. 212 (*Cossinaut Bysack et al.* v. *Hurroosoondry Dossee et al.*).

(*d*) See 2 Macn. H. L. 127; *Bai Kesserbai v. Morariji*, I. L. R. 30 Bom. 431, *Tukaram* v. *Narayan*, I. L. R. 36 Bom. 339 F. B.

(*e*) Col. Dig. T. 470, Comm.

(*f*) *Ibid.*, T. 515, Comm. Several cases under the Bengal law will be found in 2 Macn. H. L. Chap. VIII. Property inherited by a daughter from her father is not Stridhana in Bengal. *Chotay Lal* v. *Chunnoo Lal*, L. R. 6 I. A. 15.

Presidency and the provinces of Behar and Madras, in case of a maiden daughter succeeding (*g*) a female inheriting from another female takes only a widow's estate (*h*).

The share taken by a mother in a partition is, according to the Smriti Chandrika (*i*), only a means of subsistence. In *Hari Dayal* v. *Grish Chundra* (*k*) it was laid down by the Calcutta High Court that property inherited by a female from a male conferred on her only a restricted estate. In *Sorolah* v. *Bhuban* (*kk*) the above principle was applied to cover a share obtained by the mother on partition. The Allahabad High Court, however, lays down that the share allotted to the mother vests in her an absolute proprietary right (*l*). In *Durga Prasad Singh* v. *Braja Nath Bose* (*m*) the Judicial Committee has held that, in the absence of express agreement to the contrary, a share obtained by a widow (or mother), on partition of the joint property, on her death reverts to the next heir of the last male holder. That given to a sister is only a marriage portion (*n*). The Viramitrodaya insists (*o*) that in a partition by brothers, daughters are entitled to shares, not merely to a provision for marriage. The Vyavahara Mayukha (*p*), in providing for the mother and the sisters, says nothing of the nature of the estate they take in the property thus acquired by them. Nilakantha does not adopt Vijnanesvara's definition of heritage (*q*), and it seems that he would, on a widow's death, assign the share allotted to her in a partition to her sons (*r*), but the same remark might on the same ground be made as to the succession to a share given to a sister. It is doubtful, therefore, whether any abiding interest of the family of

(*g*) *Venkatarama* v. *Bhujangarav*, I. L. R. 19 Mad. 109.

(*h*) *Sheo Shankar* v. *Debi Sahai*, L. R. 30 I. A. 202.

(*i*) Chap. IV. p. 9., I. L. R. 15 Cal. 292. See per Kennedy, J., in *Jagmohan Haldar* v. *Sarodamoyee Dossee*, I. L. R. 3 Cal. 149. The pandit's opinion was different. See below.

(*k*) I. L. R. 17 Cal. 911, 916.

(*kk*) I. L. R. 15 Cal. 292.

(*l*) *Chhiddu* v. *Naubat*, I. L. R. 24 All. 67; *Sri Pal Rai* v. *Surjbali*, I. L. R. 24 All. 82.

(*m*) L. R. 39 I. A. 121; *Tewar* v. *Dorasingha*, L. R. 8 I. A. 99, 109.

(*n*) Chap. IV., pp. 16, 17, 18; *Vinayek* v. *Luxumeebaee*, 9 M. I. A. 538.

(*o*) Transl. p. 85.

(*p*) Chap. IV., sec. 4, pp. 15, 18, 40 (Stokes's H. L. B. 51, 52, 57); *Manilal* v. *Bai Rewa*, I. L. R. 17 Bom. 758; *Motilal* v. *Ratilal*, I. L. R. 21 Bom. 170; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739.

(*q*) Vyav. May., Chap. IV., sec. 2, para. 1; Stokes's H. L. B. 46.

(*r*) *Ibid.* sec. 10, p. 26; Stokes's H. L. B. 105.

the former co-sharers in such property would still subsist or not. Jagannatha (*s*) says that such a share may be aliened by its recipient, and he applies the same rule to property inherited (*t*), but his discussion of these questions shows that conflicting opinions are maintained by the principal modern commentators (*v*).

The views of English scholars and lawyers on these points have been no less various. Prof. H. H. Wilson, in Vol. V. of his Works, at p. 29, says: " It is absurd to say that a woman was not intended to be a free agent, because the old Hindu legislators have indulged in general declarations of her unfitness for that character. Manu, it is true, says of women, 'Their fathers protect them in childhood, their husbands protect them in youth, their sons protect them in age. A woman is never fit for independence' (*w*); but what does this prove in respect to their civil rights? Narada goes further, and asserts that 'after a husband's decease the nearest kinsman should control a widow, who has *no sons*, in expenditure and conduct (*x*). But as we have observed, this is neither the law nor the practice of the present day. Besides, it does not apply to the case of partition, as there the widow has sons, and they surely abandon a right to control property which they themselves have given. To sanction any other mode of procedure would only tend to perpetuate the degraded condition of the female sex in India."

And again, at page 20: "The old lawyers have said, 'let a widow enjoy a husband's wealth; afterwards let the heirs take it'; what obligation does this involve that she *must leave it?* . . . Now as to the gift, the same authorities, from whom there is no appeal, define what things are alienable as gifts and what are not. Amongst the things not alienable no mention is made of a widow's inheritance. The *whole* estate of a man, if he have issue living, or if it be ancestral property, he cannot give away without the assent of the parties interested, and this may indeed be thought to apply to the *immovable* property inherited by a

(*s*) Col. Dig., Book V., Chap. II. T. 88, Comm.

(*t*) *Ibid*, 399, Comm., and compare T. 470, and T. 483, Comm.

(*v*) The Pandits of the Supreme Court of Bengal in 2 Mor. Dig., at p. 217. said that, even recognising the restrictions on a widow's estate taken by mere succession, yet what she received on a partition was to be regarded as Stridhana subject to her absolute disposal. See also *ibid*. 239, where the restrictions imposed seem to be only moral ones.

(*w*) XI. 3.

(*x*) Quoted in the Dayabhaga, p. 269.

widow, but it is the only law that can be so applied: there being, therefore, no law against the validity of her donation, it follows that she has absolute power over the property (*y*), at least, such was the case till a new race of law-givers, with Jimutavahana at their head, chose to alter it; but they only tampered with the law of inheritance, and the law respecting legal alienation being untouched remains to bear testimony against their interpretation of a different branch of the law."

On the widow's rights in property to which she has succeeded on her husband's death, the same learned scholar says (page 16): "There are but two ancient texts which bear positively on the widow's power over the property which she inherits as her husband's sole heir. One is attributed to Katyayana, and states, 'Let the childless woman preserving (inviolate) the couch of her lord, and obedient to her spiritual guide, enjoy, resigned, her husband's wealth until her death. Afterwards let the heirs take it' (*z*). The other is from the Mahabharata, which as law, by-the-bye, is no authority at all. 'Enjoyment is the fruit which women derive from the heritage of their lords,—on no account should they make away with the estate of their lords' (*a*). Such are the ancient injunctions, which can scarcely be interpreted to mean that if a widow gives away or sells her estate such gift or sale is invalid. Even the later writers, who entertained less reverence for the female character than the ancient sages, have stopped short of such a declaration, and Jimutavahana is content to say that 'a widow shall only enjoy the estate; she ought not to give it away, or mortgage or sell it' (*b*). He allows her also, if unable to subsist otherwise, to mortgage or even to sell it, and to

(*y*) In *Doe* v. *Ganpat*, Perry, O. Ca. at pp. 135, 136, the Sastri of the Sudder Court expressed an opinion that the widow of a separated Hindu might make a gift of the property she had inherited from her husband, except for improper purposes. This was followed by Sir E. Perry, but for an additional and inapplicable reason, viz. that the grandson of the deceased husband's daughter was pointed out by English law and natural reason as a successor to the property preferable to the nephew of the deceased, one of the line of heirs expressly named by the Hindu authorities.

(*z*) Viramitra Trans. pp. 136, 225; Vivada Chint. p. 261; Dayakrama Sangraha, Chap. I., sec. II., para. 3; Chap. II., sec. 11. paras. 11, 12.

(*a*) Apahri, Take off or away: it is translated in the Digest and elsewhere, "waste," which perhaps scarcely renders its due import. [According to the Dayakrama Sangraha, the passage is taken from the Danadharma of the Anusasanaparva (?)]

(*b*) See Dayabhaga, p. 265.

make presents to her husband's relatives and gifts or other alienations for the spiritual benefit of the deceased. It is not till we come to the third generation of lawyers, the commentators on the commentators, that the restriction is positive, and Sri Krishna Tarkalankara, expounding Jimutavahana's text, declares 'a widow shall use her husband's heritage for the support of life, and make donations and give alms in a moderate degree for the benefit of her husband, but not dispose of it at her pleasure like her own peculiar property.' The utmost that can be inferred from all this is that originally the duty of the widow was only pointed out to her, and she was left, in law as she was in reason, a free agent, to do what she pleased with that which was her own, but that in later times attempts of an indefinite nature have been made to limit her power."

Returning to the same subject, a few pages later, he says (page 24): "The spirit and the text of the original law, in our estimation, recognise the widow's absolute right over property inherited from a husband in default of male issue (*c*). In Bengal the authorities that are universally received have altered this law, and restrict a widow to the usufruct of her husband's property. They have not, however, provided for its security, nor for its recovery if aliened, and by such neglect have virtually left the law as they found it, or the power, if not the right, of alienation with the widow: it is open to the Court, therefore, to make what regulations on this subject they please, as far as their jurisdiction extends, and as far as they are authorised by the Charter; and the regulation most conformable to reason, to analogy, and to the spirit of the Hindu Code, would be to give the widow absolute power over personal property and restrict her from the alienation of the estate, except with the concurrence of her husband's heirs."

Again, at page 26, he says: "In the case of the widow's sole inheritance, we have granted that the Bengal lawyers limit her in all respects to a life-interest, whilst the Mithila writers maintain her absolute right in movables, and the old law authorities oppose nothing to her absolute right in every kind of property. In the case of property, however, acquired by partition (*d*), the

(*c*) Mitakh. Ad. Yajn. II. 135; Vivada Chintamani, p. 151; Viramitrod., page 193 *a*; Vyavahara Mayukha, Chap. IV., sec. 8, p. 2 ff. (Stokes's H. L. B. 84).

(*d*) "These laws (of Inheritance and Partition), as is observed by Sir Thos. Strange, are so intimately connected that they may almost be said to be blended together." P. C. in *Katamma Natchiar* v. *Raja of Sivagunga*,

arguments in favour of absolute right are infinitely stronger, inasmuch as the Bengal authorities lean to the same view of the subject. Jimutavahana starts no objection to such power, his remark being confined entirely to the case of sole inheritance, and the Vivada Bhangarnava concludes a long and satisfactory discussion of the question by the corollary, 'Therefore a wife's sale or donation of her own share is valid.'"

With special reference to the share taken by the widow in a partition (*e*), he remarks (page 27): "It is asserted, indeed, that a husband's heirs succeed to such property in preference to a woman's own heirs, and therefore her enjoyment of it is only for life; but the postulate is supported only by analogy, not by any positive law, and therefore the inference is by no means proved. Besides, even if admitted, preference of succession does not imply restriction of right in possession. Our law of primogeniture does not preclude, under ordinary circumstances, the father's right to sell, give, or bequeath his property as he pleases; and why should any order of succession exercise such influence here when not specially provided for? 'Heritage and partition' are included by the text of the Mitakshara, which is good law in every part of India, even in Bengal amongst the constituents of 'woman's property,' and a woman is acknowledged by all to be mistress of her own wealth. It is argued that lands and houses *given by a husband* to his wife must not be aliened by her after his death; *therefore*, a share of land and houses *given by his sons* on partition of his wealth must not be made away with by their mother; but this is surely a different case. A husband, in undue fondness, might bestow upon a wife the *heritage of his sons*, and they would be deprived of that patrimony in which *they have a joint interest with the father:* it is not unwise, therefore, to secure to them the reversion of such effects."

Colebrooke's opinions on this subject appear to have varied to some extent at different times. At 2 Str. H. L. 19 he says: "Land may be given by the husband to his wife in Stridhan, and will be her absolute property" (*f*). The same doctrine as to property inherited is supported by a treatise bearing the name of

9 M. I. A. 539, on which their Lordships rest the widow's inheritance to property separately acquired by her husband, as such property would be retained by him in a partition.

(*e*) See Viramit. Transl. p. 147; Mit. Chap. I., sec. VI., para. 2.

(*f*) *Braja Kishore* v. *Kundana Devi*, L. R. 26 I. A. 66; *Harilal* v. *Lakshmibai*, I. L. R. 11 Bom. 573; *Motilal* v. *Ratilal*, I. L. R. 21 Bom. 170.

Raghunandana, which Prof. Wilson seems to have thought genuine, but which Colebrooke himself pronounces "more than doubtful," as opposed to the whole current of authorities, in his note to Dayabhaga, Chap. IV., sec. 1, para. 23 (Stokes's H. L. B. 241). At 2 Str. H. L. 402 he agrees with the Sastri that a woman may give away her own property, except lands taken by gift or inheritance from her husband (*g*), "which she cannot dispose of without consent of the next heir" (*h*). At page 407 he seems, in a Broach case, to intimate that what comes to a woman from her husband is not even Stridhana. He must here have had the Bengal law in mind, as the Mitakshara, Chap. I., sec. 1, para. 20 (Stokes's H. L. B. 373), uses the case of a gift by a husband to his wife as an illustration of the fact that full property may arise, otherwise than by birth. As Mr. Sutherland (*ibid.* 430) points out, the Mitakshara is silent on the woman's power to alien her peculiar property (*i*), and she may, on her husband's death, dispose as she pleases of his affectionate gift with the exception of immovables. As to these (*ibid.* p. 21), the Benares and Mithila authorities, he says, impose a general restriction upon the woman's alienation of the property (*k*). At pp. 108, 110, Colebrooke says that a widow succeeding is restricted from aliening the immovables, and in this Ellis concurs on the ground that "No woman under any circumstances is absolutely independent" (*l*); but as to that the case at p. 241 shows that Colebrooke thought a widow could dispose as she pleased of her Stridhana, consisting of jewels (*m*); and on her

(*g*) So in *Haribhat* v. *Damodharbhat*, I. L. R. 3 Bom. 171, as to a will by a daughter who having inherited from her father took, it was said, an absolute estate. But in *Bharmanagavda* v. *Bharmappagavda*, H. C. P. J. for 1879, p. 557, Pinhey and F. D. Melvill, JJ., ruled that the widow *of a collateral* inheriting in that right cannot dispose of the property thus inherited by will. A widow's will was held inoperative against her step-daughter's right as heir to her father, *O. Goorova Butten* v. *C. Narrainsawmy Butten*, 8 M. H. C. R. 13. The testamentary power is as to Stridhana commensurate with the right of disposal during life. *Venkata Rama's Case*, I. L. R. 2 Mad. 333.

(*h*) So 1 Macn. H. L. 40.

(*i*) *Doe dem. Kullamal* v. *Kupper Pillai*, 1 Mad. H. C. R. 88.

(*k*) See also 2 Macn. H. L. 35; *Sheo Shankar* v. *Debi Sahai*, L. R. 30 I. A. 202; *Jiwan Singh* v. *Misrilal*, L. R. 23 I. A. 1; *Sham Sunder* v. *Achhan*, L. R. 25 I. A. 183; *Teki Ram* v. *D. C. of Bara Banki*, L. R. 26 I. A. 97; *Raja Chelikani's Case*, L. R. 29 I. A. 156.

(*l*) So per Grant, J. See *Comulmoney Dossee* v. *Ramanath Bysack*, Fult. R. 200, and as to the higher castes, Steele, L. C. 177.

(*m*) See the Vivada Chintamani, p. 260. The presumption is that orna-

decease such ornaments will pass on to her daughter, or sons and daughters jointly, according as they were given to her before or after marriage (*n*).

As to the share taken by a woman on a partition, Colebrooke appears to have distinctly recognised her as a subject of "Daya," or inheritance in the fullest sense (*o*). At 2 Str. H. L. 382 he says that, according to the Mitakshara, such a share is an absolute assignment, heritable therefore by the widow's daughters (*p*). And this is confirmed by the rule which makes the wife's share in a partition her separate property even in her husband's life, and as such heritable by her daughters in preference to sons (*q*). In the case at p. 404 there is an apparent misreading of Colebrooke's note. It should be: "The share allotted as a provision to the widow does not pass to the heirs of her peculiar property, but to her husband's heirs. This point may, however, involve some difficulty according to the opinion of those who hold that it is not a mere allotment for maintenance but participation as heir." This makes it agree with the opinion at p. 382. In the same case Sutherland thinks, but with diffidence, that the share allotted to a stepmother reverts on her death to the partitioning sons. In *Bhugwandeen Doobey* v. *Myna Baee* (*r*), the Judicial Committee

ments given for ordinary wear are meant to be Stridhana, *Musst. Radha* v. *Bisheshur Dass*, 6 N. W. P. R. 279. See above, pp. 205 and 186. Family jewels, it has been held in Bengal, are not transferable by a widow as her own property, *Bhagwanee Koonwur* v. *Parbutty Koonwur*, 2 C. W. R. 13 Mis. R., but see also the Vyavastha Darpana, p. 684, Vishnu, Chap. XVII., para. 22, seems to exempt a woman's jewels from partition only during her husband's life, but this cannot be regarded as the accepted law, and is indeed, as we have seen, opposed to other Smritis. See Gautama, Ka. XIV., para. 9, below; Col. Dig., Book V. T. 473. Macnaghten says (1 H. L. 40) "that the Hindu law recognises the absolute dominion of a married woman over her separate and peculiar property except land given to her by her husband," but he adds rather inconsistently, "He (the husband) has nevertheless power to use the woman's peculium and consume it in case of distress; and she is subject to his control even in regard to her separate and peculiar property." *Gojabai* v. *Bhosle*, I. L. R. 17 Bom. 114.

(*n*) *Ashabai* v. *Haji Tyeb*, I. L. R. 9 Bom. 115.

(*o*) Mit. Chap. I., sec. I., pp. 2, 8, 12 (Stokes's H. L. B. 364, 366, 370); Chap. II., sec. I., pp. 2, 31, 39 (*ibid.* 427, 436, 439); sec. 2, pp. 1, 2 (*ibid.* 440).

(*p*) *Ibid.* Chap. I., sec. 3, p. 9; Stokes's H. L. B. 383.

(*q*) Mit. Chap. I., sec. V., pp. 2, 3; Stokes's H. L. B. 394; *Jogendro* v. *Fulkumari*, I. L. R. 27 Cal. 77; *Poorendra* v. *Hermangini*, I. L. R. 36 Cal. 75; *Chhiddu* v. *Naubat*, I. L. R. 24 All. 67.

(*r*) 11 M. I. A., at p. 514.

seem to have inclined to the view that, except in Lower Bengal, the widow's property in her share becomes absolute, but the point was not one requiring decision in that case. That a sum of money given to a widow in lieu of maintenance is at her own absolute disposal was ruled in the Madras case, cited below, p. 299, note (*r*). Under the Bengal law Sir W. Jones says (*s*), "The movable property is at the widow's disposal, the immovable descends to the heirs"; but Colebrooke says, "the doctrine of the Bengal school controls the widow even in the disposal of personal property" (*t*).

This being the state of the authorities, it must probably be admitted, notwithstanding the view of Prof. Wilson, that the more recent writers have prevailed against Vijnanesvara, at least as to a woman's dealings with immovable property taken by inheritance or by gift from her husband (*v*). In a Bengal case, 2 Macn. H. L. 214, the Sastri says that in the precept "'Let the wife enjoy with moderation the property until her death,' the word 'wife' is employed with a general import," including all cases of female inheritance. The restriction does not apply, he says, to land *given* to a daughter by her father (*w*). In the case in the Digest of Vyavasthas, Chap. II., sec. 9, Q. 7, the Sastri denies to a mother inheriting from her son any power to alien the property, though the Smriti Chandrika (*x*) and the Dayabhaga (*y*) would apparently give her an exclusive interest as against her husband (*z*).

In the Bombay Presidency, immovable property given by a husband to his two wives was held, as to the share of each, to be Stridhana not transferable after the husband's death for value to the other, so as to deprive the grantor's daughter of her right to

(*s*) 2 Mor. Dig., 243.

(*t*) *Cossinaut Bysack et al.* v. *Hurroosoondry Dossee et al.*, 2 Mor. Dig. 205, 219.

(*v*) The passage of Narada, Pt. I., Chap. III., Sl. 30, prohibiting the gift by a widow of land given to her by her husband (Dayabhaga, Chap. IV., sec. 1, p. 23; Stokes's H. L. B. 241) seems to qualify the special rule in paras. 39, 40, enabling her as surviving parent to deal at her discretion with the estate.

(*w*) See Col. Dig., Book V. T. 478, 420, Comm.

(*x*) Chap. XI., sec. 3, p. 8.

(*y*) Chap. IV., sec. 1, pp. 1, 18, 19 (Stokes's H. L. B. 235, 240).

(*z*) See *P. Bachiraju* v. *V. Venkatappadu*, 2 Mad. H. C. R. 402.

inherit (*a*), and in *Balvant Rav.* v. *Purshotam* (*b*), Sir M. Westropp, C.J., says, "The widow in this Presidency takes a limited estate in the immovable property of her childless husband or son" (*c*), but she can dispose of his movable estate during her lifetime as she chooses (*d*), and by will if she is given the power (*e*), according to the Vyav. May., though not according to the Mitakshara (*f*). In *Purshotam* v. *Ranchhod* (*g*) the same learned Judge has dealt with the nature of the widow's estate with reference to litigation between the death of her husband and the issue of letters of administration to his estate:

"Here, from the moment of the testator's death, at the very least, up to the 27th January, the date of the letters of administration, and the day on which they were issued (a period covering the institution of these suits, the laying on of the attachments before judgment, and the recovery of the judgments themselves), the representation was full. It was filled by the widow, who took as heir, and, although a Hindu widow's estate in immovables inherited from her husband, which has been compared to that of a tenant-in-tail after possibility of issue extinct (*h*) [is such that]

(*a*) *Kotarbasapa* v. *Chanverova*, 10 Bom. H. C. R. 403. Comp. *Rindamma* v. *Venkata Ramappa et al.*, 3 Mad. H. C. R. 268, and *Sri Gajapathi Nilamani* v. *Radhamani*, L. R. 4 I. A. 212, *where co-widows took a joint estate for life* in their husband's property, with rights of survivorship and equal beneficial *enjoyment.*

(*b*) 9 Bom. H. C. R. at p. 111;

(*c*) *Bechar Bhagvan* v. *Bai Lakshmi*, 1 Bom. H. C. R. 56; *Vinayak Anandrav et al.* v. *Lakshmibai*, *ibid.* 117; *Pranjivandas et al.* v. *Devkuvarbai et al.*, *ibid.* 130; *Mayaram* v. *Motiram*, p. 313 of the 2nd Edition, 2 *ibid.* 323; 2 Str. H. L. 13, &c. So in *Doorga Dayee et al.* v. *Poorun Dayee et al.*, 5 C. W. R. 141. See above, p. 92. Under a gift from a Hindu, his wife takes only a life estate in immovables, and an absolute estate in movables. There is no difference whether she takes either kind of property by will or gift. It is necessary for her husband to give her in express terms a heritable right or power of alienation to enable her to dispose of immovable property. *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R. 5 Cal. 684. A gift from mere generosity by a widow out of a gift from a husband was held invalid. *Rudra Narain Singh* v. *Rup Kuar*, I. L. R. 1 All. 734.

(*d*) *Harilal* v. *Pranavalabdas*, I. L. R. 16 Bom. 229; *Bai Jamna* v. *Bhaishankar*, I. L. R. 16 Bom. 233; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739; *Haribai* v. *Lakshmibai*, I. L. R. 11 Bom. 573.

(*e*) *Motilal* v. *Ratilal*, I. L. R. 21 Bom. 170.

(*f*) *Gadadhar* v. *Chandrabhagbai*, I. L. R. 17 Bom. 690, F.B.

(*g*) 8 Bom. H. C. R., at p. 156 O. C. J.

(*h*) *Mohar Ranee Essadah Bai* v. *The E. I. Company*, 1 Taylor and Bell, 290.

she may alien only under very special circumstances, and although she may be restrained by injunction from committing waste (*i*), yet she does fully represent the inheritance even in that kind of property (*k*). Peel, C. J., once described her estate thus: 'The estate, although sometimes so expressed to be, is not an estate for life: when a widow alienates she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do if she had not a life-estate in quantity. There is no ground for altering the nature of the estate. It devolves as an estate by inheritance under the Hindu law, and is the estate which passed from the late owner: nothing is in abeyance (*l*). The incapacity to alienate is not in any way inconsistent with an inheritance' (*m*). And then he instances estates tail after the statute *de donis* and until the invention of recoveries, and other estates of inheritance which are not alienable; and I may add that of a Hindu, entitled to ancestral lands of inheritance, who, after he has male issue, and while they are living, is unable to alienate their inchoate shares in the lands which he holds undoubtedly as of inheritance (*n*). Peel, C. J., continues: 'Nor does the fact that the next taker takes as heir to a prior owner, and not to the immediate predecessor, furnish any reason for holding the estate a mere life-estate. It is, however, for purposes of alienation unwarranted by Hindu law, no greater an estate—and in one respect it is less beneficial—than a life-estate under the English law since the accumulations on the death of the female heir pass, not to her heir, but go with the principal. Whenever, in legal decisions or in text-writers, the estate is

(*i*) *Hurrydoss Dutt* v. *Rungunmoney Dossee et al.*, 2 Taylor and Bell, 279; *Oojutmoney Dossee* v. *Sagormoney Dossee*, 1 *ibid.* 370; *Sreemutty Jadomoney Dabee* v. *Saradaprosoon Mookerjee*, 1 Boulnois, Rep. 120; *Govind* v. *Godbole*, I. L. R. 11 Bom. 320; *Bhau Babaji* v. *Mahipati*, I. L. R. 11 Bom. 325; *Sakharam* v. *Sita Ram*, I. L. R. 11 Bom. 42; *Sakrabai* v. *Maganlal*, I. L. R. 26 Bom. 206; *Jiban* v. *Brojo*, L. R. 30 I. A. 81; *Srimohan* v. *Brijbehari*, I. L. R. 36 Cal. 753; *Ganap* v. *Subbi*, I. L. R. 32 Bom. 577.

(*k*) *Doe dem. Rajchunder Paramanic* v. *Bulloram Biswas*, Fulton, Rep. 133, 135; *Gopeymohun Thakoor* v. *Sebun Cower et al.*, 2 Mor. Dig. 105, 111; *Cossinaut Bysack et al.* v. *Hurroosoondry Dossee et al.*, 2 *ibid.* 210, 215.

(*l*) A right of pre-emption may be exercised by a widow who takes her husband's property by inheritance. *Phulman Rai* v. *Dani Kurai*, I. L. R. 1 All. 452.

(*m*) *Hurrydoss Dutt* v. *Rungunmoney Dossee et al.*, 2 Taylor and Bell, 281, 282.

(*n*) As to this see now under Partition, Book II. Introd.

described as one for life, nothing more is meant than a reference to the usufruct and the power of disposition, where the exceptional power of disposition is not properly exercised. The estate is not held in trust, express or implied. It is a restrained estate, not a trust estate. In her husband's movable property at this side of India she takes an absolute estate, subject to payment of her husband's debts ' (*o*).

" In *Ramchandra Tant*[*r*]*a Das* v. *Dharmo Narayan Chuckerbutty* (*p*), a Full Bench held at Calcutta ' that the interest of an heir, expectant on the death of a widow in possession, is so mere a contingency that it cannot be regarded as property, and therefore is not liable to attachment and sale under sec. 205 of the Civil Procedure Code.' "

As to what is said by Peel, C.J., in the passage quoted from his judgment on the subject of accumulations, reference may be made for the Bengal law to the language of the Judicial Committee in the recent case of *Musst. Bhagbutti Daee* v. *Chowdry Bholanath Thakoor et al.* (*q*). Their Lordships say: " If she took the estate only of a Hindu widow, one consequence, no doubt, would be that she would be unable to alienate the profits, or that at all events, whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property, real and personal." But the documents executed by the husband and son gave, as construed, such an interest to the widow, it was said, " that whatever property, real or personal, was bought by Chunderbutti out of the proceeds of her husband's estate belongs to her and consequently to the defendant." In the same case it was held that land or personal property purchased out of the accumulations were the widow's equally with the fund, and devolved upon her heir (*r*).

(*o*) *Vinayak Anand Rav et al.* v. *Lakshmibai*, 1 Bom. H. C. R. 118; *Pranjivandas et al.* v. *Devkuvarbai et al.*, *ibid.* 130.

(*p*) 7 Beng. L. R. 341. Civil Procedure Code, 1908, sec. 60.

(*q*) L. R. 2 I. A. at p. 261; S. C. 24 C. W. R. 168.

(*r*) See further the case of *S. Soorjeemoney Dossee* v. *Denabundoo Mullica et al.*, 6 M. I. A. 526, and 9 *ibid.* 123; *Govind Chunder et al.* v. *Dulmeer Khan et al.*, 23 C. W. R. 125; *Nihalkhan et al.* v. *Hurchurn Lall et al.*, 1 Agra R. 219. In *Sri Raja Rao Venkata Mahapati* v. *Mahipati Suriah Rav* (16 Nov. 1880), C. 241; the Judicial Committee held that immovable property bought by the widow out of funds given by the husband is equally at her disposal as the money with which it was purchased. Accumulations from her maintenance

In the case of *Gonda Kooer et al.* v. *Kooer Oodey Singh* (*s*), their Lordships considering that purchases made by the widow were to be deemed accretions to the deceased husband's estate, awarded them to his heir against her devise, but purposely refrained from expressing an opinion as to what would be the effect of a widow's making purchases out of the profits of her widow's estate, with a distinct intention of appropriating such purchases to herself and conferring them on her adopted son (*t*). In *Babu Sheo Lochun Singh* v. *Babu Sahib Singh* (*v*) the Privy Council have held that when a Hindu widow invests the accumulations from her deceased husband's estate *prima facie* it is her intention that they should be regarded as accretions thereto, but it follows that they will be her separate property, descendable in a different line of succession, if she intended them to be her own. In Mithila they would absolutely belong to her, and in Bombay savings and accumulations attach to the husband's estate (*w*). The Mitakshara, as we have seen, would not restrict her dealing with such property. In one case the Sastri said that a carriage and bullocks purchased by a widow out of her pension were Stridhana (*x*), and in the recent case at Madras of *Venkata Rama Rau* v. *Venkata Suriya Rau et al.* (*y*), it was held that where a widow, having received presents of movable property from her husband, had after his death purchased immovable property with these and the money raised on her jewels, the property was Stridhana which she could dispose of by will. Under the Bengal law, as decided by the Judicial Committee, in *Luchmunchunder Geer Gossain et al.* v. *Kalli Churn Singh et al.* (*z*), a woman purchasing property out of her Stridhana has

or her life estate and presents may be invested by a lady in land, which remains Stridhana, *Nellarkumaru Chetti* v. *Marukathammal*, I. L. R. 1 Mad. 166, and the cases at pp. 271, 307 of the same volume, elsewhere referred to.

(*s*) 14 Beng. L. R. 159.

(*t*) See also *Sonatun Bysack* v. *T. Juggutsoondree Dossee*, 8 M. I. A. 66; *Gooroo Pershad Roy et al.* v. *Nuffar Doss Roy et al.*, 11 C. W. R. 497; *S. Puddo Monee Dossee* v. *Dwarka Nath Biswas et al.*, 25 *ibid.* 335.

(*v*) L. R. 14 I. A. 63; *Isri Dutt* v. *Hansabati*, L. R. 10 I. A. 150; *Tincowree* v. *Dinanath*, 3 Cal. W. R. 49; *Sowdamini Dassi* v. *Broughton*, I. L. R. 16 Cal. 574 : Cf. *Venkatrama* v. *Suriya*, I. L. R. 2 Mad. 233; *Munia* v. *Puran*, I. L. R. 5 All. 310.

(*w*) *Rivett Carnac* v. *Jivibai*, I. L. R. 10 Bom. 478.

(*x*) Q. 1576, MS., Ahmednuggur, 26th August, 1856.

(*y*) I. L. R. 1 Mad. 281; affirmed by P. C. 2 Mad. 333.

(*z*) 19 C. W. R. 292.

full power to dispose of it during her husband's life (*a*). Unlike the Mithila law, where accumulations out of husband's estate by a widow and purchases therefrom absolutely belong to her (*b*): the Bengal School holds that they attach to the husband's estate unless her intention was to the contrary (*c*).

The Sastri in the case of *Musst. Thakoor Deyhee* v. *Rai Baluk Ram et al.* (*d*), a case from the N.W. Provinces, governed generally by the Mitakshara, went so far as to say: "The real property which G. or H. acquired during their lifetime, with the proceeds of the former's separate share, is not hereditary, and the latter (because her husband died without issue) can give it away to any one she likes. Real property cannot be alienated in the event of the person who acquired it having issue of his own." He seems to have been hampered by his recollection of some of the ancient texts against a severance of the patrimony from the family (*e*), but apart from the practical error into which this led him it would not be easy to demonstrate that this opinion was not in accordance with the Mitakshara. The Judicial Committee, however, after a review of the principal text-books and decisions, dissented from the Sastri's view. They say (at page 175): "The result of the authorities seems to be that although, according to the law of the Western Schools, the widow may have a power of disposing of movable property inherited from her husband which she has not under the law of Bengal, she is by the one law, as by the other, restricted from alienating any immovable property which she has so inherited; and that on her death the immovable property, and the movable, if she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the Pandit between

(*a*) In *Gunnesh Junonee Debia* v. *Bireshur Dhul*, 25 C. W. R. 176, a widow sued her husband's brother successfully for two-thirds of a house partly as her husband's heir, partly on a conveyance to her during her husband's life by her husband's brother of his one-third share on a purchase, said, but not proved, to have been made out of her Stridhana.

(*b*) *Doorga* v. *Pooran*, 5 W. R. 141; *Biajan* v. *Luchmi*, I. L. R. 10 Cal. 392; S. C. 11 M. I. A. 487.

(*c*) *Isri Dutt* v. *Hansabati*, I. L. R. 10 Cal. 324, P. C.; S. C. 10 I. A. 150; *Sheolochan* v. *Saheb*, I. L. R. 14 Cal. 387, P. C.; S. C. 14 I. A. 63.

(*d*) 11 M. I. A. at p. 150.

(*e*) Even now "the Rajput never gives lands with his daughters, except possibly a life-interest in the revenue." Sir A. C. Lyall, in *Fortnightly Review*, for January 1, 1877, p. 111.

ancestral and acquired property. In some of the cases cited the property was not ancestral."

In *Vijiarangam's Case* (*f*) it was said that property inherited by a woman from her husband ranked like that inherited from any other relative, as Stridhana, according to the Mitakshara, but her capacity to deal at will with such property, if immovable, as a necessary consequence of this proposition, was denied. At page 263 it is said:

"We have seen that Vijnanesvara includes all property inherited by a woman in her *Stridhan*. In the same chapter (Mitak., Chap. II., sec. 1, pl. 39) he had previously arrived, through an elaborate course of argument, at the conclusion that a widow takes the whole estate of her deceased husband separated in interest from his brethren. This doctrine, therefore, must have been fully present to his mind when he developed his theory of *Stridhan* in sec. 11. He makes no distinction between the inheritance of a woman from her husband and her inheritance from any other person. The right which he thus confers on her is balanced by a corresponding right which he allows to the husband and his *sapindas*. That inheritance from a member of her own family, which on a woman's death would, according to the Bengal School, revert to the next heirs of him from whom

(*f*) *Vijiarangam et al.* v. *Lakshman*, 8 Bom. H. C. R. 244 O. C. J. This decision is modified by *Madhavram* v. *Trambaklal* (I. L. R. 21 Bom. 739), which lays down that in the Bombay Presidency female heirs, who by marriage and not by birth come into the gotra of a male whom they succeed take only a widow's estate in property which they inherit from the last male owner. Whether the estate inherited by such females is called their Stridhan or not their restricted rights over it are admitted by all schools, and on their decease it reverted to the heirs of the last male holder. They include widows (*Lallubai* v. *Mankuvarbai*, I. L. R. 2 Bom. 388); daughter in-law (*Vithaldas* v. *Jeshubai*, I. L. R. 4 Bom. 219); mother and grandmother (*Pranjivdas* v. *Devkuvarbai*, 1. B. H. C. R. 130; *Narsappa* v. *Sakharam*, 6 B. H. C. R. 215; *Sakharam* v. *Sitabai*, I. L. R. 3 Bom. 353). But daughters take absolute estate (*Haribhat* v. *Damodar*, I. L. R. 3 Bom. 171; *Jankibai* v. *Sundra*, I. L. R. 14 Bom. 612); and so do sisters (*Biru* v. *Khandu*, I. L. R. 4 Bom. 214; *Bhagrathibai* v. *Baya*, I. L. R. 5 Bom. 264). This view has been re-affirmed in *Vrijbhukandas* v. *Bai Parvati*, I. L. R. 38 Bom. 26, and in *Dhondi* v. *Radhabai*, I. L. R. 36 Bom. 546; but a grandmother inheriting movable or immovable property from her maiden granddaughter takes it absolutely, as aforesaid restrictions apply only to widowed females from males (*Gandhi* v. *Bai Jadab*, I. L. R. 24 Bom. 209, F. B.). See also *Harilal* v. *Pranavlabdas*, I. L. R. 16 Bom. 229, and *Bai Jamna* v. *Bhaishankar*, I. L. R 16 Bom. 233.

she inherited (*g*), and which, according to the Vyavahara Mayukha, would go to her heirs as though she had been a male, is assigned by Vijnanesvara (*h*) to her daughters, her sons, and after them to her husband and his *sapindas*. The two rules spring from the same source—a higher conception of a woman's capacity for property and of her complete identification by marriage with her husband's family than the Bengal lawyers would entertain—while the limiting of the widow's rights as an heir to the case of her husband's having been separated in interest from his brethren harmonises more with the Hindu theory of the united family than the opposite doctrine of her taking his share equally, whether the family have been divided or not.

"Vijnanesvara, like all the Hindu lawyers, denounces the appropriation of a woman's property by her husband, except in cases of great pressure, and by the other kinsmen under any circumstances (*i*). But he lays down no rule as to the extent of the woman's own power over the property. The natural conclusion would seem to be that he considered this already sufficiently provided for as to his immediate subject, inheritance, by other lawyers, and by the analogies to be drawn from his rules as to the estates of a male proprietor. Now in Chap. I., sec. 1, pl. 27, 28, it is laid down that a man is 'subject to the control of his sons and the rest (of those interested) in regard to the immovable estate, whether acquired by himself or inherited,' though he may make a gift or sale of it for the relief of family necessities or for pious purposes (*k*). It is clear, therefore, that a right of absolute disposal did not enter into Vijnanesvara's conception of the essentials of ownership (*l*). He

(*g*) Col. Dig. Book V. T. 399, 477.

(*h*) Mitak., Chap. II., sec. 11, pl. 9, 12, 25.

(*i*) Mitak., Chap. II., sec. 1, pl. 32, 33; Stokes's H. L. B. 465-66.

(*k*) If he reserve enough for the support of the family, however, the father is allowed to deal, free from interference, with what he has himself acquired. Such is the effect of the passage referred to when taken with Chapter I., sec 5, pl. 10, unless the latter is to be referred—as perhaps on correct principles of interpretation, it ought to be referred—solely to movable property.

(*l*) With the Hindu conception of ownership as consisting in exclusive use not necessarily including a right of alienation, we may compare in the English law the estate of the tenant for life under the Statute *De Donis* and under the Roman law the estate of an heir subject to substitutions. He was during his life regarded as sole proprietor, the substitute down to the time when the substitution opened had only a bare expectation; judgments and prescriptions

admits (*m*) the genuineness and the authority of the text of Narada, which, with so many others, proclaims the dependence of women, which he says does not disqualify them for proprietorship. He allows a husband, as we have seen, in some cases to dispose of his wife's property. The inference to be gathered from these passages is strengthened if we look into the chief authorities. Manu allows women no independence. The verse denying it occurs in Yajnavalkya also (Chap. I.). Katyayana, so frequently quoted in the Mitakshara, says that the widow is to enjoy the estate frugally till she die, and after her the heirs (*n*) consistently with that passage of the Mahabharata (*o*) which limits the widow to simple enjoyment. Jagannatha (T. 402), referring to texts 476 and 477, observes that as a woman is not allowed to make away with immovable property given to her by her husband, much less can she dispose at her will of such property inherited from him. Even Brihaspati, who, as we have seen, insists emphatically on a widow's right of inheritance, is equally emphatic in restraining her power of dealing with it (*p*). . . . It seems a reasonable inference from these and other authorities that, as to immovable property at any rate (and with immovable property, according to

operative against the successor as heir operated also against the substitute; yet subject to special exceptions the former could not alienate the property. The substitute, moreover, though he had but a mere hope of succession, could take all measures requisite for the preservation of the property. See Poth. Tr. des Substitutions, sec. v., arts. 153, 155, 160, 175, 178.

The closest resemblance, however, to the estate of the Hindu widow is perhaps to be found in that of the widow under the old Teutonic laws in the property enjoyed by her as dower. Of this she was proprietress, yet without any power of alienation. The rights of the heirs were suspended during her widowhood; the succession opening only on her death or remarriage. This dower in the lands of the husband was variable in proportion according to the settlement, but by custom was fixed usually at one-third. This was exclusive of the *dos legitima* or money gift, the amount of which it was found necessary to limit by law. The dower of the English law was confined to the husband's lands, though called *dos*. It originated probably in the Saxon law which is continued in that of gavelkind and free-bench, giving a moiety of the lands to the widow during a chaste widowhood modified by the more widely-spread custom, limiting her enjoyment to one-third. This she holds as a sub-tenant for life of her husband's heirs who must set out her lands by metes and bounds. See Laboulaye, *op. cit.* 401; Bl. Comm., Book II., Chap. VIII.

(*m*) Mitak., Chap. II., sec. 1; pl. 25, Stokes's H. L. B. 435.

(*n*) Col. Dig. Book V. T. 477.

(*o*) T. 402.

(*p*) Vyav. May., Chap. IV., sec. 8, pl. 3; *ibid.* 84.

the Hindu law, is classed every kind of property producing a periodical income) the woman's ownership is subject to the control of her husband and of the other persons interested in the preservation of the estate, and that it cannot be needlessly dissipated at her mere caprice. Katyayana, indeed, as quoted by Nilakantha (*q*), says expressly "she has not property therein to the extent of gift, mortgage, or sale," except, as Nilakantha adds, for appropriate purposes. A widow may dispose as she pleases of property as to which this power is expressly conferred, but to recognise inherited property as part of her *Stridhana* by no means involves the consequence that she can alien it without good reason (*r*). The argument in support of this consequence put forward by Jagannatha in his comments on Colebrooke's Digest, Book V., T. 399, involves a very obvious fallacy.

And this is the practical conclusion at which Prof. H. H. Wilson at last arrives. He says (page 77): "We have so fully discussed the doctrine of alienation by widows that we need not advert to the cases illustrative of grants made by them. There is clearly a difference between the situation of a widow inheriting and a father in possession, because the sons and grandsons have a direct lien upon the estate, which remote heirs have not. Although, however, the law might be held to permit a widow's alienation of property to which she succeeds as heir, yet the obvious analogy of the case and the general impression on the subject operate to prevent her alienation of fixed property and chattels, and therefore the decisions of the Sadr Dewani in the cases of *Mahoda* v. *Kalyani et al.* (*s*) and *Vijaya Devi* v. *Annapurna Devi* (*t*) may be admitted as law, the authority of the Court having been interposed, as we have recommended it should

(*q*) Vyav. May., Chap. IV., sec. 8, pl. 4; Stokes's H. L. B. 84. This restriction applies equally to lands given by a husband to his wife as Stridhana. As wife or as widow she cannot alone dispose of them. 2 Macn. H. L. 35.

(*r*) See Narada, Chap. I., sec. 3, p. 28. Property consists not in the right of alienating at pleasure; Col. Dig., Book V. T. 2, Comm. Dependence does not imply defect of ownership, *ibid.*, Book II., Chap. IV., T. 17, Comm. As to property taken as her share by a wife or widow in a partition, Jagannatha asserts her power to dispose of it equally with Stridhana. Col. Dig., Book V. T. 87, 88, Comm. This agrees with the opinion of the pandits cited below, and with the Mitakshara, Chap. I., sec. VII., sec. II., para. 8; above pp. 288, 293, 294.

(*s*) 1 Cal. S. D. A. R. 62.

(*t*) *Ibid.* 162.

be, in every case to make that invalid which was considered immoral."

At 1 Macn. H. L., p. 40, it is said that a wife is subject to her husband's control even as to her separate and peculiar property; but this is opposed to the definition of Stridhana in the Dayabhaga (*v*). It rests, perhaps, on the general texts as to a woman's dependence which are cited in Col. Dig., Book III., Chap. I., T. 51, 52; and on these Jagannatha throws out a suggestion that, although a widow, being free from the dominion contemplated by Manu and Narada, is absolute mistress of her acquisitions of property, yet an unmarried daughter, being possibly comprehended within the general term "son," takes any acquisition of wealth subject to her father's superior right, which, as to such property, continues during her subsequent coverture, so as to prevent an alienation without his assent (*w*). But her guardianship is transferred to her husband and his family on her marriage. The texts, if taken literally, would prevent any acquisition at all, and being superseded or explained away so as to allow of a widow's acquisition of property, they cannot properly be applied to a state of things which their writers did not conceive as possible.

The circumstances under which a widow may, according to the law which assigns her only a special estate, deal with the property inherited from her husband, have already been considered at p. 91. The chief of them are compendiously stated in the case of *Lalla Gunpat Lall et al.* v. *Musst. Toorun Koonwur et al.* (*x*): "The Sraddha of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payment of the husband's debts are legitimate grounds of necessity for alienations." Self-maintenance, discharge of just debts, protection or preservation of the estate, are grounds of expenditure equally justifiable as pious purposes (*y*). The charges of a pilgrimage were refused recognition as a ground for alienation in *Huro Mohun* v. *S. Auluck Monee Dassee et al.* (*z*), but she may alienate

(*v*) See above, p. 258.

(*w*) Col. Dig., Book V. T. 477, Comm.

(*x*) 16 C. W. R. 52 C. R.; *Udai* v. *Ashu*, I. L. R. 21 Cal. 190; *Vrij* v. *Bai.*, I. L. R. 32 Bom. 26; *Srimohan* v. *Brijbehari*, I. L. R. 36 Cal. 753; *gift to son-in-law on the occasion of the gowna ceremony—Ramasami* v. *Vengidusami*, I. L. R. 22 Mad. 113; *Alienation of a daughter for the marriage of her own daughter—Rustam* v. *Moti*, I. L. R. 18 All. 474.

(*y*) *Soorjoo Pershad et al.* v. *R. Krishan Pertab*, I N. W. P. R. 49.

(*z*) 1 C. W. R. 252.

a small portion of the property for pious purposes of her own (*a*). She may alienate her husband's property to go to Gaya (*b*), but not to Benares (*c*), to perform his Sraddha there. A compromise made by the widow in fraud of the rights of the expectant heirs is not binding against them (*d*). That her defective capacity, however, must not be made a means of fraud is noted in the Digest of Vyavasthas, Chap. II., sec. 2, Q. 4, as also that her transactions must be made good so far as they can be out of her limited estate (*e*). A wife in Bengal has a power of sale over immovables which she has purchased out of her separate funds (*f*). The wife, however, according to Macn. H. L. 40, on whom their Lordships rely, is subject to her husband's control, even as to her Stridhana. A widow turning her movable Stridhana into immovable property can dispose of the latter by will (*g*).

Sri Krishna Tarkalankara in the Daya Krama Sangraha regards Stridhana chiefly from the point of view of the particular modes of devolution prescribed for the different elements of it. It is for the purpose, he says, of determining precisely to which of these the different rules of succession apply that the definitions of the different kinds of Stridhana have been framed (*h*). Vijnanesvara's rules for the succession to Stridhana are discussed in the Introductory Remarks to the Digest of Vyavasthas, Chap. IVB., sec. 6, of this work (*i*), where, too, the rules of the Vyav. May. on the same subject are considered. The statement of Sir W. Macnaghten (1 H. L. 38) that "In the Mitakshara whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*," is entirely unsupported

(*a*) *Ram Kawal* v. *Ram Kishore*, I. L. R. 22 Cal. 506.

(*b*) *Collector of Masulipatam* v. *Cavaly*, 8 M. I. A. 529, 550; S. C. 2 W. R. 59, P. C.

(*c*) *Harikissen* v. *Bajrang*, 13 C. W. N. 544; S. C. 9 C. L. J. 453.

(*d*) *Musst. Indro Kooer et al.* v. *Shaikh Abdool Purkat et al.*, 14 C. W. R. 146 C. R.

(*e*) See *Mayaram* v. *Motiram*, 2 Bom. H. C. R. 313; *Bagooa Jha* v. *Lal Doss*, 6 C. W. R. 36 C. R.; *Ram Shewuk Roy et al.* v. *Sheo Gobind Sahoo*, 8 *ibid.* 519.

(*f*) *Luchman Chunder Geer Gossain et al.* v. *Kalli Churn Singh et al.*, 19 C. W. R. 292, P. C.

(*g*) *Venkata Rama Rau* v. *Venkata Suriya Rau et al.*, I. L. R. 1 Mad. 281.

(*h*) Daya Krama Sangraha, Chap. II., sec. 2, para. 1; Stokes's H. L. B. 487.

(*i*) See also Book I, p. 135 ff. above.

by anything in the Mitakshara itself (*k*), and has been the source of much confusion in practice. That work, having enlarged the woman's capacity to take property all of which it terms Stridhana, then lays down rules of corresponding breadth as to its devolution. The exception of the Sulka and its probable origin have already been noticed. The Mayukha, as we have seen (*l*), while accepting Vijnanesvara's definition of Stridhana, distinguishes between the kinds specially described in the Sastras, and for the devolution of which special rules are laid down, and all other kinds, which descend, he says, as if the female owner had been a male (*m*). In the absence of a distinct rule in the Mitakshara for the devolution of woman's property this might have been an admissible doctrine under that law. But first the Mitakshara makes the woman inherit; then it says that Stridhana includes the property thus taken (Mit., Chap. II., sec. XI., para. 3); then it says "Stridhana has been thus described" (Mit., Chap. II., sec. XI., para. 8); "Failing her issue Stridhana *as above described* shall be taken by her kinsmen . . . as will be explained" (Mit., Chap. II., sec. XI., para. 9); then, that daughters and their offspring take in priority to sons; lastly, that sons take (Mit. Chap. II., sec. XI., para. 19). An exception made as to the Sulka (Mit., Chap. II., sec. XI., para. 14), and the special rule laid down as to that, serve to emphasise Vijnanesvara's intention that the general rules should extend to

(*k*) "Vijnanesvara . . . erklärt Adyam . . . als alles auf irgend eine Art . . . Erworbene; er behauptet, dass Stridhana hier einfach in seiner etymologischen Grundbedeutung . . . zu nehmen sei: . . . Im ganzen folgenden Abschnitt über das Stridhana und die Succession in dasselbe wird diese Definition festgehalten."—Jolly, Ueber die Rechtliche Stellung der Frauen &c., p. 57. Vijnanesvara explaining Adyam so as to include every kind of acquisition, insists on the etymological sense of the definition and adheres to it throughout the section on Stridhana and its devolution. If by *peculium* Macnaghten meant the kinds of property specifically enumerated in the Smritis, he is in direct contradiction to the Mitakshara, or else draws a distinction which the Mitakshara does not draw, and on which therefore nothing turns. The rules given are as to "woman's property," not as to *peculium*, except in the single instance of Sulka.

(*l*) Above, pp. 135, 138 note (*g*); p. 262.

(*m*) The Sastri in a Bengal case, at 2 Macn. H. L. 121, directed that a woman's sons should succeed to land acquired by her. In this he agreed with the Mayukha, but in excluding a grandson he disagreed with it. The succession of the remoter heirs is in all cases governed by the same rules as though the property were a male's, according to the Daya Krama Sangraha. See Vyavastha Darpana, p. 727.

every other case, "the author," as he says, "now intending to set forth fully the distribution of Stridhana, begins by describing it" (Mit., Chap. II., sec. XI., para. 1), and then gives rules for its devolution as above (*n*).

The view taken by Jimutavahana, and constituting the Bengal law, is this. The Anvadheya or gift subsequent, and the Pritidatta or present from a husband, are types of all the special kinds of Stridhana, which he recognises, and are, he says, to be equally divided between sons and daughters. The Yautaka or gift at the marriage goes to the unmarried daughters alone (*o*), who have a preference over their betrothed, married, and widowed sisters in the distribution of the other Stridhana also (*p*). Next after daughters as successors come the sons, the daughter's sons, son's sons, and son's grandsons, after whom come the stepsons, stepson's sons; and stepson's grandsons (*q*). This line of succession resting on the principle of exequial benefits differs widely from Vijnanesvara's, who next to daughters places their daughters, and next to them daughter's sons (*r*), before the sons of the deceased woman are admitted. On failure of offspring, Jimutavahana (*s*) assigns to the deceased woman's husband married by an approved rite only property received at the nuptials. Her other property goes to her brother, mother, and father in succession (*t*). If, on the other hand, she was married

(*n*) What Yajnavalkya (II. 117) calls the "mother's property," Vijnanesvara calls Stridhana. Unless, therefore, what the mother has inherited is not her property, it follows of necessity that he intended Stridhana to include heritage. So as to property inherited by a daughter included in Stridhana but subject to a special rule of devolution. Mit. Chap. II., sec. X., para. 30.

(*o*) See *Srinath Gangopadhya et al.* v. *Sarbamangala Debi*, 2 Beng. L. R. 114 A. C.

(*p*) Viramit., sec. 3, p, 20.

(*q*) Dayabhaga, Chap. IV., sec. 2 (Stokes's H. L. B. 243-251). For the stepson by a co-wife, see *ibid.*, sec. 3 (*ibid.* 251); Daya Krama Sangraha, Chap. II., sec. 3, para. 11 (*ibid.* 493); Col. Dig., Book V. T. 505, 506.

(*r*) Mit. Chap. II., sec. 11, pp. 10, 12, 18, 19; Stokes's H. L. B. 460-2.

(*s*) Dayabhaga, Chap. IV., sec. 3, p. 4 ff; Stokes's H. L. B. 251.

(*t*) See *Judoonath Sircar* v. *Bussunt Coomar Roy*, 11 Beng. L. R. 286. Further details on the Bengal law will be found in the summary, Dayabhaga, Chap. IV., sec. 3 (Stokes's H. L. B. 251), under the head of Stridhana, in Macnaghten's H. L. and in the Vyavastha Darpana. At 2 Mor. Dig. 237, the Sastri says, in a Bengal case, that even immovable property given to a woman by her husband descends, on her death as a widow, to the heirs of Stridhana or female property. Compare the answers, referred to above, pages 289, 293.

by a disapproved rite, then the order of succession is mother, father, brother and husband. *Ayautaka* is assigned to (1) sons and maiden daughters, (2) fertile married daughters, (3) son's son, (4) daughter's son, (5) son's grandson, (6) sonless daughters, (7) brother, (8) mother, (9) father, and (10) husband. The stepson and his son are recognised as heirs, but their places in the series are not assigned. These, and also the stepson's grandson, being quasi-descendants of the deceased woman, should perhaps be placed after the true great-grandson, seeing that they offer oblations through which the deceased may incidentally benefit. This is the order laid down by the Daya Krama Sangraha, but if consanguinity gives precedence, as the Dayabhaga seems to imply, then these descendants of the husband should be postponed to (6) the barren daughter, though she cannot confer any spiritual benefits in return. After the husband and before the husband's sapindas the Dayabhaga names as heirs to Stridhana of either kind those males of the next lower generation to whom the deceased might have been a quasi-mother. But the order of precedence among these heirs is different from that given by the Vyav. Mayukha, being determined by relative sacrificial benefits. They are: (11) husband's younger brother, (12) husband's brother's son, (13) sister's son, (14) husband's sister's son, (15) brother's son, and (16) son-in-law. After these specified heirs the husband's father and other sapindas not included in the list succeed in an order determined by the relative efficacy of their sacrifices (*v*).

Jagannatha (*w*) follows Jimutavahana to some extent in his rules as to the succession to Stridhana. Sons and daughters succeed jointly except to the Yautaka. This, on failure of sons, is taken by daughter's sons, after whom come the son's sons. To other Stridhana, failing maiden daughters, sons, and married daughters, the son's son succeeds, and in default of him the

Property taken by a woman before her marriage by bequest from her father is in the same case pronounced Stridhana. If it is her Stridhana then her heirs as classed in the province should inherit it. See Col. Dig. Book V. T. 420, Comm.; Mit. Chap. II., sec. XI., para. 30. In *Ramgopal* v. *Narain Chandra* (I. L. R. 33 Cal. 315) the mother succeeded to the immovable property given by the father in the form of a Mokurri lease, in preference to the husband. In *Prosunno Kumar* v. *Sarat Soshi* (I. L. R. 36 Cal. 86) the son succeeded to the mother's non-yautaka gift of the father in preference to the daughter.

(*v*) D. B. Chap. IV., sec. III., 36, 37.

(*w*) Col. Dig., Book V., Chap. IX., sec. 2

daughter's son (*x*). After these the inheritance goes to the woman's own family of all her property, except gifts at the marriage (*y*). The husband, as to such property, comes in after her brothers and parents (*z*). The succession of the husband in the first place is limited to the specially enumerated kinds of Stridhana. As to property taken by inheritance the rule is that on the death of the woman it goes to the then nearest heirs of him whom she succeeded. The woman's own heirs are not regarded as heirs to property thus acquired (*a*). Jimuta extends the rule even to a daughter's son succeeding to his maternal grandfather, but this is contradicted by Jagannatha (*b*). Mitramisra (*c*) condemns the explanation given by Jimuta, and generally follows the Mitakshara. He, however, not only gives the Sulka to the brothers, but also immovable property bestowed by their parents, and what was given by the kinsmen. The husband married by an approved rite succeeds, with these exceptions, to the whole property left by his childless wife, not merely to her nuptial presents. The rules of the Smriti Chandrika (*d*) and the Madhaviya (*e*) are glanced at in the course of Mitramisra's discussion. The Vivada Chintamani gives the Yautaka to the unmarried daughter, the son, and the daughter's son in succession. Presents from the woman's kinsmen it distributes equally between sons and daughters. The Sulka it assigns to the brothers. On failure of issue as far as her daughter's son, the deceased woman's husband is pronounced heir (*f*).

This slight sketch of the systems or attempts at system of the other commentators will serve to show the great advantage of Vijnanesvara's scheme in point of simplicity. This, as shown in the Digest of Vyavasthas, Chap. IV., and above, p. 135 ss., has generally prevailed in Bombay and in Mithila. Thus in *Gangaram et al.* v. *Balia et al.* (*g*), it was ruled that property

(*x*) *Op. cit.* T. 445, Comm.

(*y*) *Ibid.* T. 504, 508, 509, 511.

(*z*) *Ibid.* 512.

(*a*) Dayabhaga, Chap. XI., sec. 1, p. 56 ff; Stokes's H. L. B. 320, &c., sec. 2, p. 30, *ibid.* 329; Col. Dig., Book V. T. 420, 422, Comm.; 1 Str. H. L. 130 ff.

(*b*) *Sitabai* v. *Badri Prasad*, I. L. R. 3 All. 134.

(*c*) Viramitrodaya, Transl. pp. 221, 228 ss.

(*d*) See Smriti Chandrika, Chap. IX., secs. 2, 3.

(*e*) Madhaviya, p. 43.

(*f*) Vivada Chintamani, p. 266 ff.

(*g*) Bom. H. C. P. J. F. for 1876, p. 31; Vivada Chintamani.

inherited by a woman from her father is Stridhana, which descends first to her daughter, and, failing a daughter, to her husband and his heirs. In *Pranjeevandas et al.* v. *Dewcooverbaee et al.* (*h*) it was held that "daughters take the immovable property absolutely from their father after their mother's death." In *Vinayek Anundrao et al.* v. *Luxumeebaee et al.* (*i*) it is said of the mother inheriting from her son: "The quantum of estate which she is allowed to take in the character of heir to her son is not free from doubt; although in the category of those who take as heirs to a separated brother, there is no distinction or difference made between the quantum of estate taken by a mother from that taken by a son, a father, a brother, or any other relative who admittedly takes in such an inheritance the most absolute estate known to Hindu Law" (*k*); but in *Madhavram* v. *Trambaklal* (*l*) a mother, a grandmother, a daughter-in-law, or a widow of a gotraja sapinda has been held to take only a widow's estate. In Mithila a mother inherits movables and son's self-acquired property absolutely, but immovables with the same restrictions as imposed on a widow. As to sisters, it is said (p. 124): "As to the mode in which sisters take, it would appear by analogy that they take as daughters. In a passage from the Commentary of Nanda Pandita, cited by Mr. Colebrooke in his annotations to para. 5 of sec. 5 of the second chapter of the Mitakshara, occur these words: 'The daughters of the father and other ancestors must be admitted like the daughters of the man himself, and for the same reason,' but the daughters of the man himself take absolutely, and so, therefore, do the sisters" (*m*), and the same is the law in Mithila.

In the case already referred to the Sastri says that the property taken by inheritance by a mother from her son is for the purpose

(*h*) 1 Bom. H. C. R. 130; *Bhagirthibai* v. *Kahnujirav*, I. L. R. 11 Bom. 285, F. B.; *Jankibai* v. *Sundra*, I. L. R. 14 Bom. 612.

(*i*) 1 Bom. H. C. R. 121.

(*k*) Manu, Chap. IX., sec. 185, 217; Mitakshara on Inheritance, Chap. II., sec. 3 (Stokes's H. L. B. 441); Vyavahara Mayukha, Chap. IV., sec. 8, p. 14 (Stokes's H. L. B. 87).

(*l*) I. L. R. 21 Bom. 739.

(*m*) 1 Bom. H. C. R. 124. See now Dig. Vyav., Chap. II., sec. 14, I. A. 1, Q. 4, Remark. A maternal great-niece takes an absolute estate by inheritance like a daughter or sister. I. L. R. 5 Bom. 662; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739. Cf. *Dalpat* v. *Bhagwan*, I. L. R. 9 Bom. 301.

of further descent to be regarded as her property. In the case of *Jugunath* v. *Sheo Shunkar* (*n*) the Suddur Court, on the advice of its Sastri, applied the law of the Vyav. May. by pronouncing a woman's own sister heir, in preference to her husband's sister, to property that the deceased had inherited from her father. The case, Q. 5, is a strong one, for there the son of a woman by her first marriage was pronounced her heir to property inherited by her from her second husband in preference to that husband's own family. In *Madhavram* v. *Trambaklal* (*o*) (a Bombay case) it has been held that all female heirs—for example, widow, mother, grandmother, daughter-in-law, widow of a gotraja sapinda, etc.—who by marriage come into the gotra of the male whom they succeed take only a widow's estate in the property which they inherit from him, and that, whether such an estate is called their Stridhana or not, their restricted rights over it are admitted by all schools, and on their decease the property passes to his heirs (*p*). This law applies to all females inheriting from a male (*q*), and even from a female (*r*), their estate being regarded as limited in all parts of India governed by the Mitakshara and the Dayabhaga except the Bombay Presidency (*r*) and (*s*). In Mithila a widow takes movables absolutely, whether she inherits directly from her husband or through her son, and immovables for life; her interest in such property is the same as in that given to her by the husband. The daughter takes absolutely what she inherits from her father, and the mother what she inherits from her son if it is his self-acquired property (*t*). It appears the Mithila rule is followed in Bombay to a certain extent. In *Kotarbasapa* v.

(*n*) 1 Borr. R. 102.

(*o*) I. L. R. 21 Bom. 739; Cf. *Bai Muncha* v. *Narotamdas*, 6 Bom. H. C. R. 1 A. C. J.; and *Vijayarangam* v. *Lakshman*, 8 Bom. H. C. R. 244 O. C. J.

(*p*) *Raja Chelikani's Case*, L. R. 29 I. A. 156; *Hari Dayal* v. *Grish Chunder*, I. L. R. 17 Cal. 916.

(*q*) *Jullessur* v. *Uggur Roy*, I. L. R. 9 Cal. 725; *Muttu Vaduganadha* v. *Dora Singha Tevar*, I. L. R. 3 Mad. 309; *Phukar Singh* v. *Ranjit Singh*; I. L. R. 1 All. 661; *Debi Sahai* v. *Sheo Shankar*, I. L. R. 22 All. 353; S. C. L. R. 30 I. A. 202.

(*r*) *Debi Sahai* v. *Sheo Shankar*, L. R. 30 I. A. 202; *Sheo Pertab* v. *Allahabad Bank*, L. R. 30 I. A. 209;

(*s*) *Gandi* v. *Bai Jadub*, I. L. R. 24 Bom. 192, 200, 213; *Bhau* v. *Raghunath*, I. L. R. 30 Bom. 236, 237, P. C.; *Kesserbai* v. *Morariji*, I. L. R. 30 Bom. 431, 452, P. C.; *Tuljaram* v. *Mathuradas*, I. L. R. 5 Bom. 662.

(*t*) Vivada Chintamani. *Biajan* v. *Luchmi*, I. L. R. 10 Cal. 392; S. C. 11 M. I. A. 487.

Chanverova (*v*) property given by a husband to one of his wives was held to be Stridhana, held by her under a restriction against a sale after his death to her co-widow, so as to deprive her daughter of her right of inheritance.

The use of the word *Stridhana* in the several senses to which we have referred may be observed in the above cases. According to the Mitakshara, the property must have been Stridhana in every case, but it is not clear that in some instances the idea was not present that there might be property held by a woman which was not Stridhana, and which was not subject, according to the Mitakshara, to the general rules laid down for the devolution of that kind of property. In Bengal and Madras (*w*) this notion has gained a distinct ascendancy through the prevalence, in those provinces, of authorities which, as we have seen, give to Stridhana a narrower meaning, and prescribe for its devolution much more intricate rules than Vijnanesvara.

In *Chotay Lall* v. *Chunnoo Lall* (*x*), Pontifex, J., says: "It appears to me, therefore, that if this case was uncovered by authority, property taken by inheritance by a woman from her father would be her separate property, unless the words 'acquired by inheritance' are altogether rejected from the text"; but being constrained by the weight of the contrary authorities, he felt bound (p. 239) "to decide that in this case Luckey Bibee's estate was only a qualified estate, and that, upon her decease, the plaintiffs, as the heirs of her father, became entitled to the

(*v*) 10 Bom. H. C. R. 403; *Bai Kesserbai* v. *Morariji*, I. L. R. 30 Bom. 431, P. C.; S. C. L. R. 33 I. A. 176.

(*w*) Colebrooke (2 Str. H. L. 403) says the descent from the widow is regulated by the text of Brihaspati, Book V. T. 513 (misquoted as T. 413) of Col. Dig. This the Vyav. May., Chap. IV., sec. 10, para. 30 (Stokes's H. L. B. 106), applies to the special Stridhana only, in the case of a failure of the nearer heirs provided by para. 28, *i.e.* the husband in case of an approved marriage, and the parents in other cases, though apparently before the Sapindas of either. The Mit., Chap. II., sec. 11, para. 11 (Stokes's H. L. B. 460), merely allows the sapindas of husband or parents to succeed. In this case Colebrooke must have intended to state the law of the Smriti Chandrika and Madhaviya, not of the Mitakshara. See Smriti Chandrika, Chap. IX., sec. 3, para. 36. In Madras on the death of one who inherited as a maiden daughter she is succeeded by her married sisters, not by her own sons, *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar*, I. L. R. 3 Mad. at p. 335; and *Simmani Ammal* v. *Muttammal*, *ibid.*, at p. 268. See p. 99 ss. *supra*.

(*x*) 14 B. L. R., at p. 237, affirmed in L. R. 6 I. A. 15. Cf. *Bai Narmada* v. *Bhagwanbai*, I. L. R. 12 Bom. 505, and *Manilal* v. *Bai Rewa*, I. L. R. 17 Bom. 758.

property in dispute: though I must confess that, speaking for myself, if the case had been untouched by authority, I should have felt compelled to give a plain meaning to the plain and unqualified words of the Mitakshara rather than explain them away, or in effect reject them, by the application of principles of which, after all, we have only a hazy and doubtful knowledge" (*y*). On appeal this decision was affirmed by Sir R. Couch, C.J., and Ainslie, J. In the judgment of the learned Chief Justice, the chief precedents for a departure from the text of the Mitakshara are cited (*z*). Of these four are Bengal cases, and rest partly on the doctrine of the Dayabhaga and partly on Macnaghten's mistaken notion that the Mitakshara recognised woman's property which was not Stridhana, or that it provided some rule for the descent of such property different from the one prescribed for Stridhana. A Madras case (*a*) also is cited, in which it is said that the texts recognising a daughter's inheritance as Stridhana relate only to the appointed daughter. This is directly opposed to the Mitakshara (*b*) and to the law in Madras, where the maiden daughter takes an absolute estate, passing on her death to her heir (*c*), as is another theory started in the same case that the daughter inherits only as the passive instrument of providing a worshipper for the deceased (*d*). Vijnanesvara bases sapindaship entirely on consanguinity (*e*). The Bombay case of *Navalram Atmaram* v. *Nandkishor Shivnarayan* (*f*), referred to by the learned Chief Justice of Bengal, rules that property inherited

(*y*) A similar conclusion is arrived at by Innes, J., I. L. R. 3 Mad. at pp. 310, 313, and at p. 333, Muttu Swami Ayyar, J., says, "There is no doubt that Vijnanesvara Yogi, the author of the Mitakshara, classes it as stridhanam," but these learned judges held that the Mitakshara did not on this point give the law to the Madras presidency.

(*z*) These are: *Musst. Gyankoowur* v. *Dookhurn Singh*, 4 Cal. Sel. Rep. 330; *Sheo Sehai Singh et al.* v. *Musst. Omed Koowar*, 6 Cal. Sel. Rep. 301; *Heralal Baboo* v. *Musst. Dhuncoomary Beebee*, Cal. S. D. A. R. for 1862, p. 190; *Punchunand Ojhab et al.* v. *Lalshan Misser et al.*, 3 C. W. R. 140; *Deo Persad* v. *Lujoo Roy*, 14 Beng. L. R. 245*n.*, 246*n.*; S. C. 20 C. W. R. 102; *Katama Natchiar* v. *the Raja of Shivagunga*, 6 M. H. C. R. 310.

(*a*) *Katama Natchiar* v. *the Raja of Shivaganga*, 6 M. H. C. R. 310. Cf. *Raja Chelikani's Case*, L. R. 29 I. A. 156.

(*b*) See Mit. Chap. II., sec. 2, para. 5, and Chap. I., sec. 11, para. 1; Stokes's H. L. B. pp. 441, 410.

(*c*) *Venkatarama* v. *Bhujanga*, I. L. R. 19 Mad. 109. Cf. *Jankisetty* v. *Miriyala Hammayya*, I. L. R. 32 Mad. 521.

(*d*) 6 M. H. C. R. p. 338; Mit. Chap. II., sec. II., paras. 2, 3.

(*e*) See above, p. 112.

(*f*) 1 Bom. H. C. R. 209.

by a married woman from her father is Stridhana, and descends as Stridhana to her daughters. Vijnanesvara's leading principle is that women gain as full ownership by inheritance as by any other recognised mode of acquisition. If, however, they take a full ownership they must, in the absence of an express rule to the contrary, transmit the property to their heirs (*g*). Katyayana's rule (*h*), supposed by other commentators to bring in the husband's heirs after the widow by the mere word "heirs," is by Vijnanesvara significantly omitted.

Jagannatha shows (*i*) that the inference drawn in the case of other female successors by Jimuta Vahana from the text of Katyayana relating to a widow is altogether unfounded. Of Jimuta's view that on the death of a daughter who had succeeded as a maiden to her father's property that property passes to her married sisters as his heirs previously excluded by her, he says it is "not directly supported by the text of any legislator or the concurrence of any commentator." Hence, he says, in the case of a daughter's succession to her father, her heirs, not his, take on her death except where Jimuta's personal authority is accepted.

In one of the Bengal cases the Vivada Chintamani is referred to as if it supported the narrower limitation of the estate taken by way of inheritance by a widow or daughter. What the Vivada Chintamani says, however, as stated by the learned editor, is that "any property which a woman inherits is her Stridhana. Hence any property of her husband which she inherits shall on her death be received by the heirs of her peculiar property (*k*). This being so even in the case of a widow to whom Katyayana's rule in favour of "the heirs" directly applies, it follows *a fortiori* that "if the mother die after inheriting her son's property such property becomes her Stridhana. Hence the heirs of her peculiar property get it." Similarly Visvesvara and Balambhatta, the two principal commentators on the Mitakshara, say: "If the succession (to a man deceased) be taken . . . by the grandmother it becomes a maternal estate and devolves on . . . her daughters, or successively on failure of them on her

(*g*) See Vyav. May., Chap. IV., sec. X., paras. 22, 26; Smriti Chand. Chap. VIII., para. 11.

(*h*) Col. Dig., Book V. T. 477.

(*i*) Col. Dig. Book V. T. 420, Comm.

(*k*) See Viv. Chint. Table of Succession XII, XIII, pp. 262, 292.

daughter's sons, her own sons and so forth" (*l*)—that is, the property is Stridhana though taken by inheritance from a grandson. The term is not used, because the doctrine of the Mitakshara being once received, it had no specific significance (*m*), but the devolution prescribed necessarily implies it.

The Saraswati Vilasa, sec. 264, explains Yajnavalkya's text in precise agreement with the Mitakshara. It describes Stridhana as a kind of "daya" (*n*), sec. 333 ff; and includes a woman's succession in the class of unobstructed inheritance, sec. 398 (*o*). In providing also for succession to Stridhana in this largest sense, though it recognises the special rules applicable to Sulka, &c., secs. 288, 303, it does not ground any difference on the fact of the Stridhana's having been inherited or not inherited property. In all cases save those which are the subjects of special rules, it assigns the succession first to daughters on account of their partaking their mother's nature more fully than sons. It limits the woman's power of dealing with immovable property as do the Vivada Chintamani and the other commentaries (*p*), without contradicting the Mitakshara, which recognises her constant dependence (*q*). In *Katama Natchiar* v. *The Raja of Shivagunga* (*r*), however, the Privy Council say: "The passages in the

(*l*) Mit. Chap. II., sec. IV., para. 2, note. At Allahabad, however, exactly the contrary was held, consistently with the other cases, *Phukar Singh* v. *Ranjit Singh*, I. L. R. 1 All. 661. See p. 313 for cases which lay down that the estate which a grandmother takes is limited.

(*m*) Comp. Vyav. May., Chap. IV., sec. X. para. 25.

(*n*) The Smriti Chandrika, Chap. IV., reconciles the familiar Vedic text on the unfitness of women to inherit with the passages that assign shares to a mother and a sister, by arguing that these shares not being of definite portions, constituting property subject to partition, cannot be Daya (commonly rendered heritage), which involves the notion of a continuous right of participation in the successive male members of the family, inherent in each member from the moment of his birth. As women have not common family sacrifices to support, that central notion of the joint family fails in their case as a support of the group of ideas, applicable to an undivided estate amongst males. No rules are provided for the regulation of a joint female property, and the Vyavahara Mayukha, Chap. IV., sec. 8, pp. 9 and 10 (Stokes's H. L. B. 86), says that in the case of a plurality of widows or daughters, they are to divide it and take equal shares.

(*o*) The importance of this from the Hindu point of view consists in this, that the "unobstructed" right is the fullest conceivable, not being obstructed or deferred as ownership by the existence of the present possessor.

(*p*) See Smriti Chandrika, Chap. IX., 13, 15.

(*q*) Mit. Chap. II., sec. I., 25.

(*r*) 9 M. I. A. 539, 613.

Mitakshara contained in clauses 2 and 3 of sec. 1, Chap. I., . . . when examined, clearly appear to be mere definitions of 'obstructed' and 'non-obstructed' heritage, 'and to have no bearing upon the relative rights of those who take in default of male issue,'" and consistently with this Jagannatha points out (*s*) that if "obstructed" inheritance gives but a defective ownership, as some authors have contended as a ground for cutting down the estate of a female successor, the principle must apply to a daughter's son, a pupil, and the other remote heirs in whose cases no such limitation is admitted. Notwithstanding the cases that rest on a different interpretation, the high Indian authorities just referred to seem to place it beyond reasonable doubt that the Mitakshara intended, rightly or wrongly, to give a woman full ownership by inheritance, and to make her the source for property thus taken of a new line of succession (*t*). Still, the decisions have gone so far and are now so numerous in a sense opposed to this construction that it cannot properly be acted on. In the case of the *Widow of Shanker Sahai* v. *Raja Kashi Pershad* (*v*) the Judicial Committee refused to limit a widow's estate to a mere life interest, but in *Brij Indur Bahadur Singh* v. *Ranee Janki Koer* (*w*) their Lordships said:

"It is unnecessary to determine whether immovable property acquired by a woman by inheritance is 'woman's property.' It has been decided that a woman cannot, even according to the Mitakshara, alienate immovable property inherited from her husband, and that after her death it descends to the heirs of her husband and not to her heirs, *Musst. Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A. 175 (*x*). And still more recently it has been pronounced (*y*) "impossible . . . to construe this passage [of the Mitakshara] as conferring upon a woman taking by inheritance from a male a Stridhana estate transmissible to her

(*s*) Col. Dig., Book V. T. 420, Comm. II.

(*t*) See also above, page 263, note (*x*), which makes it clear that property inherited by an unmarried woman passes on her death to her heirs as such, according to the express rule of the Mitakshara for that case.

(*v*) L. R. 4 I. A. 208.

(*w*) L. R. 5 I. A. 1.

(*x*) P. C., in *Brij Indur Bahadur Singh* v. *Ranee Janki Koer*, L. R. 5 I. A., at p. 15.

(*y*) *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar*, L. R. 8 I. A., at pp. 108, 109.

own heirs." In *Sheo Shankar* v. *Debi Sahai* (z) it has been held that a woman inheriting even from a female does not take absolutely.

While this has been the course of the decisions of the Privy Council in cases from Bengal, Madras, and Allahabad (a), another development by inference from the restrictions on a widow has been arrived at in Bombay. The absolute estate of a woman is necessarily her Stridhana (b), and as she can deal with it as she pleases (c), so it, if anything, must be inherited as hers by her heirs. So also as to a sister, according to the law of the Mayukha, and with the same consequences (d). In Bengal, Madras, and N.W. Provinces, where the restrictions on women's inheritance are thought consistent with the doctrine of the Mitakshara, the daughter succeeding as such has but the same limited interest as the widow, and transmits no rights to her own heirs (e). Jagannatha recognises it as incongruous that the daughter who is postponed as heir to the widow should have a larger power of alienation (f). It did not occur to him that entrance to the family by birth or marriage made a difference. But, lastly, the Judicial Committee in *Mutta Vaduganadha* v. *Dorasinga* (g) say "how impossible it is to construe the passage (Mit., Chap. II., sec. XI., para. 2) as conferring upon a woman (in that case a daughter) taking by inheritance from a male a Stridhana estate transmissible to her own heirs. The point is now completely covered by authority." Hence it seems a female heir must be regarded as taking in no case more than a life estate before that of the other heirs of her own predecessor (h), except

(z) L. R. 30 I. A. 202; *Sheo Pertab* v. *Allahabad Bank*, L. R. 30 I. A. 209; S. C. I. L. R. 28 All. 468.

(a) In Madras as well as in Bengal, contrary to the law as construed in Bombay (above, p. 98), it is said that daughters once excluded as being married at the father's death succeed in turn as the father's heirs. On the same principle after their death the father's heir should be sought again. See above, p. 98, notes (l) (m).

(b) See above, p. 283 ss.

(c) *Venkatrama's Case*, I. L. R, 2 Mad. 333.

(d) *Vinayak Anundrao* v. *Lakshmibai*, 1 Bom. H. C. R., at p. 124; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739.

(e) See *Chotay Lal* v. *Chunoo Lal*, L. R. 6 I. A. 15; *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar*, L. R. 8 I. A. 99; *Virasangappa* v. *Rudrappa*, I. L. R. 19 Mad. 120.

(f) Col. Dig., Book V. T. 399, Comm.

(g) L. R. 8 I. A., at p. 108.

(h) L. R. 30 I. A. 202.

in Bombay, the law of which has been left unaffected by their Lordships of the Privy Council in *Sheo Shankar* v. *Debi Sahai* (*h*), and confirmed in *Bhau* v. *Raghunath* (*i*) and *Kesserbai* v. *Morariji* (*k*), and according to the Mithila law, where a daughter takes absolutely, and even a widow succeeds to movables with complete proprietary rights. In the great case of *Katama Natchiar* v. *the Rajah of Shivagunga* (*l*) the estate of a Zamindar was adjudged to belong to the daughter of the deceased owner in preference to his nephew, and it thus "passed from the line of Muttu Vaduga," the nephew, after being held by him, his two sons, and his grandson in succession. The wife and daughter were pronounced the immediate heirs, though the heirs of the last male owner still had an interest, according to the doctrine of reversion (*m*). The daughter died, and then it was adjudged that not her children, but the eldest grandson of her father, through her half-sister, was entitled next in succession to the whole estate, it being impartible (*n*).

Now, in the case of *Tulijaram Morariji* v. *Mathuradas and others* (*o*) it is said that all females entering a family by marriage and becoming heirs through that connection are subject to the same restrictions as a widow of the propositus—that is, they take movable property absolutely, but in immovable property only an estate *durante viduitate*. Other female heirs, as daughters, it is said take absolutely. This is an intelligible distinction, and the rule as to the daughters is generally followed in Bombay (*p*), but the opposition is not one made by any Hindu authority. In *Vinayak Anundrao* v. *Lakshmibai* (*q*), Arnould, J., says: "There

(*i*) I. L. R. 30 Bom. 229, 236, 237, P. C.

(*k*) I. L. R. 30 Bom. 431, 452, P. C.

(*l*) 9 M. I. A. 539.

(*m*) See *Periasami et al.* v. *The Representatives of Salugai Tevar*, L. R. 6 I. A. 61.

(*n*) In the Multan district, it is observed, any property inherited by a woman passes on her death to her family of marriage and not of birth. Panj. Cust. Law, II. 272; see *Muttu Vaduganadha Tevar* v. *Dorasinga*, L. R. 8 I. A. 99. In Madras a married daughter's estate is now limited like the widow's—*Virasangappa* v. *Rudrappa*, I. L. R. 19 Mad. 110.

(*o*) I. L. R. 5 Bom. 662; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739; *Dhondi* v. *Radhabai*, I. L. R. 36 Bom. 546.

(*p*) See Chap. II., sec. 7.

(*q*) 1 B. H. C. R., at p. 121; *Madhavram* v. *Trambaklal*, I. L. R. 21 Bom. 739.

is no difference made by the texts in the quantum of estate taken by a mother and a son." The daughters succeeding take absolutely as the Sastris agreed in the *Devacooverbai's Case* (*r*), and "as the daughters take absolutely so do the sisters" (*s*). But "from these authorities [the Mitakshara and the Mayukha] it would appear that a widow takes an absolute interest in her husband's estate" (*t*). The Sastris referred to said she could expend even the immovable property, though only for proper purposes. Hence Sir M. Sausse concluded to "a mere life use of the immovable estate" and "an uncontrolled power during her lifetime (*v*) over the movable estate" as descending to a widow. The limitation of the widow's estate is thus evolved from Katyayana's restriction as to her use of the property (*w*), but without the widow's estate being made, as in Bengal, Madras, and N.W. Provinces, a type of all inheritance by females (*x*). By the recent decision it is made a type of all female inheritance in the family of marriage, but not of birth; but if the restriction is to be construed as proposed, and applied to any others than the widow, who alone is mentioned by Katyayana as bound to economy of the estate taken from her husband, there seems to be no good reason why it should not be applied to all female heirs as well as to some of them. If the Mitakshara doctrine is accepted, all take a complete estate, especially the widow, who, it is elaborately proved, takes the whole estate of her deceased husband (*y*). If the views of other lawyers prevail, no woman takes an absolute estate by inheritance. An instance of the former doctrine already given shows well how it was understood by the principal commentators on the Mitakshara. A daughter may thus inherit while many male agnates of the family remain

(*r*) *Ibid.*, at p. 132.

(*s*) *Ibid.*, at p. 124.

(*t*) *Ibid.*, at p. 132.

(*v*) *Gadadhar* v. *Chandrabhagbai*, I. L. R. 17 Bom. 690 (F. B.); *Motilal* v. *Ratilal*, I. L. R. 21 Bom. 170, *distinguishes the above ruling* (21 Bom. 690) *and gives a widow the right to bequeath movables; Harilal* v. *Pranavladas*, I. L. R. 16 Bom. 229; *Bai Jamna* v. *Bhaishankar*, I. L. R. 16 Bom. 233.

(*w*) Vyav. May., Chap. IV., sec. VIII., paras. 3, 4; Col. Dig., Book V. T. 399, 402; Daya-Krama-Sangraha, Chap. I., sec. II., paras. 3-6; above, pp. 287, 291.

(*x*) See above, p. 295; Col. Dig., Book V. T. 420.

(*y*) Mit. Chap. II., sec. I., paras. 3-39.

who, by her taking an absolute estate, are deprived of their succession (*z*).

(*z*) So the allotment retained for the wife by her husband in a partition goes to her daughters as Stridhana; Mit. Chap. I., sec. VI., para. 2. It thus passes away to their heirs, and leaves their family of birth, except in the particular case of their dying before their marriage is completed. In that case their brothers of the full blood alone take as heirs; the property does not blend again with the general family estate. Mit. Chap. II., sec. XI., para. 30.

XII.—THE DIGEST OF VYAVASTHAS.

INHERITANCE.

CHAPTER I.

HEIRS TO A MEMBER OF AN UNDIVIDED FAMILY.

SECTION 1.—SONS AND GRANDSONS.

Q. 1.—A man of the Sudra caste died. He had the following relations:—1 son of the deceased's eldest son, 3 younger sons, 2 brothers, and 1 cousin. The deceased received a cash allowance from Government on account of certain "Hakka" and *Lajima* (*a*) rights. It is an old ancestral property. How should the certificate of heirship be granted to each of them? Describe his share. If it is not an ancestral property, how should the share of each be described in his certificate?

A.—If the property was acquired by the forefathers of the deceased, and if it has never been divided before, it should be first divided into two shares, the one to be considered as belonging to the deceased's father and the other to the cousin's father. Then the share of the deceased's father should be sub-divided into three shares, one to be allotted to each of the three brothers, including the deceased. The deceased's own share, which is $\frac{1}{3}$ of $\frac{1}{2}$, should be divided again into four shares, one to be assigned to his grandson and three to his sons.

Tanna, April 16th, 1852.

AUTHORITIES.—(1) Mit. Vyav. f. 50, p. 1, l. 1; (2) f. 50, p. 1, l. 7, (see Auth. 3); (3) f. 48, p. 2, l. 5 :

(*a*) Lavajima.

"Whatever else is acquired by the co-parcener himself without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs (Col., Mit. p. 268, Stokes's H. L. B. 384). It devolves as though there had been a partition (*b*).

(4) Mit. Vyav. f. 44, p. 2, l. 13 (see Chap. II., sec. 4, Q. 1).

REMARKS.—1. The answer applies equally to the higher castes. Bhalchandra Sastri said the son of the wife first married was to be regarded as the elder, but this is not warranted by the Mitak. or the Vayav. May. See Steele, L. C. 40.

2. For details regarding "indivisible or separate property," see PARTITION, Book II.

3. In case the deceased had alone acquired the property in question, it goes in equal shares to his sons and grandson.

4. An unseparated son excludes separated ones. See *Bajee Bapoojee* v. *Venoobai*. (*c*)

5. A son born in wedlock is held legitimate though begotten before it. (*d*)

6. A son may relinquish his share in the common estate for money. He then takes the place of a separated son. (*e*)

7. An elder son by a younger wife succeeds to an impartible estate in preference to a younger son by an elder wife. (*f*)

8. A joint trade is joint family property (*g*). See Book II.

9. A joint trade loan is a charge on joint family property. (*h*)

SECTION 2.—OTHER MEMBERS OF AN UNDIVIDED FAMILY.

Q. 1.—A man got his son married and spent a good deal of money on his education. The son afterwards emigrated, and was for a long time in service in another country, where he acquired considerable property and died. Who will be his heir, his father or his wife?

(*b*) See *Musst. Phoolbas Koonwar* v. *Lalla Jogesher Sahoy*, L. R. 4 I. A., at p. 19.

(*c*) S. A. No. 282 of 1871, Bom. H. C. P. J. F. for 1872, No. 41.

(*d*) *Collector of Trichinopoly v. Lakhamani*, L. R. 1 I. A., at p. 293.

(*e*) *Balkrishna Trimbak* v. *Savitribai*, I. L. R. 3 Bom. 54 See below, Chap. II., §1, Q. 6.

(*f*) *Padda Ramappa* v. *Bangari Sherama*, I. L. R. 2 Mad. 286.

(*g*) *Samalbhai* v. *Someshwar et al.*, I. L. R. 5 Bom. 38.

(*h*) *Sheoji Devkarn* v. *Kasturibai*, Bom. H. C. P. J. F. for 1880, p. 255; *Bemola Dossee* v. *Mohun Dossee*, I. L. R. 6 Cal. 792. See Col. Dig., Book I., Chap. V. T. 182, 185, 186.

A.—Whatever he may have given to his wife out of affection, or whatever may be her stridhana, belongs to her. All the rest of the son's property goes to his father.

Ahmednuggur, September 29th, 1854.

AUTHORITIES.—(1) Vyavahara Mayukha, p. 153, l. 2:

"A wife, a son, and a slave are (in general) incapable of property, the wealth which they may earn is (regularly) acquired for the man to whom they belong." (Borradaile, p. 121, Stokes's H. L. B. 100.)

(2) Vyav. May., p. 151, l. 1; (3) Viramitrodaya, f. 221, p. 1, l. 10.

REMARK.—As the son was instructed at the father's expense, the property gained by him cannot be separate as against the father, unless acquired by means not referable to the family estate. See Book II. "PROPERTY SELF-ACQUIRED."

Q. 2.—A father and his son were undivided. The latter died, and left a daughter and a wife. Will these be his heirs, or his father, or his brother, or his mother?

A.—All have an equal right to the estate of the deceased. But the ornaments of the wife belong to her alone.

Dharwar, October 10th, 1859.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1; (2) Vyav. May. f. 155, p. 4.

REMARK.—All the deceased's property, so far as it is not separate property (avibhajyam), will go to the father, and be divided between him and his surviving son on partition. See Question 1.

Q. 3.—If there is an ancestral Inam in the possesion of five brothers, and some of them die without issue, will the survivors inherit their shares?

A.—Yes.—*Rutnagherry, September 15th*, 1846.

AUTHORITY.—Vyav. May. f. 136, l. 2:

"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property." (Borradaile, p. 101, Stokes's H. L. B., p. 85.)

Q. 4.—Who will be the heir to a deceased brother?

A.—If the brother was undivided, his brothers will inherit his property.

But if he was divided, his wife, etc., will be his heir.

Brothers who have divided and afterwards again lived together are called "re-united." If a re-united brother die his re-united coparcener will inherit his estate.

Poona, October 24th, 1845.

AUTHORITIES.—(1*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (2*) Mit. Vyav., f. 55, p. 2, l. 1:

"The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow student; on failure of the first among these, the next in order is indeed the heir to the estate of one who departed for heaven having no male issue. This rule extends to all (persons and) classes." (Col. Mit., p. 324, Stokes's H. L. B. 427.)

(3*) Vyav. May., p. 144, l. 8:

"Yajnavalkya enumerates the order of those entitled to succeed to the wealth of one re-united; as of a re-united (co-heir) the re-united (co-heir), so of the uterine brother the uterine brother." (Boradaile, p. 112; Stokes's H. L. B., p. 93.)

Q. 5.—A man died and left an ancestral Watan. Will his widow or his younger brother inherit it?

A.—If the property is ancestral, and the brothers were undivided, it will belong to the younger brother, though it may have been entered in the records of Government in the name of the eldest only. The wife has no right to it (*i*).

Broach, May 14th, 1855.

AUTHORITIES.—(1) Mit. Vyav., f. 50, p. 1, l. 7; (2*) Vyav. May., p. 136, l. 2. (See Chap. I., sec. 2, Q. 3.)

(*i*) A vatan cannot be enjoyed by a female while males of the family claim it.—*Anpoornabai* v. *Janrow*, S. D. A. R. 1847, p. 74, following an interpretation of 1832 on sec. 20 of Reg. XVI., of 1827. But the reason there given is now no longer applicable. A female may succeed, Chap. IV. B., sec. 1, Q. 12; *Bai Suraj* v. *Government of Bombay et al.*, and *Bapubhai* v. *Bai Suraj et al.*, 8 Bom. H. C. R. 83 A. C. J.; *Bai Jetha* v. *Haribhai*, S. A. No. 304 of 1871 (Bom. H. C. P. J. F. for 1872, No. 38); *The Government of Bombay* v. *Damodhar Permanandas*, 5 Bom. H. C. R. 202 A. C. J.; (comp. *Keval Kuber* v. *The Talukdari Settlement Officer*, I. L. R. 1 Bom. 586); *Sayi Kom Naru*

Q. 6.—Two brothers, Bhai and Bhaidasa, possessed a village. They gave to a certain Bhikari Ramadatta four bighas of land for himself and his heirs. Rama had four sons. One of these sons died, and after him his son, leaving a widow. The latter claims one bigha as the share of her husband. Upon inquiry it appears that the land had not been divided. Is her claim under these circumstances admissible?

A.—The claim is not admissible, since the land was undivided. The other three sons of Bhikari Ramadatta inherit their brother's share.

Broach, May 18th, 1855.

Authorities.—(1) Mit. Vyav., f. 45, p. 1, l. 1; (2*) Vyav. May., p. 136, l. 2. (See Chap. I., sec. 2, Q. 3.)

Remarks.—The brothers deceased were held to be represented by their sons in a joint Hindu family in *Bhagwan Goolabchund* v. *Kriparam Anundran* (*k*); *Debi Pershad* v. *Thakur Dial* (*l*); *Bhimul Doss* v. *Choonee Lall* (*m*).

In *Moro Vishvanath* v. *Ganesh Vithal* (*n*) it was held that the representation descends without limit when there is not an interval of more than three generations between the deceased and his surviving descendant.

Q. 7.—Three brothers divided their father's property and lived apart. But one room was left undivided, and given to their mother as a dwelling-place. One of the brothers died, leaving a widow. Then the mother of the brothers died. The widow claims a third of the room as her husband's share. Has she a right to

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Powar v. *Shrinivasrao Pandit*, Bom. H. C. P. J. F. for 1881, p. 270, subject to the provisions of the Vatandars' Act (Bom. Act 3 of 1874). There is not a general presumption in favour of the impartibility of Vatan estates. He who alleges the impartibility must prove it. *Adreshappa* v. *Gurrushidappa*, L. R. 7 I. A. 162, *infra*, Book II, § 5 C. As to the succession generally to inams and vatans, see Chap. II., sec. 6 A, Q. 8, Remark; and as to claims to inclusion amongst the recognised vatandars, see *Gurushidagavda* v. *Rudragavdati et al.* (I. L. R. 1 Bom. 531.) In Madras it is said that a woman cannot hold the office of Karnam except nominally. *Venkatratnama* v. *Ramanujasami*, I. L. R. 2 Mad. 312. She may perhaps appoint a deputy, as in Bombay, under sec. 51 of the Act above referred to.

(*k*) 2 Borr. 29.

(*l*) I. L. R. 1 All. 105.

(*m*) I. L. R. 2 Cal. 379.

(*n*) 10 Bom. H. C. R. 444. So in the Panjab; see Tupper, Panjab Customary Law, vol. II., p. 141.

it? She has given it as Krishnarpana to her daughter's son. Has she a right to do so?

A.—The widow has no right to any part of the undivided room.

Broach, March 17*th*, 1857.

AUTHORITIES.—(1) Mit. Vyav., f. 47, p. 2, l. 13; (2*) Vyav. May., p. 136, l. 2. (See Chap. I., sec. 2, Q. 3.)

REMARK.—As to residence in the family dwelling, see above, p. 245, and Book II., "PROPERTY NATURALLY INDIVISIBLE." See also Q. 9.

Q. 8.—Two brothers lived apart, and each managed his own affairs. The elder of them died without male issue, leaving a widow only. Can she claim a share of the family Watan?

A.—A widow without male issue has no right to demand a share of any Watan, Vritti, or hereditary offices which were acquired by ancestors, and which were not previously divided.

Ahmednuggur, August 7*th*, 1854 (*o*).

AUTHORITIES.—(1 and 2*) Vyav. May., p. 136, l. 6 and l. 2 (see Chap. I., sec. 2, Q. 5).

REMARK.—A Hindu widow has no estate in the joint family property (*p*).

Q. 9.—Four brothers effected a partition and lived separate from each other. As usual, a house, some ground, and other immovable property remained undivided. Two of these brothers died. The question is whether or not the share of the immovable property should be made over to the widows or to the surviving two brothers.

A.—The widows of the deceased brothers cannot claim *the whole* of the shares of their husbands, but they should be pro-

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(*o*) The right to a vritti (upadhyaya) being established in a family, a fresh cause of action arises on each infringement of the right by a rival family. *Divakar Vithal Joshi* v. *Harbhat bin Mahadevbhat*, Bom. H. C. P. J. F. for 1881, p. 106.

(*p*) *Lallubhai* v. *Raval Bapuji*, Bom. H. C. P. J. for 1880, p. 243; *Antaji Raghunath* v. *Pandurung*, P. J. 1879, p. 478.

vided with a suitable residence. The rest of the immovable property will fall to the two surviving brothers.

Ahmednuggur, January 5th, 1849.

AUTHORITIES.—(1) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (2) Vyav. May., p. 134, l. 4, 6, and 7; (3) Mit. Vyav., f. 49, p. 1, l. 10.

REMARK.—The Sastri means that to the portion left undivided the ordinary rules governing the inheritance of undivided property must be applied, and that these will exclude the widow, saving her right to residence.

That right cannot be extinguished even by a sale of the house (*q*).

2. When two united brothers successively die, each leaving a widow and no children, the widow of the last deceased brother takes the property, the widow of the first deceased being entitled only to maintenance (*r*). For the share of an undivided co-parcener, who leaves no issue, goes to his undivided co-parceners, whether the property is ancestral or acquired by the co-parceners as joint estate (*s*).

Q. 10.—A man had three sons. One of them died without issue. He and his two brothers had not divided their ancestral property. Although the deceased had left a widow, the certificate of heirship was given to his two brothers. They subsequently died. One of them has left a widow and two daughters. The other has left three daughters. The property of the first deceased brother is in the possession of the widow, who is the mother of two daughters. It will be observed that one brother, who had not taken his share from his two brothers, died, and that his two brothers survived him. Now his widow claims the share of her husband from the heirs of the two brothers, who possess the ancestral property. The question is whether she can claim a share or a maintenance only.

The widow of the first deceased brother wishes to take the share due to her husband, but it is to be noticed that the two brothers who died afterwards have left some daughters to be married. According to the custom of the caste, a large expense is required for the marriages and subsequent ceremonies. The widow who

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(*q*) See *Mangala Debi* v. *Dinanath Bose*, 4, Ben. L. R. 72 O. C. J.; *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353; *Parvati Kom Balapa* v. *Kisansing bin Jaising*, Bom. H. C. P. J. F. for 1882, p. 183.

(*r*) *Musst. Surajmookhi Koonwar* v. *Musst. Bhagavati Koonwar*, Privy Council, 8th Feb. 1881.

(*s*) *Radhabai* v. *Nanarav*, I. L. R. 3 Bom. 151.

demands the share of the common property has no children. Will this circumstance cause any obstacle to her claim?

A.—The husband of the widow appears to have died without having previously divided his property. He has left no sons. His widow cannot therefore claim any share from the heirs of the two brothers who died afterwards. They should only give her maintenance (*t*).

Surat, March 17th, 1858.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 10 (see Auth. 3); (2) Mit. Vyav., f. 48, p. 1. l. 9; (3*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3).

Q. 11.—A man died, and his widow has filed an action against her brother-in-law for the recovery of certain property belonging to her deceased husband. The brother-in-law had lived apart from his deceased brother for about twenty-five years. A division of the family property had not, however, taken place. Can the widow claim a share?

A.—The widow cannot claim a share of that which may be undivided and ancestral property; but if there is any which may have been acquired by her husband without making use of the property of his ancestors, she can claim it from her brother-in-law.

AUTHORITIES.—(1) Vyav. May., p. 136, l. 4:

"But if her husband have departed for heaven the wife obtains food and raiment; or (*tu*) if unseparated, she will receive a share of the wealth as long as she lives" (*v*). (Borradaile, p. 102; Stokes's H. L. B. 85.)

(2) Vyav. May. p. 136, l. 2 (see Chap. I., sec. 2, Q. 3).

(*t*) The custom of the City of London and of other places reserves the chief room in the family dwelling as the widow's chamber. See Elt. Ten. of Kent., pp. 42, 173; and below, Chap. II., sec. 7, Remarks.

(*v*) NOTE—The words "if unseparated" (*avibhakta*) belong to both halves of the sentence, and the translation should run thus:

"In an undivided family, if her husband have departed for heaven the wife obtains food and raiment, or she will, etc." In the explanation, which in the Mayukha follows this text, the word avarudha is wrongly translated by "a woman set apart." It means "a concubine."

Q. 12.—Two brothers of the Kanoji caste were undivided. One of them died, leaving a widow. The other brother does not maintain her, nor does he assign to her any property to live upon. Who has, under the circumstances, the right to collect the money due to the deceased, the wife or the brother?

A.—The brothers were undivided. The brother has therefore the right to collect debts due to the deceased. The widow of the latter has a claim to maintenance only. But she must stay with her brother-in-law if she has no good reason to show why such an arrangement is impossible.

Ahmednuggur, March 15*th*, 1849.

AUTHORITY.—Vyav May., f. 136, p. 2, Borr. 101; Stokes's H. L. B. 85 (see Chap. I., sec. 2, Q. 3).

REMARK.—See above, Section on MAINTENANCE, p. 246 ss.

Q. 13.—1. There are three brothers, whose property is undivided. It consists of an office of priest called the "Yajamana Vritti," a house, and some other things. On the death of one of these brothers a question has arisen whether the surviving brothers or the son of the deceased brother's sister are the heirs?

2. Suppose the property of the brothers was divided, and they themselves separated, who would be the heir in this case?

3. Will the son of a cousin or the son of a uterine sister be entitled to inherit the ancestral office of a priest held by a deceased in an undivided state?

4. Supposing the above-mentioned property was divided, which of the two relatives above named would be entitled to inherit it?

A.—1. If one of the three brothers whose property was undivided died without leaving either a son or a grandson, his uterine brothers must be considered the heirs.

2. In the case of a family whose property is divided, the order of heirs laid down in the Sastra is as follows: The widow, the daughter, the daughter's son, the parents, and the uterine brothers. In the absence of each of these, the next succeeding becomes the heir.

3. When the office of priest is undivided, and when a co-sharer dies, his cousin's son will be entitled to inherit the deceased's share provided the following kinsmen are not in existence: The

uterine brother, nephew, parents, half-brother, sons of half-brother, uncle, sons of uncle, and widow.

4. When the property is that of a deceased person divided in interest his sister's son inherits his share; as long as the sister's son is alive the cousin's son cannot succeed.

Surat, October 18th, 1845.

Authorities.—(1*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3; (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. 1., sec. 2, Q. 4).

Remarks.—*Ad.* 3. The undivided co-parceners alone inherit the deceased's share. (Auth. 1.)

Ad. 4. The cousin's son inherits the deceased's property, in preference to the sister's son, since he is a "Gotraja Sapinda," connected by funeral oblations with, and a member of, the same family as the deceased, whilst the sister's son is only a Bhinnagotra Sapinda. (Auth. 2.) See also Introductory Note to Chap. II., sec. 15—§ 5. The Sastri seems to have been steeping his mind in Bengal law. See H. H. Wilson's Works, vol. V., p. 14.

Q. 14.—There were four brothers who divided their movable property and left the immovable undivided. The immovable property consisted of some land given to them in order to keep up a lamp in a temple. One of the four sons died. He left a widowed daughter. Can she obtain her father's share?

A.—She cannot obtain it. It goes to the other undivided relations.

Rutnagherry, January 7th, 1853.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 46, p. 2, l. 14; (3*) Mit. Vyav., f. 51, p. 1, l. 9 (see Chap. I., sec. 2, Q. 17); (4*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3).

Remark.—The Sastri has not distinguished between the divided and the undivided property.

Q. 15.—There were three brothers. Two lived united and one separate. The one of the undivided brothers had a son, the other a daughter. The latter lived in the house of her husband. Both the brothers died. Who will inherit the second brother's property?

A.—The first brother's son inherits his uncle's property. But

if anything had been promised by the second of the brothers to his daughter, it must be given to her.

Ahmednuggur, November 29th, 1845.

AUTHORITIES.—(1*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (2) Mit. Vyav., f. 51, p. 1, l. 9 (see Chap. I., sec. 2, Q. 17).

REMARK.—The property promised must not have been disproportionately great. Vyav. May., Chap. IV., sec. X., pl. 5, 6; above p. 205.

Q. 16.—Three brothers died. One of them left a grandson, the second a son, the third a son's daughter. Will the latter inherit her grandfather's property?

A.—As long as males are living in the family the son's daughter has no right to her grandfather's share.

Poona, 10th September, 1852.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2*) p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (3*) Mit. Vyav., f. 51, p. 1, l. 9 (see Chap. I., sec. 2, Q. 17).

Q. 17.—A man died and left a daughter. His brother, who was united with him in interests, adopted a son. Will the latter or the daughter inherit the property of the deceased?

A.—The deceased and his brother were undivided. Consequently the latter's adopted son will inherit deceased's property.

Dharwar, September 29th, 1849.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2*) p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (3*) Mit. Vyav., f. 51, p. 1, l. 9:

"In regard to unmarried sisters, the author states a different rule, giving them as an allotment the fourth part of a brother's own share." (Colebrooke, Mit., p. 286; Stokes's H. L. B. 398.)

REMARK.—The position of all daughters of undivided co-parceners is the same as that of sisters. Nephews represent their fathers. See cases referred to below (*w*).

(*w*) *Bhagwan Goolabchund* v. *Kriparam Anundram et al.*, 2 Borr. R. 29; *Nurbheram Bhaeedas* v. *Kriparam Anundram, ibid.* 31. Comp. p. 98, note (*m*) above.

Q. 18.—Two persons, related as uncle and nephew, held an hereditary Watan. The nephew died, and the question is whether the widow of the nephew or the uncle should come in the place of the nephew as his heir?

A.—If the uncle and his nephew were separated members of the family the widow of the nephew will inherit his share. If the property was not divided, and if it was held as a joint property of the uncle and the nephew, the uncle should come in the place of the deceased nephew.

Broach, May 14th, 1855.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) f. 50, p. 1, l. 7; (3*) Vyav. May., p. 136, l. 4 (see Chap. I., sec. 2, Q. 11).

Q. 19.—A man's widow and his cousin live together as an undivided family. The widow's late husband had lent money to other people, and the question is who has the right to recover it?

A.—As the deceased and his cousin lived together the cousin has the right to recover the money due to the deceased. The widow will be entitled to a maintenance.

Rutnagherry, July 13th, 1847.

Authority.—Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3).

Remark.—The cousin who was united with the deceased, and not the widow, inherits the deceased's share.

Q. 20.—A man died. His first cousin performed his funeral ceremonies. Will he or deceased's half-brother inherit the estate?

A.—The first cousin was separate from the deceased whilst the half-brother lived with him as a member of a united family. Consequently the half-brother alone inherits.

Tanna, August 12th, 1847.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3).

Remark.—At 2 Macn. H. L. 66 is an answer to the effect that where a man dies united with a whole and a half-brother, these succeed together, to the exclusion of deceased's widow.

Q. 21.—A man died, leaving a daughter. Will the latter or a second cousin with whom the deceased had lived united in interests, inherit the deceased's estate?

A.—The second cousin inherits the deceased's estate; the daughter will receive only what her father may have given to her.

Ahmednuggur, January 8th, 1851.

Authorities.—(1) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (2) Vyav. May., p. 140, l. 1; (3*) Mit. Vyav., f. 51, p. 1, l. 7 (see Chap. II., sec. 1, Q. 2).

Q. 22.—A woman has a daughter. Her husband left the country and was not heard of for many years. She receives the proceeds of her share of the estate. The woman and her husband have been living separate from their cousin for about seventy-five years. The immovable property has not been divided. The woman has sued her cousin for a division of the immovable property. The cousin states that the woman should be satisfied only with a share of the proceeds of the property, and that the share would be continued to her during her lifetime. He further states that he would divide the property only on condition of her agreeing never to transfer it in any way. The question is how the case should be decided?

A.—As the woman has received her share of the proceeds separately for many years, and as she has a daughter, she has a right to move for the partition of the immovable property. The objection of her cousin, founded on the apprehension of the transfer of the property, is not valid. The woman has a right to transfer her property whenever she may find it necessary to do so.

Ahmednuggur, November 25th, 1848.

Authorities.—(1 and 2) Vyav. May., p. 134, l. 4 and 6; (3) p. 136, l. 2 (see Chap. I., sec. 2, Q. 3).

Remark.—As the property is undivided, the widow has no right to it. The Sastri seems to have considered separate enjoyment of the proceeds a proof of partition. As to this see Book II., sec. 4 D. The right which the Sastri ascribes to the woman to alien the property is not generally recognised. (See above, p. 283 ss.)

Q. 23.—A woman has instituted a suit against her mother-in-law and four cousins of her father-in-law for the recovery of the share of her father-in-law of the ancestral property of the family. Is her claim tenable?

A.—The woman cannot claim any share of the property. She can only claim a maintenance from the defendants.

Ahmednuggur, July 21*st*, 1856.

AUTHORITIES.—(1) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (2) f. 136, l. 4. = Mit. Vyav., p. 55, f. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 24.—Certain members of a family have a right to a house which is their undivided and ancestral property. A son of one of the members died, and his widow claims the share of her husband. The other members of the family—namely, grandsons of her brother-in-law and sons of her father-in-law's brother—are alive. Can the widow claim the share?

A.—The widow of a man who dies while the family of which he is a member is still united in interests, cannot claim a share. She can only claim a maintenance.

Surat, 1845.

AUTHORITIES.—(1*) Vyav. May., p. 136 l. 2 (see Chap. I., sec. 2, Q. 3); (2*) p. 136, l. 4. = Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 25.—A paternal grand-aunt and her grand-nephew lived together as an undivided family. They hold Yardi and Kulkarni Watans. Can the paternal grand-aunt claim a share of the Watans, or only a maintenance from their proceeds?

A.—She can claim a maintenance only, and provided she sustains her good character and lives with her grand-nephew.

Ahmednuggur, April 30*th*, 1847.

AUTHORITIES.—(1) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (2) p. 136, l. 4. = Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (3) Vyav. May., p. 129, l. 2 and 4; (4) p. 134, l. 4 and 6; (5) p. 137, l. 7; (6) Mit. Achar., f. 12, p. 1, l. 4 and 6; (7) Mit. Vyav. f. 16, p. 1, l. 6; (8) f. 69, p. 1, l. 1.

REMARK.—See p. 246, *supra*, and Chap. VI., sec. 3 c, Q. 6, below.

Q. 26.—Two brothers, A. and B., obtained a house as security for a debt. A. took his wife's sister's son into his house, and brought him up as his own son. The house was in the joint possession of this latter person and of the son of B., and after B.'s son's death in his possession jointly with the sons of the deceased B.'s grandson. But the wives of these two began to quarrel, and B.'s grandson sued A.'s sister's son for the possession of the whole house. The latter has no certificate to show that he was formally adopted. He had merely possession of the house for twenty or twenty-five years. Is B.'s grandson's claim admissible under these circumstances or not?

A.—A.'s wife's sister's son had not been formally adopted, and can therefore not be considered as A.'s son. The claim of B.'s grandson is therefore admissible.

Ahmednuggur, November 1st, 1849.

AUTHORITIES.—(1) Mit. Vyav., f. 53, p. 2, l. 6; (2) f. 51, p. 1, l. 3; (3) f. 50, p. 1, l. 1; (4*) f. 44, p. 2, l. 14 (see Chap. II., sec. 4, Q. 1); (5) Vyav. May., p. 102, l. 4; (6) p. 110, l. 6; (7) p. 100, l. 1; (8) p. 142, l. 8.

CHAPTER II.

HEIRS OF A SEPARATED PERSON.

SECTION 1.—SON BY BIRTH, LEGITIMATE.

Q. 1.—If a man separates from his father and brothers, and acquires property after the separation, who will be his heir? If his son be his heir should his mother be considered the son's guardian during his minority?

A.—His son will be his heir, and his widow, during his son's minority, will be his son's guardian.

Poona, June 2nd, 1845.

AUTHORITIES.—(1*) Manu IX., 185 :

"Not brothers, nor parents, but sons (if living and their male issue) are heirs to the deceased."

"The production of children, the nurture of them, when produced, and the daily superintendence of domestic affairs are peculiar to the wife."

REMARKS.—1. The son would of course not be separated from his father, by the separation of the father from his father and brothers. A new joint family would forthwith commence consisting of the father and son. In every case of partition between a father and sons, a son born after partition is sole heir to the shares reserved for the father and the mother (*x*).

Sir H. Maine explains the law of Borough-English (*y*) by supposing it originated in a preference given to the youngest unemancipated son who remained under the *patria potestas* over those who were presumably separated. Under the Hindu law the preference arises from the union of interests and sacrifices. It extends to a son remaining joint with his father and to a brother remaining united with another in a general partition, as may be seen in the preceding chapter.

2. Under the Mithila law the mother as a guardian is preferable to the father (*z*).

(*x*) Mitakshara, Chap. I., sec. VI., para. 1. ss.
(*y*) Early History of Institutions, pp. 222, 223.
(*z*) *Jussoda Kooer* v. *Lallah Nettya Lall*, I. L. R. 5 Cal. 43.

Q. 2.—Should the sons, who are minors, or the widow, or the brothers of a deceased Sudra, be considered his heirs?

A.—All of them have a right to the property of the deceased, but the sons are his heirs.

Poona, June 23rd, 1845.

Authorities.—(1*) Manu IX., 185 (see Chap. II., sec. I., Q. 1); (2*) Mit. Vyav., f. 69, p. 1, l. 1:

"Manu has declared that aged parents, a faithful wife, and an infant son must be maintained, even by performing a hundred improper actions."

(3*) Mit. Vyav., f. 51, p. 1, l. 7:

"Of heirs dividing after the death of the father let the mother take an equal share." (Colebrooke, Mit., p. 285; Stokes's H. L. B. 397.)

Remark.—The sons are their father's heirs, and the widow is entitled to maintenance, or, if the sons divide, to one full share of the property, provided she had received no Stridhana. (See Book II., and above pp. 64, 163.)

Q. 3.—A man of the Mahar caste expelled his wife from his house. His son went out with her. The husband afterwards died, when a son of his relatives was nominated by his friends as the son of the deceased, and was presented with a turban. Will he be his heir?

A.—The son of the deceased will be his heir, and not the person nominated.

Authorities.—(1*) Dattaka Mimamsa, p. 1, l. 3:

"In regard to this matter Atri says: Only a man who has no son ought to procure a substitute for a son."

(2*) Manu IX., 185 (see Chap. II., sec. 1, Q. 1).

Q. 4.—A Kunbi brought up a son of another Kunbi, and transferred to him his immovable property. It accordingly passed into the possession of the foster-son. A son was afterwards born to the Kunbi. This son and the foster-son lived separate from each other for many years. The son has now sued the foster-son for the recovery of the immovable property given to him by the Kunbi. Can he do so, and within what time should the suit be brought? Can the possession of the property be disturbed after the lapse of thirty years? If the father and his foster-son should have improved and taken care with trouble and expense of the

immovable property in question, cannot the foster-son have some claim to it?

A.—A son is entitled to three-fourths of the property which his father may have transferred to his adopted son before the birth of his son. The adopted son will only be entitled to one-fourth, provided his adoption has been performed with the due ceremonies and sacrifices by the adoptive father. The Sastra does not lay down any rule in regard to the limitation of time within which a suit for a share of property should be brought. It is, however, laid down that when a man has received the income of any immovable property for twenty years and of any movable property for ten years without any objection or demand from the owner, he cannot be obliged to pay the income, but the right to the immovable property is never lost.

The foster-son mentioned in the question should be allowed to hold such things as he may have received from his foster-father as tokens of his affection, provided they are becoming his rank in society, and not unjustly oppressive to the son. If the foster-son was born of his father's slave woman he would be entitled to one-half of the property which is allotted to his son.

Authorities.—(1) Datt. Mim., f. 1, p. 1, l. 1, 3, and 11; (2) Vyav. May., p. 102, l. 4:

"He is called a son given (Dattrima) whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress, confirming the gift with water." (Borradaile, p. 66; Stokes's H. L. B. 58.)

(3) Vyav. May., p. 110, l. 6; (4) p. 107, l. 6; (5) p. 112, l. 3; (6) p. 28, l. 5; (7) Mit. Vyav., f. 11, p. 2, l. 11; (8) f. 51, p. 1, l. 3; (9) f. 55, p. 1, l. 11; (10) Manu IX., 185 (see Chap. II., sec. 1, Q. 1).

Remark.—It must be noted that the question refers to the relative rights of a son, and a *foster-son*, not an *adopted son*, in which case a different relation of right would arise. (See section 2.)

2. If the father should have parted with ancestral property for valuable consideration, and not for a palpably immoral purpose, the son would be bound by such alienation, according to *Narayanacharya* v. *Narsoo Krishna* (*a*). This case, and the ones cited in it, are discussed with reference to the Hindu law of Bombay in Book II.

(*a*) I. L. R. 1 Bom. 282. See also above, pp. 203, 204.

Q. 5.—A. died, leaving a son B., by his first wife, and a second wife C. Does A.'s house pass to B. alone, or can C. claim a share of it?

If a portion of the house happen to be in the occupation of C. will such occupation give C. a title to the portion of the house which she is occupying?

A.—On the death of A. his house passes to his son B., and although B.'s stepmother may at the time be in occupation of a portion of the house, she cannot on that account be considered to have any right to such portion.

Surat, April 6th, 1846.

AUTHORITIES.—(1) Mit. Vyav., f. 69, p. 1, l. 1 (see Chap. II., sec. 1, Q. 2); (2) Manu IX., 185 (see Chap. II., sec. 1, Q. 1).

REMARK.—The stepmother can, however, claim maintenance, (Auth. I.) and residence. (See above, p. 245, and Book II.)

Q. 6.—A. had a son B. by his first wife. B. separated from his father A., who married a second wife C. On the death of A., if B. pays A.'s debts will B. or will C. be A.'s heir? If B. is A.'s heir, then is C. entitled to a share of A.'s property, or can she claim only a maintenance out of A.'s estate?

A.—B. will be heir to his father A.; but if A. has assigned to C. any stridhana this stridhana will belong to C., and besides, so long as she behaves chastely and lives under the protection of B. she should be allowed maintenance.

Ahmednuggur, April 21st, 1848.

AUTHORITIES.—(1) Vyav. May., p. 89, l. 2; (2) p. 142, l. 8; (3) p. 181, l. 5; (4) Mit. Vyav., f. 69, p. 1, l. 1 (see Chap. II., sec. 1, Q. 2); (5) Manu IX., 185 (see Chap. II., sec. 1, Q. 1).

REMARK.—A prior separation and renunciation of rights by a son does not deprive him, on his father's death, of his right of inheritance (*b*).

2. *Ramappa Naicken* v. *Sithammal* (*c*) establishes (reversing the judgment of Mr. Burnell, the District Judge) that a separated son inherits before the father's widow. To the same effect is the judgment in *Advyapa bin Dundapa* v. *Dundapa bin Andaneapa* (*d*).

3. See p. 246 ss.

(*b*) *Balkrishna Trimbak Tendulkar* v. *Savitribai*, I. L. R. 3 Bom. 54. Comp. Viner's Abridgment, Extinguishment, Co. Litt. 7 *b*, 8 *b*, 237 *b*; see above, p. 57.

(*c*) I. L. R. 2 Mad. 182.

(*d*) Bom. H. C. P. J. F. for 1881, p. 48.

Q. 7.—A Rangari (dyer) put away his wife and his son by her, after which he lived for several years with a concubine, by whom he had a daughter. On his death will his widow and her son be his heirs or will his concubine and her daughter be his heirs?

A.—The son is entitled to inherit his father's movable and immovable property, though he may have lived separate from him. The kept woman and her daughter are not the heirs of the deceased.

Poona, September 11*th*, 1849.

Kheda, May 18*th*, 1848.

AUTHORITIES.—(1) Manu IX., 163:

"The son of his own body is the sole heir to his estate."

(2) Mit. Vyav., f. 46, p. 2, l. 1; (3) Manu IX., 185 (see Chap. II., sec. 1, Q. 1).

Q. 8.—If a "Lingayat" die, will his widow or his son inherit his house?

A.—The son is the rightful heir to the father's movable and immovable property. A widow can only claim that portion of the family property which may have been left for her by her husband at the time he effected a division of his property among his sons, or a share (to be) reserved by the sons when sharing the property among themselves.

Ahmednuggur, September 2*nd*, 1850.

AUTHORITIES.—(1) Mit. Vyav., f. 46, p. 1, l. 9; (2) f. 20, p. 1, l. 6; (3) f. 33, p. 1, l. 3; (4) Vyav. May., p. 89, l. 2 and 6; (5) p. 108, l. 3; (6) p. 90, l. 2 and 3; (7) p. 94, l. 7; (8) p. 95, l. 5; (9) p. 151, l. 2; (10) p. 175, l. 3; (11) Manu IX., 185 and 163 (see Chap. II., sec. 1, Q. 1 and Q. 7).

Q. 9.—A., a Kunbi, had a son B. by his first wife. He then married a woman C., who had been married before. B. and C. survived A. Has C. any right to a share of the immovable property of A., and if so, to what share?

A.—As A. left a son by his first wife, the wife, who was not a

virgin when he married her, can have no right to any share of his property.

Tanna, September 28th, 1852.

Authorities.—Mit. Vyav., f. 54, p. 2, l. 16; (2) f. 55, p. 2, l. 1; (3) Manu IX., 163 and 185 (see Chap. II., sec. 1, Q. 7, and Q. 1).

Remark.—As the second marriage of a Hindu female has been legalised by Act XV., of 1856, it seems that the widow can claim maintenance under Mit. Vyav., f. 69, p. 1, l. 1 (see Chap. II., sec. 1, Q. 2; and above, pp. 82, 83).

Q. 10.—A Hindu died, leaving a widow and a son, which of these is the heir?

A.—The son is the heir, but if the property left by the deceased is to be divided, the widow will receive a share equal to that which the son receives.

Broach, July 28th, 1848.

Authorities.—(1) Mit. Vyav., f. 51, p. 1, l. 7; (2) Manu IX., 185 (see Chap. II., sec. 1, Q. 1); (3) Mit. Vyav., f. 69, p. 1, l. 1 (see Chap. II., sec. 1, Q. 2).

Remark.—The widow could not claim such a division, nor any separate share, against the will of the son. (See Book II.)

Q. 11.—A deceased person has left two sons and a widow. Will the widow be entitled to a share of her husband's property in the same manner as the sons?

A.—The widow is entitled to a share of the property equal to that received by one of her sons. The value of the stridhana which she may have received should be deducted from her share, that is, if a division of property take place.

Dharwar, November 29th, 1850.

Authority.—Mit. Vyav., f. 51, p. 1, l. 7 (see Chap. II., sec. 1, Q. 2).

Q. 12.—A man died, leaving a widow and four sons. Three of these sons are minors and one is an adult. Can each of these sons claim an equal share in their father's property, and can the widow claim any share in her husband's property?

A.—Each of the sons of a deceased father can take an equal share of the patrimony. If their mother or the widow of their father has not received any property in the shape of stridhana she should be allowed a share in her husband's property equal to that which is allotted to one of her sons. If she has received Pallu (the Gujarathi word for Stridhana), her share will be equal to one-half of that which falls to one of her sons.

Broach, June 3rd, 1848.

Authorities.—(1) Mit. Vyav., f. 51, p. 1, l. 7 (see Chap. II., sec. 1, Q. 2); (2*) Vyav. May., p. 94, l. 8 :

"If any (Stridhana) had been given, they are only to get half (a son's share), for he adds : Or if any had been given, let him assign the half." The half meaning so much as, with what had been before given as separate property, will make it equal to a son's share. "But if her property be (already) more than such share, no share belongs to her." (Borradaile, p. 58; Stokes's H. L. B. 51.)

Remark.—In case the mother possesses separate property, the amount of her share will depend on the amount of her stridhana. (See Auth. 2.)

Q. 13.—Can a widowed sister without male issue claim from her brother a share of her father's property, and has she any right to live in her brother's house?

A.—The sister has no right to any share of the property, nor to a residence in her brother's house.

Ahmednuggur, August 1st, 1847.

Authority.—Manu IX., 185 (see Chap. II., sec. 1, Q. 1).

Remark.—Colebrooke recognised a widowed sister's claim in a case of destitution. (See above, p. 241.)

Q. 14.—A man died, leaving two sons, one of whom paid all his father's debts. Is he alone, on this account, entitled to inherit the property of his father, or have both sons equal rights of inheritance?

A.—If the son who paid his father's debts has taken possession of the property with the consent of his brother he may be con-

sidered the owner of the whole. If he has paid the debts and taken possession of the property of his father without the consent of his brother, then the brother or his son has a right to recover one-half of the property on payment of the amount of one-half of the debts discharged with interest.

Ahmedabad, June 25th, 1858.

AUTHORITIES.—(1) Vyav. May., p. 181, l. 5; (2) Mit. Vyav. f. 47, p. 2, l. 13: "Let sons divide equally both the effects and debts after (the demise of) their two parents." (Colebrooke, Mit. p. 263; Stokes's H. L. B. 381.)

REMARK.—The sons divide the father's property equally, and are subject to equal shares of his debts. If one of the sons has paid all debts, he will be justified in retaining, besides his own share, as much as covers what he has expended in excess of his proper share of the debts.

Q. 15.—A. died, leaving his widow B., his sons C. and D., and C.'s wife E. Which of these is his heir? After the death of A., and while the property was still undivided, C. died, leaving no male issue. If C. had property, which of the above-named persons would succeed to it after the death of C.? If D. had property, and, while the family was still undivided, D. died, which of the two widows, B. and E., would succeed to it? If A. left a house as the common property of the family, which of the two widows B. and E. would be entitled to occupy? A.'s house was sold by B. without the consent of E. Is the sale valid?

A.—C. and D. are the heirs of A. As C. died while the family was united in interests, the right of inheritance to the whole of the undivided property of the family will devolve on D.

AUTHORITIES.—(1) Mit. Vyav. f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) f. 55, p. 2, l. 10; (3) f. 46, p. 2, l. 11; (4) Viramitrodaya f. 194, p. 1, l. 4; (5) Manu IX. 185 (see Chap. II., sec. 1, Q. 1); (6):

"Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes." (Colebrooke, Mit., p. 257; Stokes's H. L. B. 376.)

REMARK.—The last passage is intended as an answer to the last of the series of questions proposed.

Q. 16.—Are all the sons of a man equally entitled to inherit the immovable property acquired by their father, and can they, after their father's death, divide such property?

A.—All the sons of a man are equally entitled to inherit their father's immovable property, and they may divide it after his death.

Poona, November 5th, 1851.

AUTHORITIES.—(1) Mit. Vyav., f. 47, p. 2, l. 13 (see Chap. II., sec. 1, Q. 14; (2) Vyav. May., p. 90, l. 2.

Q. 17.—A. died, leaving B. a son, C. the son of another son D., and E. the widow of a third son F. How should the real property of A. be divided among these three?

A.—The property should be divided equally between B. and C. E. is entitled to a maintenance only.

Surat, September 16*th*, 1846.

AUTHORITIES.—(1) Vyav. May., p. 94, l. 1:

"In wealth acquired by the grandfather, whether it consist of movables or immovables, the equal participation of father and son is ordained." (Borradaile, p. 57; Stokes's H. L. B. 51.)

(2) Vyav. May., p. 136, l. 4 (see Chap. I, sec. 2, Q. 11). See *infra*, Book II., sec. 6 B.

REMARK.—As to the maintenance of the widow, see sec. X; above, p. 239; and Book II., sec. 6 B.

Q. 18.—A man and his son were united in interests. The son died, and the question is, who should be considered the heir? There are his father, mother, brother, wife, and son.

A.—All have equal right to the deceased's property. The ornaments which might have been given to the wife of the deceased must, however, be considered her exclusive property.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) Vyav. May., p. 54, l. 4; (3) Manu IX. 185 (see Chap. II., sec. 1, Q. 1).

REMARK.—The father, being united, succeeds according to the authorities cited (see above, Book I.) if the son of the deceased was separated. Otherwise the son takes his father's place in union with his grandfather.

Q. 19.—A man had two sons. The father divided his property between them, and reserved a portion for himself. He had afterwards a third son born to him. The father subsequently died. The question is, what portion of the property should be given to the third son?

A.—It appears that when the father was alive he divided his property between his sons, and reserved a portion for himself. The father may have acquired some more property after the division took place. All the property which may thus have come into the possession of the father belongs to the son born after the division. The sons who separated cannot claim any portion of this property. The son born after the division will be entitled to it, and will be also liable for such debts of the father as he may have contracted since the separation of his two sons.

Poona, August 20th, 1857.

AUTHORITIES.—(1) Vyav. May., p. 99, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 50, p. 2, l. 6:

"A son born after a division shall alone take the paternal wealth. The term 'paternal' must be here interpreted 'appertaining to both father and mother.'" (Colebrooke, Mit., p. 281; Stokes's H. L. B. 394.)

SECTION 2.—ADOPTED SON (*e*).

Q. 1.—A person adopted his sister's son's son, but became afterwards displeased with him. He made a will bequeathing his property to his adopted son and several brothers. Can he distribute his property in this manner, and is an adopted son liable to his natural father's debt?

A.—No. A man has no right to distribute his property in the manner described in the question, when he has a legal heir in his

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(*e*) An adopted son competing with one begotten takes one-fourth as much, *Ayyavu Muppanar* v. *Niladatchi et al.*, 1 M. H. C. R. 45. Adoption causes a complete severance from the family of birth, Shrinivas *Ayyangar* v. *Kuppan Ayyangar*, 1 M. H. C. R. 180; *Narsammal* v. *Balarmacharlu*, *ibid*. 420.

adopted son. A son given in adoption is not responsible for the debt of his natural father.

Sadr Adalat, May 25th, 1824.

AUTHORITIES.—(1*) Dattakamimamsa, p. 36, l. 10 (see Chap. II., sec. 2, Q. 3); (2*) Manu IX. 142:

"A given son must never claim the family and estate of his natural father; the funeral cake follows the family and estate; but of him who has given away his son the funeral oblation is extinct." (See Vyav. May., Chap. IV., sec. V., para. 22.)

REMARK.—As to the will, see Book II., Chap. I., sec. 2, Q. 8, Remark; and above, p. 214.

Q. 2.—Can a man set aside an adoption duly solemnised?

A.—It cannot be set aside without sufficient grounds.

Poona, October 27th, 1854.

AUTHORITY.—*Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3).

REMARK.—"Without sufficient grounds"—that is, unless the son shows such physical or moral defects as would make the rules of disinheritance applicable.

Q. 3.—A man adopted a son. The adoptive father afterwards died, leaving a widow. The adopted son wishes to have possession of the whole property of his adoptive father. What is the law on the point?

A.—The widow of the adoptive father should in the above case be allowed a portion of the property, which, together with her "Stridhana," will make up a share equal to that which the adoptive son receives.

Sadr Adalat, June 25th, 1827.

AUTHORITIES.—(1) Vyav. May., p. 94, l. 8 (see Chap. II., sec. 1, Q. 12); (2) Mit. Vyav., f. 51, p. 1, l. 7 (see Chap. II., sec. 1, Q. 2); (3*) Datt. Mim., p. 36, l. 10:

"Therefore Manu says, 'an adopted son who possesses all the qualities

(requisite for an heir) inherits (his adoptive father's estate), though he may have been adopted from another family (gens).' "

REMARKS.—1. The adopted son inherits his adoptive father's property.

2. The passage quoted by the Sastri, under Authority 2, prescribes that the mother should receive a son's share, if after the father's death the sons divide the estate. Where no division takes place the mother receives a suitable maintenance only.

3. The adoption by a widow, according to *Raje Vyankatrav* v. *Jayavantrav* (*f*) operates retrospectively, and relates back to the death of her husband. But the Hindu Law does not allow this principle to be made a means of fraud. See next case.

Q. 4.—Can a woman, having an adoptive son, let her land by the contract called " Sarkat " (*g*) without his consent?

A.—When a son is adopted he becomes the owner of the property of his father. A woman, therefore, has no right to let her land by the contract called " Sarkat " without his consent. Any contract entered into before the adoption of an heir will, however, be valid.

Poona, June 20th, 1845.

AUTHORITY.—*Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3).

REMARKS.—1. It must be presumed that the land, though called " the widow's," belonged originally to the husband.

2. The adopted son is not bound by an unauthorised alienation (*h*). But he is bound by one for a recognised necessity (*i*). He is also bound by one made before his adoption to pay off a debt of the widow's deceased husband (*k*). The widow must be understood as occupying a place similar to that of a manager down to the time of the adoption. Whether before or after the adoption (the adopted son being a minor) the person contracting with her should satisfy himself of the propriety of the transaction. *Ram Dhone*

(*f*) 4 Bom. H. C. R. 191 A. C. J.

(*g*) " Partnership," a letting on terms of a division of the produce.

(*h*) *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A., at p. 443.

(*i*) See *Bamundoss Mookerjea* v. *Musst Tarinee*, 7 M. I. A., at pp. 178, 180, 185, 206.

(*k*) *Satra Khumagi et al.* v. *Tatia Hanmantrao et al.*, Bom. H. C. P. J. F. for 1878, p. 121. He takes the duties with the rights of a begotten son. See *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A., at pp. 178, 180, 185, and *Manikmulla* v. *Parbuttee*, C. S. D. A. R. for 1859, p. 515; *Maharajah Juggernaut Sahaie* v. *Musst. Muckun Koomwar*, Cal. W. R. 24 C. R.; *Rambhat* v. *Lakshman Chintaman*, I. L. R. 5 Bom., at p. 635.

Bhuttachargee v. *Ishanee Dabee* (*l*); *Rajlakhi Debia* v. *Gakul Chandra Chowdhry* (*m*); *C. Colum. Comara Vencatachella* v. *R. Rungasawmy* (*n*); *Dalpatsing* v. *Nanabhai et al.* (*o*); *The Collector of Madura* v. *Mootoo Ramalinga* (*p*); *Bamandas* v. *Musst Tarinee* (*q*); and *Nathaji* v. *Hari* (*r*). In the last case a gift made by a widow before adopting a son was set aside in his favour. In the case of *Govindo Nath Roy* v. *Ram Kanay Chowdhry* (*s*), on the other hand, cited in I. L. R. 2 Cal. 307, an alienation for value was upheld; and in a later judgment (*t*) it is laid down that in no case can an estate, vested in possession, be divested by the subsequent adoption of a son, who then claims as a collateral heir of the former owner. In *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (*v*) it was held that where a nephew of a deceased had, by fraud, prevented his widow from adopting, and had thus himself succeeded to the whole instead of the half of the estate left by the widow of another uncle, the subsequent adoption did not relate back so as to divest the nephew of the moiety to which the adopted son, if taken in due time, would have been co-heir with his cousin by adoption. Whether an adoption by one widow annulled a prior conveyance of her estate by another was a question sent back for trial in *Babaji* v. *Apaji* (*w*). In a series of cases in C. S. D. A. R. for 1856, pp. 170 ss., an adopted son who had long received rents under leases granted by his adoptive mother sought to enhance the rents inconsistently with the leases. It was thought he could do this, but now probably his conduct would be deemed a ratification. These cases differ from the case of *Shiddheshvar* v. *Ramachandrarao* (*x*), as in the latter the adoptive mothers, after the adopted son had attained his majority, had mortgaged the estate in their own names. The adopted son promised to his mothers to redeem the mortgage, and he offered no objection to the mortgagee's paying them an annuity in accordance with the mortgage; but it was held that there could be no ratification of what had not been done professedly on account of the principal, and that mere quiescence of the owner would not validate unauthorised dealings with his property. The mortgagee, it was said, if he had taken assignments of prior charges valid as against the adopted son, might enforce them in another suit.

In *Bai Kesar* v. *Bai Ganga* (*y*) the question was as to alienation by a father's widow as guardian of a son's minor widow of property of the latter. The transaction was set aside on account of the guardian's not having obtained a certificate of administration under Act XX. of 1864; but as the sale had

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(*l*) 2 C. W. R. 123 C. R.
(*m*) 3 B. L. R. 57 P. C.
(*n*) 8 M. I. A., at p. 323.
(*o*) 2 Bom. H. C. R. 306.
(*p*) 12 M. I. A. 443.
(*q*) 7 M. I. A. 169.
(*r*) 8 Bom. H. C. R. 67 A. C. J.
(*s*) 24 C. W. R. 183.
(*t*) *Kally Prosonno Ghose* v. *Gocool Chundre Mitter*, I. L. R. 2 Cal. 307.
(*v*) I. L. R. 7 Cal. 178.
(*w*) S. A. No. 190 of 1877; Bom. H. C. P. J. F. for 1877, p. 269.
(*x*) I. L. R. 6 Bom. 463.
(*y*) 8 B. H. C. R. 31 A. C. J.

been made to pay debts reasonably incurred, its rescission was made conditional on the repayment by the younger widow of the purchase-money to the vendee. (See further, Book II. Introd.)

3. For the conditions limiting a widow's power to adopt in Bombay, see *Ramji valad Narayan* v. *Ghamau Kom Jivaji* (z) and Book III. of this work treating of ADOPTION.

Q. 5.—The holder of an Inam granted for the support of a temple died, leaving an adopted son. The son and the widow of the holder disagreed and separated. The question, therefore, is whether the Inam should in future be entered in the name of the adopted son or of the widow?

A.—The Inam should be entered in the name of the adopted son.

Ahmednuggur, October 16th, 1851.

AUTHORITIES.—(1) Datt. Mim., p. 1, l. 3 and 11; (2*) p. 36, l. 10 (see Chap. II., sec. 2, Q. 3); (3) Vyav. May., p. 104, l. 7; (4) p. 105, l. 6; (5) p. 107, l. 6; (6) p. 102, l. 4; (7) p. 110, l. 6; (8) p. 108, l. 3.

Q. 6.—A deceased man has left a daughter and an adopted son. Which of these has a right to inherit the property belonging to the deceased?

A.—The daughter is entitled to one-eighth of the property. The expenses of her marriage should be defrayed from this share and the rest of the share made over to her. The adopted son should receive the remaining seven-eighths of the property.

Ahmednuggur, March 14th, 1856.

AUTHORITIES.—(1) Vyav. May., p. 102, l. 4; (2) p. 110, l. 6; (3) Mit. Vyav., f. 51, p. 1, l. 9 (see Chap. I., sec. 2, Q. 17); (4*) Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3).

Q. 7.—A Brahman widow has adopted a son. Should he or she have the management of her property during her lifetime?

A.—The adoptive mother's Stridhana should remain in her

(z) Bom. H. C. P. J. F. for 1882, p. 141.

possession. The adopted son should make a suitable provision for the support of his mother, and the mother should remain under the control (*a*) of her son, who should have the management of all the movable and immovable property.

Ahmednuggur, October 17th, 1845.

AUTHORITY.—*Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3).

Q. 8.—A woman after the death of her husband adopted a son. Can he claim the property of his (adoptive) father during the lifetime of his mother?

A.—Yes, he can claim his father's property, but not that of his mother.

Poona, November 1st, 1852.

AUTHORITIES.—(1) Mit. Vyav., f. 54, p. 2, l. 15; (2*) Datt. Mim. p. 36, l. 10 (see Chap. II., sec. 2, Q. 3.)

Q. 9.—A woman adopted a son, and agreed to put him in possession of his property. The woman afterwards refused to act up to her agreement. Can the adopted son sue his adoptive mother for the possession of the property?

A.—The adoptive mother can be sued on the agreement, but she can still claim a maintenance.

Poona, November 5th, 1852.

AUTHORITIES.—(1) Viram. f. 121, p. 1, l. 10; (2) p. 2, l. 14; (3*) Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3).

Q. 10.—Can an adopted son of a woman claim the property in her possession? A part of the property was acquired by her and the rest by her husband.

A.—The portion of the property which was acquired by the woman is her "Stridhana," of which she alone is the owner.

(*a*) See above, p. 246 ss.

The adopted son can claim a half of the property belonging to her husband. The other half must be left with the widow. She is at liberty to enjoy the proceeds of the immovable property, but not to mortgage or dispose of it.

Rutnagherry, February 20th, 1845.

AUTHORITIES.—(1) Mit. Vyav., f. 51, p. 1, l. 7; (2) f. 60, p. 2, l. 16; (3) f. 61, p. 1, l. 10; (4) f. 61, p. 2, l. 3; (5) f. 60, p. 2, l. 16:

(Yajnavalkya.) "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fires, or presented to her on her husband's marriage to another wife, or else any other (separate acquisition), is denominated a woman's property.". . . (Vijnanesvara). And on account of the word "adyam" (and the like) property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are denominated by Manu and the rest 'woman's property.' (Colebrooke, Inh., p. 364; Stokes's H. L. B. 458. Translation revised according to note in 1st edition of this work, *q. v.* See above, pp. 259 ss.)

REMARK.—The adopted son takes the whole of his adoptive father's property. (See Chap. II., sec. 2, Q. 3.)

Q. 11.—A woman has adopted a son. She is possessed of some movable and immovable property. Is she or her adopted son the owner of the property?

A.—When a son is adopted by a widow he becomes the owner of her husband's property. If he should happen to be a minor the property should be taken care of by the widow, who is the owner of her "Stridhana" only.

Ahmednuggur, August 18th, 1849.

AUTHORITIES.—(1) Datt. Mim., f. 1, p. 1, l. 3 and 11; (2) Vyav. May., p. 102, l. 10; (3) p. 110, l. 6; (4) p. 104, l. 7; (5) p. 105, l. 6; p. 107, l. 6; (7) p. 103, l. 7; (8*) Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3); (9*) Manu IX. 27 (see Chap. II., sec. 1, Q. 1).

Q. 12.—A widow of the Mahar caste adopted a son of her sister. He succeeded to the Watan of his adoptive father. His cousin has sued him for the recovery of the property. How should this case be decided?

A.—The sister's son adopted by the widow is legally entitled

to the Watan of his adoptive father. The cousin, therefore, cannot disturb his possession.

Ahmednuggur, April 12th, 1856.

AUTHORITY.—*Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3).

Q. 13.—A person having lost his first adopted son adopted another, and the wife of the deceased adopted one also. How will the two adopted sons share the family property?

A.—Equally.

Tanna, June 12th, 1858.

AUTHORITIES.—(1) Mit. Vyav., f. 50, p. 1, l. 7 (see Chap. II., sec. 4, Q. 2); (2) f. 50, p. 2, l. 3.

REMARK.—The adoption by the widow of the deceased son, it was answered in one case (No. 1666 MSS), would hold good notwithstanding a prior adoption by her father-in-law. An adoption by her alone is to be preferred (No. 1660 MSS).

Q. 14.—A man adopted a son, but afterwards he had a son born to him. He separated from his adopted son, giving him a share of his property. The man and his son subsequently died. The widow of the son married another husband. The adopted son and a " Pat " widow of the adoptive father are the only persons who claim to be the heirs of the adoptive father. Which of these is the heir?

A.—The adopted son.

Dharwar, January 13th, 1859.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2*) Viram., f. 194, p. 2, l. 4 (see Chap. II., sec. 6A, Q. 14); (3*) Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3).

Q. 15.—A man first adopted a son and afterwards he had a son born to him. How will they share the man's property?

A.—The adopted son is entitled to one-fourth of the share of the son.

Dharwar, September 10th, 1847.

AUTHORITY.—Vyav. May., p. 108, l. 2:
"When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." (Borradaile, p. 72; Stokes's H. L. B. 66.)

REMARK.—On the death of an intestate a contest arose between his adopted son and the adopted son of his natural son. The Court held that their rights were equal. *Raghoobanand Doss* v. *Sadhuchurn Doss* (b). This would not be right on the principle of an adopted son fully representing his father in the absence of a natural son, as that would give the adoptive grandson the whole share of his father, in competition with whom the father's adoptive brother would take only half a share.

Q. 16.—If a son is born to a man after he has adopted one, what portion of his property should be given to the adopted son?

A.—The property should be divided into five shares, one share should be given to the adopted and four to the begotten son.

Sadr Adalat, July 2nd, 1858.

AUTHORITIES.—(1) Datt. Mim., f. 21, p. 2, l. 1; (2*) Vyav. May., p. 108, l. 2. (See the preceding question.)

Q. 17.—A Patil adopted a son, afterwards a son was born to him by a wife who had been married before he married her. Which of these will be his heir? If, after he had adopted a son, a son was born to him by his wife who was a virgin when he married her, which of the two sons will be his heir?

A.—The son of her who was a virgin when the Patil married her has a greater right than the adopted son, and the adopted son a greater right than he who was born of a twice-married mother.

Dharwar, December 3rd, 1858.

AUTHORITIES.—(1) Mit. Vyav., f. 53, p. 2, l. 6; (2*) f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (3*) Vyav. May., p. 108, l. 2 (see Chap. II., sec. 2, Q. 15); (4*) p. 112, l. 2 (see Chap. II., sec. 3, Q. 16).

REMARKS.—1. If the son born after adoption was born from a Pat wife he would, in the higher castes, and except by custom in the lower also (being under the Hindu Law considered illegitimate), be excluded. But as the illegitimate son of a Sudra he will, according to Authority 3, receive one-third

(b) I. L. R. 4 Cal. 425.

of the property. But see also Chap. II., sec. 3, Q. 16, and Remarks on the same question.

2. If a legitimate son be born after the adoption has taken place the adopted son receives a fifth of the deceased's estate, according to the preceding question. According to the Mit., Chap. I., sec. XI., p. 24, the adopted son takes a fourth part.

Q. 18.—A. an Agarvali, had no children, but he brought up one B. as his foster son. A.'s mistress had a son C. before she was kept by A., and C. accompanied his mother when she went to live in A.'s house, and took A.'s name. On the death of A. will B. or C. succeed to his property?

A.—A.'s foster son B. will be his heir. C., the son of his mistress, will not be his heir merely because he went with his mother to live in A.'s house.

Ahmednuggur, September 30th, 1846.

Authorities.—(1*) Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3); (2*) Vyav. May., p. 102, 1, 2 :

"Here we must remark that, with the exception of the son given (all other) secondary sons are set aside in the Kali (or present) age." (Borradaile, p. 66; Stokes's H. L. B. 58.)

Remark.—B. will inherit only if he was formally adopted; *Bashettiappa* v. *Shivalingappa* (*c*); *Nilmadhab Das* v. *Bisswambhar Das et al.* (*d*).

Q. 19.—A Koli A. had nephews, but they were separated from him. He had no son of his own, but he brought up B, the son of a relation by a kept woman, either as a foster child or as his adopted son (it is not known which). On the death of A. will his property pass to B. or to his nephews?

A.—If B. was adopted by A. he will be his heir. If B. was not adopted, but only brought up as a foster child by A., then his nephews, though separated from him, will inherit his property in preference to B.

Ahmednuggur, February 21st, 1846.

Authorities.—(1*) Datt Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 13); (2*) Vyav. May., p. 102, l. 2 (see Chap. II., sec. 2, Q. 18).

(*c*) B. H. C. P. J. F. for 1873, p. 162.
(*d*) 3 B. L. R. 27 P. C.

Q. 20.—A., a Sudra, died, leaving first and second cousins and also a boy B., whom he had either brought up as a foster child or else bought. A., previous to his death, bequeathed a portion of his property to B. Is B. entitled to claim any further share of the property besides that expressly bequeathed to him, and if so how should the rest of the property be divided between B. and A.'s cousins?

A.—If B. was adopted by A. with all the forms required by the Sastras, then he will succeed to the whole of the property left by his adoptive father. If he has not been so adopted he can claim only so much property as may have been expressly assigned to him by the deceased A., and the rest of A.'s property will pass to his blood relations.

Ahmednuggur, January 17th, 1848.

AUTHORITIES.—(1) Vyav. May., p. 102, l. 2 (see Chap. II., sec. 2, Q. 18); (2) p. 159, l. 2; (3) p. 142, l. 8; (4) p. 7, l. 8; (5) Mit. Vyav., f. 54, p. 1, l. 3 and 13; (6) f. 53, p. 2, l. 6; (7) f. 54, p. 2, l. 13; (8) f. 51, p. 1, l. 3; (9) f. 50, p. 1, l. 1; (10) Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3).

SECTION 3.—ILLEGITIMATE SON.

Q. 1.—Can a son of a Sudra's female slave be his heir?

A.—The son of a female slave is the heir of a Sudra.

Ahmednuggur, September 30th, 1846.

AUTHORITY.—*Mit. Vyav., f. 55, p. 1, l. 11:

"Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead the brethren should make him partaker of a moiety of a share; and one who has no brothers may inherit the whole property in default of a daughter's son." (Colebrooke, Mit., p. 322; Stokes's H. L. B. 426.)

REMARKS.—See *Rahi* v. *Govind* (*e*), *Narayanbharti* v. *Lavingbharti* (*f*), and *Inderun Valungypooly Taver* v. *Ramasawmy* (*g*).

2. The union of the sexes amongst many of the wilder tribes and the lower castes of India can be called marriage only by courtesy. The word implies a set of relations which amongst them does not really exist. Thus amongst the Khonds the so-called wife is bought from her father and carried off by

(*e*) I. L. R. 1 Bom. 97.

(*f*) I. L. R. 2 Bom. 140.

(*g*) 13 M. I. A. 141; S. C. 3 B. L. R. 4 P. C.

force (*h*). She can leave her husband when she will, her parent being then bound to repay her price. Amongst some classes in Kangra a purchased widow is reckoned a "wife" without further ceremony (*i*). The custom of some castes in Gujerat allows the woman to leave the man and to form a connection with another, subject or not to ratification by the caste. Mere incompatibility of temper is with several regarded as a ground for dissolution of the union, and in nearly all the lower castes the man may dismiss the woman at his pleasure with or without reason; the only restraint he feels arises from the necessary expense of a new wife. Parents and brothers habitually encourage young wives to run away from their husbands, to induce the latter to divorce them and so leave room for another sale. The Brahmanic law regards a marriage as really indissoluble (*k*), though the erring wife may be divorced in the sense of being disgraced and kept apart. It could not, therefore, treat with respect connections in which there was no religious compunction of sacra, no recognition of an indissoluble bond, no procreation of children to fulfil the sacrificial law. The British Courts give effect to many unions as marriage which are almost entirely wanting in the characteristics of what in England goes by that name, and even apply the provisions of the Penal Code to transgressions of a law which in itself never laid any strict obligations on the spouses. The relations of the sexes in British territory have thus been raised in some degree to a higher level amongst the lower castes, but at the cost of penal inflictions, it may be feared, in many instances in which the culprits were wholly unconscious of having committed any offence (*l*).

Baudhayana makes mere sexual association a lawful union for Vaisyas and Sudras, "for," he says, "Vaisyas and Sudras are not particular about their wives." Shortly afterwards he says: "A female who has been bought for money is not a wife; she cannot assist at sacrifices offered to the gods or the manes. Kasyappa has pronounced her a slave."—Transl., p. 207. (See above, pp. 80, 264.)

3. An illegitimate son was preferred to a widow and daughter in *Sadu* v. *Baiza and Genu* (*m*). (See below, Q. 12.)

Q. 2.—Can an illegitimate son of a Brahman claim a share from his legitimate brother?

A.—No, he cannot have any share. He can only claim that which his father may have expressly given to him.

Ahmednuggur, February 15*th*, 1851.

(*h*) See Rowney, Wild Tribes of India, p. 103.

(*i*) See Panj. Cust. Law, II. 184.

(*k*) See above, p. 84, and below, sec. 6 B Introd. Remarks.

(*l*) See *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom. 545, 565, 570; Rowney, *op. cit.* p. 136, 139, 190, 204; Steele's Law of Castes, 32, 33, 170, 171, 172, 173. Lord Penzance in *Mordaunt* v. *Mordaunt*, L. R. 2 P & D., at p. 126; Lush, L.J., in *Harvey* v. *Farnie*, L. R. 6 P. D., at p. 53.

(*m*) I. L. R. 4 Bom. 37, S. C.; Bom. H. C. P. J. F. 1879, p. 509.

AUTHORITIES.—(1) Vyav. May., p. 99, l. 1 (see Auth. 3); (2) p. 98, l. 4; (3) Mit. Vyav., f. 55, p. 1, l. 15 :

"From the mention of a Sudra in this place (it follows that) the son begotten by a man of a regenerate tribe on a female slave does not obtain a share, even by the father's choice, nor the whole estate after his demise" (*n*). (Colebrooke, Mit. p. 323; Stokes's H. L. B. 426.)

REMARK.—See above, p. 255.

Q. 3.—A Marwadi has a son by a woman either kept or purchased as a slave. Can the woman or the son be his heir?

A.—If the Marwadi is a Sudra, his illegitimate son will be his heir. If he is not a Sudra, and if he has not made a gift of his property to any one, the Sirkar should take his property after paying for his funeral rites and the maintenance of the woman. If the deceased has made a gift of his property to either the son or the woman it should be made over to him or her.

Ahmednuggur, February 23rd, 1847.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (2) f. 57, p. 1, l. 5 :

"It is said by Katyayana that heirless property goes to the king, deducting, however, a subsistence for the females (*o*) as well as the funeral charges; but the goods belonging to a venerable priest let him bestow on venerable priests." (Colebrooke, Mit. p. 335; Stokes's H. L. B. 435.)

(3) Vyav. May., p. 236, l. 61; (4) p. 98, l. 6; (5) Manu IX. 155.

(*n*) According to the Sanscrit text as given above the translation "nor the whole estate after his demise" is not correct. It ought to be "nor half a share, much less the whole."

The English law of Glanville's time allowed a father to give to an illegitimate son a share of the patrimony which he could not give to a younger legitimate son without the consent of the heir. (See Glanville, p. 141.) This arose from a preservation of the literal direction of a text while the law to which it was collateral had changed. For an analogous process in the Hindu Law see below, Q. 8.

(*o*) According to Vijnanesvara, "females" here means "concubines" (averuddha). If a *patni* wife survived, the property would not be heirless.

Q. 4.—When a deceased Pardeshi (*p*) has no nearer heir than a son of his kept woman, can such a person be his heir?

A.—Yes.

Poona, August 17th, 1847.

AUTHORITY.—*Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

REMARK.—"Yes," if the son is his own also, and if deceased belonged to the Sudra caste.

Q. 5.—A person permitted his illegitimate son to live in one of his houses. This person and his descendants occupied the house for several years. They repaired, improved, and divided it among themselves. Can the house be claimed by the legitimate heirs of the original owner, and how many years' possession constitutes a prescriptive title?

A.—A man of the Sudra caste having legitimate and illegitimate sons, can transfer his real or personal property to the latter. The legitimate heirs cannot cancel such a transfer. The period necessary to constitute a prescriptive title is not fixed in the Sastras.

Ahmednuggur, May 26th, 1847.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (2) f. 55, p. 1, l. 3; (3) f. 11, p. 2, l. 11, and f. 12, p. 2, l. 14. Translated 1 Macn. H. L. 200; (4) Vyav. May., p. 83, l. 3; (5) p. 89, l. 2.

REMARKS.—1. A Sudra cannot transfer his entire property to his illegitimate children if he has legitimate sons. He can only give equal portions to the legitimate and illegitimate heirs. See, however, Book II., Chap. I., sec. 2; above, p. 206.

2. If the house which the illegitimate son had received was not more than a portion equal to the share of a legitimate son, the latter cannot recover it. If it was more, he would be able to recover it, but be obliged to give to the illegitimate son one-third of the property or one-half of a son's share (*q*). Even amongst the higher castes, as the illegitimate son is entitled to maintenance, a grant to him by his father for this purpose is valid against the legitimate sons (*r*). (See above, p. 255.)

(*p*) "Pardeshi," Paradesi (lit. foreigner) is used in the Dekhan to denote any Hindu who has immigrated from some other part of India, especially from Hindustan, whatever his caste may be.

(*q*) *Kesaree et al.* v. *Samardhan et al.*, 5 N. W. P. R. 94.

(*r*) *Raja Parichat* v. *Zalim Singh*, L. R. 4 I. A. 159.

3. According to the Mitakshara, contrary to Yajnavalkya and Narada, to which it refers, proprietary rights cannot be acquired by mere occupancy, however long it may last, and though the owner may not remonstrate. But see now Act 15 of 1877, Reg. V. of 1827, and Book II., "WILL TO EFFECT A SEPARATION."

Q. 6.—Is a cousin who performed the funeral ceremonies of his deceased relative, or a kept woman's son who is a minor under the guardianship of his sister, his heir?

A.—As the deceased was separate from his relatives, and as he was of the Sudra caste, his illegitimate son will be heir. But as the illegitimate son is a minor under the protection of his sister she may have the charge of the property on his behalf.

Nuggur, November 1st, 1845.

AUTHORITY.—*Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

Q. 7.—A man of the Mali caste left a son by a kept woman, and this son claims a share in certain land which is in possession of the deceased's nephew. Is the claim of the illegitimate son valid?

A.—As it appears that the man lived separate from his brothers, and that his share is in the possession of his nephew, the illegitimate son can claim it.

Nuggur, September 12th, 1845.

AUTHORITY.—*Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

REMARK.—If there be no legitimate sons, daughters or daughter's sons, the illegitimate son of a Sudra succeeds, taking precedence of a legitimate son's daughter (*s*).

Q. 8.—A Mohatur-widow of a man of the Mali caste sued his kept woman for a house belonging to her husband. The widow, while her husband was alive, lived separately from him for about twelve years. During all this time she was supported by her own

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(*s*) *Sarasuti* v. *Mannu*, I. L. R. 2 All. 134.

According to the law of the Lombards the legitimate sons excluded illegitimates, but were compelled to provide them and their own sisters with portions.

labour. It is not said that her character was bad. The man has two sons by the kept woman. Can the claim of the widow be allowed?

A.—The man's sons by the kept woman are his heirs. They should inherit the whole property and grant a suitable maintenance to the widow.

Ahmednuggur, March 13th, 1848.

AUTHORITY.—*Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

REMARKS.—1. A Mohatur-widow is a widow who had been married twice. 2. For the preference of the illegitimate son to the widow, see p. 79 s.

Q. 9.—A man, deceased, of the Sudra caste, had two sons, one legitimate and the other illegitimate. The former died, leaving a widow. The deceased had a house, and the question is, who shall inherit it?

A.—The daughter-in-law has a right to a maintenance only. The illegitimate son will inherit the property of his father.

Ahmednuggur, October 30th, 1856.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 1, l. 11 (see Chap II., sec. 3, Q. 1); (2) f. 12, p. 1, l. 16; (3) Mit. Achara, f. 12, p. 1, l. 4; (4) Vyav. May., p. 134, l. 6; (5*) p. 136, l. 4 (see Chap. I., sec. 2, Q. 11).

REMARK.—The illegitimate son of a Sudra is entitled to half the share of a legitimate son, *Dhodyela et al.* v. *Malanaik*, S. A. No. 243 of 1873 (*t*) in Bombay and Madras (*v*), if there be a legitimate son, daughter, or grandson. Failing these, he may inherit the whole. Mit., Chap. I., sec. 12, pl. 1 ss. See *Salu v. Hari* (*w*), *Gopal Narhar* v. *Hunmant Ganesh Saffray* (*x*), *Sarasuti* v. *Mannu* (*y*).

Q. 10.—A Sudra A., who was possessed of an open piece of ground suited for building purposes, died, leaving two sons. One of these, B., was a legitimate son, and the other, C., was either

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(*t*) Bom. H. C. P. J. F. for 1874, p. 43.
(*v*) 2 Str. H. L. 70.
(*w*) H. C. P. J. for 1877, p. 34.
(*x*) I. L. R. 3 Bom. 273, 288.
(*y*) I. L. R. 2 All. 134.

an illegitimate son or else his foster son. On the death of A. will the piece of ground belong to B. alone or will it belong to C.? If C. is entitled to a share of it, to what share is he entitled?

A.—In the Sudra caste both legitimate and illegitimate sons succeed to their father's immovable property. Their father may divide it according to his pleasure, and assign what share he pleases to a foster son. If the property has to be divided after the death of the father, then, according to the Sastras, the illegitimate son will be entitled to one-third and the legitimate son to two-thirds of the whole property left by the father.

Ahmednuggur, March 14th, 1855.

AUTHORITY.—Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

REMARKS.—1. The father may give an equal share to his illegitimate son if he likes. He could not give the bastard a greater portion than the other. (See above, p. 192; Mit., Chap. I., sec. XII., para. 1.)

2. If C. is a "foster son," and has not been formally adopted, he receives nothing.

Q. 11.—A., a tailor, died, leaving a legitimate son B. and an illegitimate son C. Are B. and C. entitled to equal shares of the movable property and of the Watan of A., or can C. claim no share at all? On the death of B. will C. be the heir to the Watan, or will it pass to the distant relatives of A.? Is B. competent to will away on his death-bed the Watan to distant members of his family, to the prejudice of C.?

A.—B. is entitled to three-fourths of the property of A., and C. to one-fourth. If B. die, leaving neither a widow nor a son nor a daughter, his Watan and other property will pass to C. If B. and C. have separated, then B. is competent to transfer his property to his other relations instead of to C.

Ahmednuggur, December 13th, 1847.

AUTHORITIES.—(1) Vyav. May., p. 83, l. 3; (2) p. 99, l. 1 (see Auth. 4); (3) p. 196, l. 4; (4*) Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (5) f. 68, p. 2, l. 16:—

"Property, except a wife and a son, may be given without prejudice to (the interest of) the family. But the whole estate may not be given if there is living issue, nor that which has been promised to anybody."

REMARK.—According to the Remark to Q. 5 and the Answer to Q. 10, the illegitimate son would be entitled to one-third of the whole estate. It is,

however, possible to interpret the expression "half a share," which Yajnavalkya uses in the passage bearing on this point (Authority 4), in the sense also which has been given to it in the answer to Q. 11. For Vijnanesvara, when discussing the allotment of a "fourth of a share" to a daughter of a person leaving sons, states that the property is to be divided first into as many shares as there are daughters and sons. Then each daughter is to receive a fourth of such a share, and lastly, the rest is again to be divided equally amongst the brothers. (See Colebrooke, Inh., p. 287.) If the same principle is followed in regard to the "half share" of an illegitimate son, he will, in case there is only one legitimate son living, receive a fourth of the whole estate. The same difficulty presents itself also in regard to the fourth share of an adopted son. (See Chapter II., sec. 2, Q. 15 and 17.)

Q. 12.—A man of the Sudra caste died, leaving a widow and her son and a kept woman and her son. The widow and the legitimate son of the man afterwards died, and the question is whether the property of the deceased should be taken by a separated legitimate member of his family or by the illegitimate son?

A.—A woman who has not been married by the "Lagna" or "Pat" ceremony, but is kept by a man as a concubine from her childhood, is called a "Dasi," and a son of a "Dasi" can inherit the property of his father when there is no legal widow, son, daughter, or daughter's son (*z*). In the present case the illegitimate son appears to be the nearest heir of the deceased. The separated legitimate member of his family cannot therefore claim his property.

Poona, October 9th, 1857.

AUTHORITY.—Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

REMARK.—The illegitimate son would inherit the whole estate of his father according to the Mitakshara (see Q. 8), even though a widow of the latter might be living; but here the estate having descended to the two sons jointly (see Q. 10), or to the legitimate son, subject to the illegitimate's right to half a share, the Sastri was not justified in treating the case as if the father had died leaving only the illegitimate son. In *Baiza et al.* v. *Sadu*, S. A. No. 74 of 1876, there was a difference of opinion as to whether legitimate and illegitimate sons could be coparceners. In appeal by Sadu it was held that he the illegitimate and his legitimate half-brother were coparceners (*a*). In the same

(*z*) This is the doctrine of the Dattaka Chandrika, sec. V., para. 31. For the Mitakshara see below, Q. 18.

(*a*) *Sadu v. Baiza*, I. L. R. 4 Bom. 37.

case it was admitted in argument that the widow was entitled only to maintenance. In Madras Mr. Ellis (2 Str. H. L. 66) thought that illegitimate sons of Sudras might take equally with legitimate sons, but this does not appear to be the accepted rule even there (*ibid.* 70). Illegitimate sons by the same mother inherit *inter se* as brothers, *Maynabai et al.* v. *Uttaram et al.* (*b*), and see *infra*, section 11, Q. 4, and probably, but not quite certainly, from legitimate brothers on the footing of a joint family with rights of survivorship. (See Steele, 180.) But little difference indeed was at one time recognised between the legitimate and the illegitimate sons of Sudras. The Brahma Purana, quoted by the Viramitrodaya, Tr. p. 120, says that Sudras are incapable of having a son (putra) in the proper sense, as "a slave, male or female, can have only slave offspring." (See above, p. 77 ss., and Q. 1 and 8.) The subsidiary sons in the order of their preference exclude those lower in the scale (Mit., Chap. 1, sec. 11; Narada, p. II., Chap. XIII., pl. 22, 25, 33, 49). In the answer to Q. 11 above the Sastri assumes that they may form a united family. On the other hand, Macnaghten, 1 H. L. 18, seems to rank the illegitimate as a co-heir only with a daughter's son, though he recognises his right to a half share where there are legitimate sons. In Bengal it has been said by Mitter, J., in *Narain Dhara* v. *Rakhal Gain* (*c*) that only the son of a Sudra by his (unmarried) female slave has any right of inheritance, and the Mitakshara, Chap. I., sec. 12, is cited in support of this doctrine. A kept woman is for this purpose, however, regarded as a slave. (See Datt. Mimam, sec. 4, pl. 76; Steele, L. C. 41; 2 Str. H. L. 68). In the case of *Rahi* v. *Govind* (*d*) the position of the illegitimate son is learnedly discussed, but not with reference to this particular question.

Q. 13.—A Sudra who held a Patilki Watan died. He had a daughter by his "Lagna" wife and a son by his kept woman. Which of these is the heir?

A.—The property of the deceased should be divided between the daughter and the illegitimate son in the proportion of two-thirds to the daughter and one-third to the son.

Poona, September 4th, 1852.

AUTHORITY.—Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1; Stokes's H. L. B., p. 426).

(*b*) 2 M. H. C. R. 196.
(*c*) I. L. R. 1 Cal. 1, 5.

Q. 14.—A Rajput brought a woman into his house. It is not known whether she was legally married to him or not, either by way of "Lagna" or "Pat." She has two sons and a daughter. The Rajput and she quarrelled, the consequence of which was that she was allowed to live separately from him, he continuing to support her. He subsequently brought another woman into his house. It cannot be ascertained whether this woman either was married to him or not. He had three sons and a daughter by this woman. Some people say that up to the time of his death he expressed his will that the property should be given to one of the sons of the first woman, but the others affirm that his last wish was to give the whole property to all the sons of the second woman. Who should be considered the heir in such a case?

A.—Two slave women of the Sudra caste have equal rights, and when both of them have sons the property should be equally divided among the sons and mothers. If the woman first kept by the deceased was, together with her sons, dismissed by him owing to suspicion regarding her character, she cannot claim any share of the property. The second woman and her sons should be treated as heirs.

Ahmednuggur, February 21*st*, 1847.

Authorities.—(1) Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (2) f. 5, p. 1, l. 5; (3) f. 51, p. 1, l. 3 and 7; (4*) Viramitrodaya, f. 172, p. 2, l. 13:

"But when the father divides his estate during his lifetime he ought not to give a greater share to one of his sons, nor should he disinherit any one of them without sufficient reason." (See the Commentary below, Book II., Chap. I., sec. 2, Q. 5.)

Remarks.—1. The two kept women themselves have no right to inherit from the deceased, but can only claim maintenance. See Q. 4.

2. Their sons inherit equally after the father's death, but only in case he was a Sudra. See Q. 1 and 2.

3. There is no passage in the law books which proves that a concubine's sons lose their rights on account of their mother having connection with other men than their father after their birth.

4. In case the deceased was a Sudra, he had no right so to bestow his property as to exclude any of his sons from the inheritance if they were not disabled to inherit by "physical or moral defects." Auth. 4. See also Chap. VI.

(*d*) I. L. R. 1 Bom. 97.

Q. 15.—A Sudra has a grandson, the son of his legitimate son. He has also an illegitimate son. The Sudra, when he was alive, bestowed a house and some other property on the illegitimate son. Should this be considered a legal gift?

A.—A father may allow his illegitimate son a share equal to that which he assigns to his legitimate son. If the partition takes place after the father's death the illegitimate son can claim only one-half of that which the legitimate son receives. This is the established rule of the Sastra. The illegitimate son, therefore, should be allowed to enjoy whatever his father may have bestowed upon him.

Khandesh, September 24th, 1852.

AUTHORITY.—Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

REMARK.—The gift will, however, be valid only if the illegitimate son has not received more than the legitimate son's child did.

Q. 16.—A Patil adopted a son. Afterwards a son was born to him by a wife who had been married before he married her. Which of these will be his heir? If after he had adopted a son a son was born to him by his wife who was a virgin when he married her, which of the two sons will be his heir?

A.—The son of her who was a virgin when the Patil married her has a greater right than the adopted son, and the adopted son a greater right than he who was born of a twice-married mother.

Dharwar, December 3rd, 1858.

AUTHORITIES.—(1) Mit. Vyav., f. 53, p. 2, l. 6; (2*) f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (3*) Vyav. May., p. 108, l. 2 (see Chap. II., sec. 2, Q. 15); (4*) p. 112, l. 2:

"From this text of Vasishtha: When a son has been adopted, if a legitimate son be afterwards born the given son takes a fourth part (of a share)." Borradaile, p. 76; Stokes's H. L. B. 66.

REMARKS.—1. If the deceased was a Sudra his son begotten on a Punarbhu (twice-married woman) will, according to the Hindu Law, inherit one-half of a son's share (see Auth. 2), since a second marriage is null, and the offspring consequently illegitimate, according to the Sastras. Manu, V. 162, says: "Nor is a second husband allowed to a virtuous woman." She must not "even pronounce the name of another man," *ibid.* 157. According to Manu IX. 65, "Nor is the marriage of a widow even named in the laws."

To the same effect are the passages in the General Notes I. and VI. That a re-marriage is not allowed by the Mitakshara is stated by Colebrooke, 2 Strange, H. L. 399; and Strange himself pronounces against its legality, 1 Strange, H. L. 242. The Nirnayasindhu, quoted beneath (Chap. II., sec. 8, Q. 6), declares that the re-marriage of a once-married woman is not allowed. The Viramitrodaya quotes the Adipuran to the effect that the re-marriage of a woman once married is, along with the killing of kine, the partition with specific deductions, and the niyoga, disallowed in the present (Kaliyuga) age (*e*).

But that re-marriages, though disapproved, were practised at the time of the composition of Manu's Code is plain from Manu IX. 175, 176. A woman thus associating with a second husband is distinguished by Yajnavalkya (I. 68) from the *svairini* who deserts her husband and cohabits adulterously with another man. The son of the twice-married woman was, indeed, under the older law assigned a place in the scale of sons above that of the adopted son (Yajn. II. 129 ss, cited in Mit., Chap. I., sec. 11, pl. 1); but re-marriage having become illegal amongst the higher castes, the illegitimacy of the offspring followed, until legislation restored the widow's capacity. Amongst the lower castes the re-marriage of widows and divorced wives has always been common. The Sastri, in answer to Q. 37 of sec. 4, has even said that the Sastris sanction a "Pat" marriage. This is contradicted in the next answer, but caste custom might itself be regarded as approved by the Sastras according to the often-repeated formula (Manu VIII. 41), and on this ground probably it has been recognised in most cases, as may be seen in sec. 6 B below. In Ch. IV. B, sec. 4, there is a case in which the Sastri pronounces a woman's son by her first marriage heir to the property which she had inherited from her second husband. The children by a "Pat" marriage are generally regarded as legitimate, where the marriage is allowed. (See Steele's Law of Caste, 169. See also Manu V. 162, 157; IV. 175, 176; General note at the end of translation of Manu, I. and VI.)

2. By Act XV. of 1856 the son of a Punarbhu is legitimised by the sanction given to the second marriage of his mother. The offspring of an adulterous intercourse, even amongst Sudras, has no right of inheritance. See *Datti Parisi Nayudu et al.* v. *Datti Bangaru Nayudu et al.* (*f*) and the case of *Rahi* v. *Govind* (*g*) in which the law is fully discussed; see also *Viramuthi Udayana* v. *Singaravelu* (*h*); see, too, *Narayan Bharthi* v. *Laving Bharthi* (*i*). The same cases, however, show that the illegitimate son is in all cases entitled to maintenance. Nor has the offspring of an incestuous intercourse between a father-in-law and daughter-in-law any rights of inheritance (*k*).

3. If legitimate sons are born to a man after he has adopted a son, the adopted son inherits a fourth of a son's share on the demise of the father (Auth. 3).

(*e*) Tr. p. 61.
(*f*) 4 M. H. C. R. 204.
(*g*) I. L. R. 1 Bom. 97.
(*h*) I. L. R. 1 Mad. 306.
(*i*) I. L. R. 2 Bom. 140.
(*k*) 4 M. H. C. R. 204, *supra*.

Q. 17.—A decased person has some relations who are separate in interest. He has also a daughter by his "Lagna" wife, and a son by his "Pat" wife. Who will be the heir of the deceased?

A.—The relations, whose interests are separate, have no title whatever. The daughter and the son should be allowed equal shares of the property.

Dharwar, 1846.

AUTHORITY.—*Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

REMARKS.—1. According to the Hindu law, apart from customary exceptions, the son of a Punarbhu (re-married widow) is illegitimate, and consequently inherits, if there be living legitimate issue of his father, half a share. See Katyayana in Smriti Chandrika, Chap. V., p 10; 2 Str. H. L. 68, 70; Col. Dig., Book V., Text 174.

2. Regarding the legislation of widows' re-marriages, see Q. 16.

3. Children by "Pat" are equally legitimate with those by marriage, according to Col. Briggs, Steele, 169. See *infra*, Chap. II., sec. 8, Q. 6.

Q. 18.—A man married a woman who had been previously married, and by her had a son. At his death can the son of such a wife inherit his immovable property?

A.—If a man died leaving neither son nor daughter by the wife whom he married as a virgin, nor the son of such a daughter, the son of the previously married wife will succeed to his immovable property.

Dharwar, July 26*th*, 1850.

AUTHORITY.—Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

REMARKS.—1. This stamps him as illegitimate in the opinion of the Sastri; and Ballambhatta, commenting on Mit., Chap. II., sec. 1, p. 28, speaks of twice-married women and others not considered as wives espoused in lawful wedlock.

2. According to the Hindu Law the son, being illegitimate, will succeed only in case the deceased was a Sudra. See 2 Str. H. L. 65, 68.

3. Regarding the legalisation of the marriage of a Hindu widow, see Act XV. of 1856. See also Q. 16.

SECTION 4.

GRANDSONS.—LEGITIMATE, NATURAL OR ADOPTED.

Q. 1.—A man's son died, leaving a son. The man himself also died afterwards, leaving a widow. The question is whether the widow or the grandson is the heir? If the widow is the heir, another question is whether she can dispose of the property during the lifetime of her grandson?

A.—A grandson has an unquestionable right to the property of the grandfather. This right is termed in law the "Apratibandha daya." As there is a grandson, the widow cannot claim the property of her husband, and she has no right to sell it.

Surat, June 5th, 1857.

Authorities.—(1) Mit. Vyav., f. 44, p. 2, l. 13 :

"The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction." (Colebrooke, Mit., p. 242; Stokes's H. L. B. 365.)

(2) Mit. Vyav., f. 50, p. 1, l. 7.

Q. 2.—A father-in-law caused his daughter-in-law to adopt a son, and afterwards he died. Who should be considered the heir of the deceased, the adopted grandson or the widow?

A.—The adopted grandson.

Tanna, November 15th, 1851.

Authorities.—(1) Mit. Vyav., f. 50, p. 1, l. 7 :

"For the ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody, or in chattels (which belonged to him)." (Colebrooke, Mit., p. 277; Stokes's H. L. B. 391.)

(2) Mit. Vyav., f. 53, p. 2, l. 6; (3) Manu IX. 141.

Remark.—A great-grandson in the male line precedes a daughter's son, *Gooroogobindo* v. *Hureemadhab* (*l*).

(*l*) I. Marsh. 398.

SECTION 5.

ILLEGITIMATE SONS' SONS.

Q. 1.—A man of the Sudra caste has a daughter, a separated nephew, and a grandson who is son of his illegitimate son. Which of these is the heir?

A.—The daughter will have one-half, and the other half should be given to the illegitimate grandson. The separated nephew is not entitled to anything at all.

Ahmednuggur, September 11th, 1849.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (2*) f. 44, p. 2, l. 13 (see Chap. II., sec. 4, Q. 1).

REMARK.—The grandson inherits the half of a share to which his father was entitled.

SECTION 6.—WIDOW (*m*).

A.—MARRIED AS A VIRGIN.

Q. 1.—A man who used to receive from Government an allowance called "Toda Gras," died without issue. He has left a widow. Should the allowance be paid to her as it was paid to her husband? Can she claim any property in addition to the Pallu or Stridhan which she may have received at the time of her marriage?

A.—When the deceased man is a separated member of a family, and when he has left no children, his widow will be the heir to his property. If she has received any Stridhana or Pallu on the occasion of her marriage, it cannot be considered a part of her husband's property. It is a separate and peculiar property, and its possession can form no obstacle to any right of receiving a share in her husband's property.

Surat, February 26th, 1848.

(*m*) The Smriti Chandrika, Chap. XII., para. 31, relying on a passage of Sankha (see Daya-Bhaga, Chap. XI., sec. 1, para. 15), places the widow of a reunited coparcener after the brother, father, and mother. The Vyav. May., Chap. IV., sec. 9, p. 24, adopts the same construction, but in this case it follows Madan in giving to the mother precedence over the father. These rules seem to be arbitrary. Brihaspati (Smriti Chan., Chap. XII., sec. 5, para. 38), quoted on the same subject, places the widow next after the children.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remark.—See *Pranjiwandass* v. *Devkuvarbai* (*n*) and the Introduction, sec. 3 B (4), and sec. 11, pp. 88, 299, 295.

As to payment of debts to the widow empowered or directed to adopt, see *Bamundass* v. *Musst. Tarinee* (*o*), and for the case of a widow, the real heir, and another person holding a certificate of administration, see *Purshotam* v. *Ranchhod* (*p*).

That a widow represents the estate as between her successors and strangers, see above, p 88, and *Nand Kubar* v. *Radha Kuari* (*q*).

A money decree having been obtained against a man and executed against his widow as his representative, it was held that after the widow's death the daughter could not recover the property sold in execution from the purchaser (*r*).

The presumptive heir cannot maintain a suit for a declaration of his right. See *Greeman Singh* v. *Wahari Lall Singh* (*s*), where it is said that the Specific Relief Act (I. of 1877), § 42, makes no difference, as it refers only to vested rights.

A widow's refusal to adopt, according to her husband's directions, is no ground of forfeiture of her rights of inheritance. *Uma Sunduri Dabee* v. *Sourobinee Dabee*, I. L. R. 7 Cal. 288.

In Gujarath caste custom in some cases gives the mother precedence over the widow, as *ex. gr.* in the cases in Borr. C. Rules, MS. Book G, Sheets 42, 50. See above, p. 152.

Careful provision is made by the rules of most of the castes in Gujerath for securing at marriage the Pallu of the bride, whether consisting of gifts from her own family or from her husband.

As to a family custom of excluding childless widows from inheritance differing from the general custom of the country, see *Russic Lal Bhunj et al.* v. *Purush Munee*, 3 Mor. Dig. 188, and note 2 (*t*).

Q. 2.—Four brothers became separate. The youngest of them was a minor. The eldest brother therefore took charge of the minor's share. The minor subsequently died, leaving a widow. can she claim her husband's share? The minor has passed an

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(*n*) 1 Bom. H. C. R. 130.

(*o*) 7 M. I. A. 169.

(*p*) 8 Bom. H. C. R. 152, A. C. J.

(*q*) I. L. R. 1 All. 282.

(*r*) *Hari Vydianathayanna* v. *Minakshi Ammal*, I. L. R. 5 Mad. 5, referring to *The General Manager of the Raj Durbhunga* v. *Maharaja Coomar Ramaput Singh*, 14 M. I. A. 605, and *Isham Chunder Mitter* v. *Buksh Ali Soudagur*, Marsh. R. 614. In a note to the report reference is made to *Zalem Roy* v. *Dal Shahee*, *ibid.* 167.

(*s*) I. L. R. 8 Cal. 12.

(*t*) With this may be compared the privilege allowed to the noble class in Germany of making special laws by a family compact.

agreement to the eldest brother that he (the eldest brother) should take charge of his, the minor's share, whenever he should live separate from him. Does this operate in any way against the right of the widow?

A.—The share of the minor was set apart, and his widow is therefore entitled to it. The minor must be considered as separated, though he chose to live with his eldest brother.

Dharwar, August 28th, 1855.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—A wife is, under the Hindu Law, in a subordinate sense, a co-owner with her husband; he cannot alienate his property or dispose of it by will in such a wholesale manner as to deprive her of maintenance. Held, therefore, where a husband in his lifetime made a gift of his entire estate, leaving his widow without maintenance, that the donee took and held such estate subject to her maintenance (*v*).

Q. 3.—A woman's husband and father-in-law are dead. She has possession of their property. Should her right of inheritance be recognised?

A.—Yes.

Dharwar, 1845.

AUTHORITY.—*Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—The widow inherits under the text quoted above, only in case her father-in-law died before her husband. Regarding the other alternative, see Chap. II., sec. 14, and above, p. 116.

Q. 4.—A man died. His proprety is in the possession of another man. The deceased has left a widow and a daughter. The former has filed a suit for the recovery of the property, omitting the name of the latter. Can she alone claim the property?

A.—The widow has the right to the property of her husband.

(*v*) *Jamna* v. *Machul Sahee*, I. L. R. 2 All. 315. See also *Narbadabai* v. *Mahadeo Narayan*, I. L. R. 5 Bom. 99. Comp. above, p. 205.

She can therefore claim it on her own account, omitting the name of her daughter.

Surat, January 24th, 1853.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 5.—A man named Bhagavandas Devakar, separated from his brother. He received his share of the landed property and had his name registered in the records of Government as the owner of it. On his death his wife, named Amrita, got her name registered in the records of Government as the owner of the land. She then leased $8\frac{3}{4}$ bigas of land to her nephew, Khushal Raghunatha. He accordingly obtained possession of the land. He subsequently set up a claim to the land, alleging that it was in his possession because he was the nephew of Bhagavandas. The widow, Amrita, wishes to recover the land from her nephew. Can she do so?

A.—The widow of the deceased Bhagavandas has a right to the land. Her nephew cannot claim it. Amrita may recover it from him.

Broach, September 8th, 1855.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 6.—There were four brothers. They divided their ancestral property among them and separated. Afterwards one of the brothers died. His property passed into the hands of his widow. A brother of the deceased has filed a suit against the widow, and wishes to impose the following conditions upon her: That she should not dispose of or waste the property in her possession, and that if she desires to have a maintenance settled upon her she should give up all her property in consideration of an allowance. What are the rules of the Sastra on the subject?

A.—If the brothers had not separated the widow would have been entitled to a maintenance only. The husband of the widow having separated, before his death, from his brother who has filed the suit against the widow, his widow is the heir. The brother cannot claim the right of inheritance. The widow cannot dispose

of her immovable property unless she be placed under a great necessity.

Rutnagherry, January 11th, 1848.

AUTHORITIES.—(1) Vyav. May., p. 136, l. 4; (2) p. 135, l. 2:

"As for this text of Katyayana: After the death of her husband the widow, preserving (the honour) of the family, shall obtain the share of her husband so long as she lives; but she has no property (therein to the extent of) gift, mortgage, or sale; it is a prohibition of a gift of money, or the like, to the Vandi (*w*), Charana (*x*), and the like (swindlers). But a gift for religious objects (not visible, that is, the attainment of spiritual benefits), and mortgage or the like, suitable (that is, with a view) to those objects may be even made." (Borradaile, p. 101; Stokes's H. L. B. 84).

(3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—See above, p. 285. A Hindu widow must, if she can, pay a debt of her deceased husband even though barred by limitation. She is justified in aliening part of the estate for this purpose; *Bahala Nana* v. *Parbhu Hari* (*y*). A widow's needless alienation will subsist during her own life. *Pragdas* v. *Harikishen* (*z*).

At Allahabad it has lately been said that a widow's power of alienation for spiritual purposes is limited to those by which her husband, as distinguished from herself, will benefit (*a*). For this reference is made to *The Collector of Masulipatam* v. *Cavaly Vencata Narrainappah* (*b*). In Bombay her right, though limited, is not so narrowly restricted by the Vyav. Mayukha, Chap. IV., sec. VIII., para. 4; and the Courts have allowed her a reasonable liberty of disposal for pious objects (*c*).

In *Kameshwar Pershad* v. *Run Bahadur Singh* (*d*) the Judicial Committee says the principle laid down in *Hunooman Persaud* v. *Mt. Babooee Munraji* is applicable to: (a) alienation by a widow of her estate of inheritance; (b) transactions in which a father, in derogation of the rights of his son, under the Mit. law has made an alienation of ancestral family estate.

Q. 7.—Two persons, A. and B., inherited a house in equal shares from a common relation. A. then mortgaged his share of the house, and died. After his death B. redeemed the mortgage and transferred the whole house to his creditor as security for a

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(*w*) A Vandi is a wandering minstrel (Bhata).

(*x*) Charana, a juggler (Kolambi).

(*y*) I. L. R. 2 Bom. 67.

(*z*) I. L. R. 1 All. 503.

(*a*) *Puran Dai* v. *Jai Narain*, I. L. R. 4 All. 482.

(*b*) 8 M. I. A. 520.

(*c*) See above, pp. 91, 285.

(*d*) I. L. R. 6 Cal. 843; S. C. L. R. 8 I. A. 8.

debt. After some time B. paid off this debt and regained possession of the house. C., the widow of A., then demanded her husband's share of the house from B., who objected to give it up on the ground that he had paid off the debt with which A. had left the house, and on the ground that C. had for many years lived separate from her husband A. C. has made over her share of the house to a person in consideration of money advanced by him for her support. She has no male issue. Is she, under these circumstances, entitled to recover a half of the house from B.?

A.—C.'s husband was possessed of one-half of the house which he mortgaged. When B. redeemed A.'s half of the house C. did not object to his doing so. Her present claim, therefore, is inadmissible. If her conduct is good, and if she was abandoned by her husband, and if she is desirous of recovering her husband's share of the house, she must pay to B. whatever he has paid on account of the half of the house, with interest. According to the Sastras C. has no right to make over the half of the house, even for her own maintenance, without paying her husband's debts (*e*). C.'s right of inheritance cannot be set aside during her lifetime, even though B. may have performed the funeral rites of the deceased A.

Ahmednuggur, July 9th, 1847.

Authorities.—(1) Mit. Vyav., f. 20, p. 1, l. 2; (2) f. 20, p. 2, l. 11; (3) f. 45, p. 1, l. 5; (4) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (5) f. 55, p. 2, l. 8; (6) f. 69, p. 1, l. 15; (7) f. 12, p. 2, l. 14; (8) f. 20, p. 2, l. 11:

"He who takes the inheritance must be made to pay the debts (of the person from whom he inherits)." (Stokes's H. L. B. 56) (*f*).

(9) Vyav. May., p. 183, l. 8.

Remarks.—1. If the house was divided the widow inherits her husband's share. See Authority 4.

2. Her silence at the time when her brother-in-law paid off the mortgage does not affect her rights, according to the Mitakshara.

3. She will have to refund the money which her brother-in-law paid.

(*e*) So in *Lakshman* v. *Satyabhamabai*, I. L. R. 2 Bom. 499, per Sir M. R. Westropp, C. J.

(*f*) See *supra*, p. 245, and *infra*, Book II., sec. 7 A. 1 *a* (2). By the 11th Article of Magna Charta the widow's dower was freed from chargeability for the husband's debts, the payment of which out of his estate is further postponed to the maintenance of minor children according to the father's condition, and to the fulfilment of the service or terms on which the property was held by the deceased. The dower was looked on as secured by a contract prior to the debts, giving to the widow an independent interest in the

Q. 8.—An Inamdar died without male issue. Is the Inam land which he held continuable to his widow according to the Hindu law? If a Hindu should die without a son, leaving descendants only through his daughter, will his private property fall to them, or to his other relations, or to his widow? Are the rules on these subjects applicable to all castes?

A.—If a man dies without male issue, and if he is not a member of an undivided or reunited family, his faithful wife becomes his heir. The property of a deceased person will fall first to the widow, and when there is no widow to the deceased's daughter. The widow has a preferable claim to all other relatives. These rules are applicable to all castes of the Hindus.

Poona, October 6th, 1849.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—There are no special rules about Inam-land in the Hindu Law Books. The Privy Council, in *Bodhrav Hanmant* v. *Narsingrav* (*g*) held that Inam villages granted to a man and his male heirs are not distinguishable, according to the law of the Southern Maratha Country, from ordinary ancestral estate, and are divisible amongst the grantee's heirs. See below, sec. 13, Q. 10, as to the construction of grants. The same was held as to a desgat watan, in *Kadapa* v. *Adrashyapa* (*h*), and that a vritti or hereditary office is generally partible. See Steele, L. C., p. 41.

2. The inamdar in relation to the tenants of the property may occupy the position of a complete proprietor, or of a mere alienee of the land tax, or of a grantee of a lordship over mirasdars holding rights of permanent occupancy subject only to reasonable rates or rents. And in different parts of his manor he may have different rights under the same grant or prescriptive title, owing to the existence of rights (as to hold at an invariable rent) known or presumed to have been prior in origin to his own (*i*).

3. The Vatandar Joshi (astrologer holding an hereditary office) of a village

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husband's lands. Under the Mohammedan Law the doweress ranks *pari passu*, it is said, with other creditors; see *Mir Mahar Ali* v. *Amani*, 2 Ben. L. R. 307, and *Musst Bebee Bachun* v. *Sheikh Hamid Hossein*, 14 M. I. A. 377. She has not a special lien constituting an interest in immovable property; *Mahabubi* v. *Amina*, Bom. H. C. P. J. F. for 1873, p. 34. A Jewess claiming under a deed was preferred to subsequent creditors in *Sookhal* v. *Musst. Raheema*, 2 Borr. R. 687.

(*g*) 6 M. I. A. 426.

(*h*) R. A. No. 30 of 1874; Bom. H. C. P. J. F. for 1875, p. 182.

(*i*) *Prataprav Gujar* v. *Bayaji Namaji*, I. L. R. 3 Bom. 141, referring to *Lakshman* v. *Ganpatrav*, Special Appeal No. 344 of 1876, and *Vishnubhat* v. *Babaji*, Bom. H. C. P. J. 1877, p. 146. (At p. 142 of the Report the last case is twice mentioned by mistake for the former.) See also *Parshotam Keshavadas* v. *Kalyan Rayji*, I. L. R. 3 Bom. 348.

may recover damages from an intruder who usurps his functions and takes his fees. This is so even though the fees be not precisely fixed in amount, provided only that some reasonable fees must be paid by those entitled to the Joshi's ministrations (*k*). The presumption is that a Vatandar Joshi is entitled to officiate in the case of any particular family; but though damages may be awarded for an intrusion, an injunction will not be granted such as to prevent a family from using the services of a rival functionary. The position of a village priest or astrologer being thus recognised as one of public interest to the Hindu community, the holder of it can of course be constrained, if necessary, to perform the duties of it when properly called on. In the case of religious or charitable trusts, too, any devotees or beneficiaries may take proceedings for enforcing the duties resting on the incumbent or the trustees, subject to the consent of the Advocate-General or his substitute (usually the Collector of the district), under sec. 539 of the Code of Civil Procedure (*l*).

4. In *Narain Khootia* v. *Lokenath Khootia* (*m*) it was apparently held by the Deputy Commissioner that a religious grant made by a former Maharaja of Chhota Nagpore could be resumed at will by his successor in the exercise of a royal or quasi-royal authority. The resumption of grants by native rulers was very common, as Sir T. Munro shows (*n*), though not of religious grants in Western India (*o*). The decree of the Deputy Commissioner, however, was reversed by the High Court of Calcutta on the ground that impartibility of the raj did not make it inalienable as to gra s of land in perpetuity. (See above, pp. 154, 185, 191.)

Q. 9.—A man of the Burud caste (*p*) had received a house as a mortgage before his death. He lived separate from his father. Should the house be made over to his widow or his father?

A.—Whatever was gained by the man without making use of his father's property will pass to his widow. If the father and his sons are not separate, then the common property will pass into the hands of the father.

Ahmednuggur, August 21*st*, 1848.

Authorities.—(1) Vyav. May., p. 134, l. 4 & 6 (see Auth. 4); (2) p. 136, l. 4; (3*) p. 153, l. 2 (see Chap. I., sec. 2, Q. 1); (4*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remark.—Regarding the definition of "separately acquired property," see Partition, Book II.

(*k*) *Vithal Krishna Joshi* v. *Anant Ramchander*, 11 Bom. H. C. R. 6, quoting *Sitarambhat* v. *Sitaram Ganesh*, 6 Bom. H. C. R. 250, A. C. J.; *Raja valad Shevappa* v. *Krishnabhat*, I. L. R. 3 Bom. 232.

(*l*) See *Radhabai* v. *Chimnaji*, I. L. R. 3 Bom. 27.

(*m*) I. L. R. 7 Cal. 461.

(*n*) Sir T. Munro, by Sir A. Arbuthnot, Vol. I., pp. 152, 154.

(*o*) *The Collector of Thana* v. *Hari Shitaram*, I. L. R. 6 Bom. 546; Elph. Hist. of Ind., Book II., Chap. II., pp. 75, 78 (3rd edition).

(*p*) The Buruds are basket-makers.

Q. 10.—Has the father or the widow of a deceased person a preferable title to succeed to his property?

A.—If the deceased lived separately from his father his widow is his heir; but if he had not separated his father will succeed.

Poona, June 5th, 1846.

AUTHORITY.—*Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—But the wife inherits also property which the deceased may have acquired separately. See the preceding question.

Q. 11.—Two brothers separated. One of them and his son, after separation, died. Does the property of the deceased pass by right to his daughter-in-law or the surviving brother? If it goes to the latter, can the former have a claim to maintenance?

A. Should the daughter-in-law be a woman of good character she will succeed to her husband's, and consequently to her father-in-law's estate. If she be not a woman of good character her father-in-law's brother takes the whole property of his deceased brother, and gives his daughter-in-law a reasonable sum for maintenance.

Ahmednugugr, September 7th, 1848.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) Vyav. May., p. 134, l. 4 (see Auth. 1); (3) p. 133, l. 2; (4) p. 134, l. 6; (5) p. 137; l. 3; (6) p. 136, l. 7; (7*) p. 133, l. 7 :

. . . by reason of this text of Katyayana: "Let the widow succeed to her husband's estate provided she be chaste; and in default of her the daughter inherits, if unmarried."

"Among the married ones, when some are possessed of (other wealth) and others are destitute of any, these (last) even will obtain the estate." (Borradaile, p. 103; Stokes's H. L. B. 86.)

REMARK.—The daughter-in-law will inherit only if her father-in-law died before her husband. If she be unchaste her issue next inherit in her stead, and, on failure of issue, the father-in-law's brother. See below, Book I., Chap. VI., sec. 3.

Q. 12.—Two uterine brothers lived as an undivided family. One of them died, leaving a widow. Afterwards the other also died, leaving a widow. Can both these widows inherit the property of their respective husbands?

A.—As the property was acquired by the ancestors of the deceased man, and as the family was undivided, the widows can

inherit the shares of the property belonging to their respective husbands.

Surat, March 31*st*, 1845.

Authority not quoted.

REMARK.—The widow of the brother who died last inherits; the other has a claim to maintenance. See the next Question, and the Authorities there quoted.

Q. 13.—Two brothers are either united or separated in interests. When one of them or both die will their widows be entitled to their property?

A.—If the family was united in interests the property of a deceased brother falls to the surviving brother. Upon the death of the latter his wife becomes his heir. The wife of the one who died first is only entitled to a maintenance. If the brothers were separated before their death their wives inherit the property of their respective husbands.

Tanna, December 11*th*, 1858.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) Vyav. May., p. 136, l. 4 (see Chap. I., sec. 2, Q. 11).

Q. 14.—Two Hindu brothers lived together. The elder of them died, leaving a widow. The younger also died, leaving a widow. The qustion is whether the widow of the brother who died first or the widow of him who died afterwards should be considered the heir?

The widow of the younger brother is a minor, and there are her sister-in-law and mother. Which of these will be her guardian?

A.—The widow of the last deceased brother is the heir. The mother has the right to be the guardian of the widow of the younger brother, who is a minor.

Surat, October 22*nd*, 1857.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) f. 12, p. 1, l. 4; (3*) Viramitrodaya, f. 194, p. 2, l. 4:

"And thus Narada says: After the death of the husband (the nearest relation belonging to) his family has power over his childless wife; such a person is competent to appoint her (to a kinsman), to protect and support her. If the

husband's family is extinct, no male, no supporter has been left, and no Sapinda relations (of the husband) remain, in that case (the nearst relation) belonging to the widow's father's family has power over her."

REMARK.—According to the passage quoted under Auth. 3, it would seem that the sister-in-law, as belonging to the family of the widow's husband, has a better right to the guardianship than the widow's mother.

Q. 15.—A man died and left two sons. The elder of these died and left a widow. Afterwards the younger brother also died and left a widow. The two brothers had been undivided. They have left no children. Which of the two widows inherits the ancestral property?

A.—The two widows have equal rights to the property, because they stand in equal relationship to the original head of the family (their father-in-law).

Surat, June 18*th*, 1852.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 140, l. 1; (3*) p. 136, l. 4 (see Chap. I., sec. 2, Q. 11); (4*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—As the family is undivided the younger brother inherits his elder brother's share, and at his death his widow is his heir. The elder brother's widow has only a claim to maintenance.

Q. 16.—A person died, leaving certain movable and immovable property. His widow and brother claim to be his heirs. Who shall receive the certificate of heirship?

A.—If the deceased was a separated member of the family his widow is entitled to a certificate of heirship. If he was not separated his widow has not a right of inheritance (*q*).

Rutnagiri, 1847.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) Vyav. May., p. 136, l. 4 (see Chap. I., sec. 2, Q. 11).

(*q*) A childless Hindu widow who has succeeded to her deceased husband's separate share of a Mahal and is recorded as a cosharer, is entitled under Act XIX of 1873 to a perfect partition of her share. *Jhunna Kuar* v. *Chain Sukh*, I. L. R. 3 All. 400.

Q. 17.—Two brothers lived separately in the house which was purchased in their names with the money of their father. One of the brothers died. The question is whether the deceased's share should be given to his father, brother, or widow?

A.—The house was bought with the father's money. The transaction was concluded in the names of his two sons. The deed of sale mentions their names. They lived in the house separately. This circumstance shows that they are separated brothers. The question does not state that they were [un]divided in interests nor that the father had given them the house in gift. From this omission it may be inferred that the brothers were separated. The portion of the house which belonged to each of the separated brothers becomes, on his death, the property of his wife.

Surat, January 20*th*, 1855.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

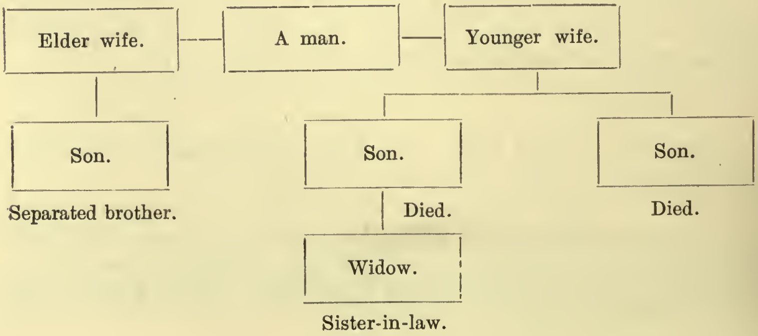
REMARK.—The passage quoted refers only to the right of the widow to inherit in case her husband has separated from the family.

Q. 18.—A man died leaving two wives. The elder wife died leaving one son, and the younger died leaving two sons. The son of the elder wife had separated from the other two. The two uterine brothers died. The elder of these has left a widow. Besides this widow there is the separated half-brother. The question is, which of them is the heir of the last-deceased brother?

A.—The sister-in-law of the deceased, having lived with him as a member of an undivided family, is his heir.

Dharwar, August 17*th*, 1854.

The following is the genealogical table showing the family spoken of in the question:



AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3).

REMARK.—If, of the two undivided uterine brothers, the married one dies first, his brother will inherit from him (see Auth. 2); and after his death the half-brother will succeed. The widow will then be entitled to claim maintenance only. If the married brother died last his widow inherits from him.

Q. 19.—A man, his wife, his son, and his son's wife lived together as an undivided family. The man died first, and his death was followed by that of his son. Can the son's wife claim from her mother-in-law a half of the family property as her share?

A.—If the family is undivided the mother-in-law becomes the heir of her deceased son, and in such a case the possession of the property by the mother-in-law need not be disturbed. If the family is divided the daughter-in-law is the heir.

Poona, February 5th, 1858.

AUTHORITIES.—(1) Mit. Vyav., f. 50, p. 1, l. 7; (2*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—If the father died before his son the daughter-in-law is the legal heir, since her husband inherited from his father, and she is, on failure of issue, the nearest heir to her husband. If, on the contrary, the son died before his father, the mother-in-law inherits the family property from the latter. See the next question. The preference of the mother to the widow by some caste-laws has been noticed above, Q. 1.

Q. 20.—A man died, leaving a widow; subsequently his son also died, leaving a widow. The daughter-in-law sued her mother-in-law for the ancestral property. Can she do so?

A.—In default of male issue a man's widow is his heir. The daughter-in-law, therefore, has rightly sued her mother-in-law.

Tanna, February 14th, 1852.

AUTHORITIES.—(1) Mit. Vyav., f. 50, p. 1, l. 7; (2*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (3) Viramitrodaya, f. 195, p. 2, l. 4 (see Auth. 2); (4*) Manu IX. 185 (see Chap. II., sec. 1, Q. 1).

Q. 21.—A man died without issue, leaving a widow and mother. The deceased's property consists of an ancestral house. It is in the occupation of the widow and the mother. Are both heirs, or, if only one, which of them is heir of the deceased?

A.—If the deceased was separate and had received his share of the family property, his widow inherits his property. If the deceased was not separate both his mother and widow are his heirs. If the wife conducts herself virtuously, supports and serves her mother-in-law, she will have the better right of the two to inherit the property; but if the wife does not behave in this manner the right of the mother will be superior.

Ahmedabad, September 12th, 1851.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 6 :

"Let the widow succeed to her husband's wealth, provided she be chaste." (Borradaile, p. 100; Stokes's H. L. B. 84.)

(2) Vyav. May., p. 136, l. 7; (3) p. 136, l. 4 (see Chap. I., sec. 2, Q. 11).

REMARKS.—1. If the deceased was separate, the widow is his heir.

2. If he was undivided, and male members of the family are alive, she can only claim maintenance.

3. The mother has in either case only a claim to maintenance.

Q. 22.—A widow adopted a son, who died after his marriage. The questions are: Who will be his heir, his adoptive mother or his widow? Which of the two can adopt a son, and if each of them adopt a son how shall the property be divided between the sons?

A.—The deceased, though adopted by the widow, became heir of her husband. On his death his widow is the last heir. She therefore has the right to adopt a son, and her adopted son can perform the funeral rites for his mother as well as for his grandmother. The mother-in-law therefore cannot, unless there is a good reason for it, adopt a son.

Sadr Adalat, April 12th, 1850.

AUTHORITIES.—(1*) Manu IX. 141 (see Auth. 2); (2*) Datt. Mim., p. 36, l. 10 (see Chap. II., sec. 2, Q. 3); (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 23.—There are a daughter-in-law and her mother-in-law. The husband of the former died, and the question is: Who should collect the debts due to him?

A.—It is enjoined in the Sastra that the property of a person who died without issue, and who had declared himself separate from the other members of he family, goes to the widow, and that

the property of a person who died without issue, but had not declared himself separate, goes to his mother. In the case under reference the debt should be recovered by the mother-in-law.

Rutnagiri, October 14th, 1847.

Authorities.—(1) Vyav. May., p. 136, l. 4 (see Chap. I., sec. 2, Q. 11); (2) Mit. Vyav., f. 51, p. 2, l. 5; (3*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (4) Manu IX. 217.

Remark.—The widow of the last deceased member of an undivided family inherits in preference to the widows of all pre-deceased members. (See Questions 18, 19, and 24.)

Q. 24.—A man died leaving a widow and mother. The widow is a minor of about eight years. The mother declared herself to be the heir, and took charge of the banking business of the deceased. The question is whether the mother or the widow has right to the man's property?

A.—When a man has separated from other members of his family his wife alone has a right to inherit his property after his death. As, however, the deceased had not separated from his parents, his mother has rightly assumed the possession of his property. On the death of the mother-in-law her daughter-in-law will succeed her as heir.

Ahmedabad, March 26th, 1850.

Authorities.—(1) Vyav. May., p. 95, l. 5; (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (3) Viram., f. 194, p. 2, l. 4 (see Chap. II., sec. 6a, Q. 14).

Remark.—The deceased person's wife inherits. But as she is a minor she will be under the guardianship of her mother-in-law, if the latter is a fit person and if no male blood relatives of the husband are living. (See Act No. XX. of 1864; Act IX. of 1861.)

Q. 25.—A man of the Gavali (milkman) caste left at his death some money to be recovered from a debtor. His mother obtained a decree, and attached some property belonging to the debtor. There is a widow of the deceased, who, though a "Lagna" wife, did not live with her husband during his lifetime. The mother-in-law on this ground contends that her daughter-in-law has no right to the property of the deceased. What is the law on this point?

A.—If the daughter-in-law, though living in her mother's house, has maintained her good character, and is of a proper age, she can

recover the debt. If she has a bad character, or has married another husband, she cannot claim any property of her husband.

Sholapoor, March 27th, 1854.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 134, l. 6 (see Chap. II., sec. 6a, Q. 21); (3*) p. 137, l. 7 (see Chap. II., sec. 6a, Q. 11); (4) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 26.—A man died leaving a widow, a son, and a daughter-in law. They all lived as an undivided family. Afterwards the son died. The right of inheritance is contested between the mother and the daughter-in-law. The question is, which of these is the heir?

A.—According to the Sastra, a man's son and widow have a right equally to share his property. If the son is dead his wife has a right to inherit her husband's share of his father's property. The mother-in-law has no right to it. If the father's property has not been divided between his widow and son the daughter-in-law cannot claim her share. If, however, she pleases her mother in-law, and induces her to assent to a division of her property, she may obtain a share. If the daughter-in-law cannot please and induce her mother-in-law to consent to a division, and if the mother-in-law withholds her consent, the daughter-in-law cannot get her share. The mother-in-law will, however, be bound in such a case to maintain her daughter-in-law. On the death of the mother-in-law the daughter-in-law will inherit her property.

Ahmedabad, October 21st, 1845.

Authorities.—(1) Vyav. May., p. 136, l. 7; (2) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remark.—A mother receives a share of her husband's property only if either there are several sons, and these divide after the father's death, or if a son assigns some of his father's property to his mother instead of giving her maintenance. Neither the one nor the other condition seems to exist in this case. The mother has, therefore, after her son's death only a right to maintenance. The daughter-in-law, on the other hand, inherits her husband's property.

Q. 27.—When a man dies after the death of his son, will the man's or his son's widow be his heir?

A.—The father's widow is the heir. Her daughter-in-law is entitled to a maintenance only.

Khandesh, September 7th, 1858.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. (3)); (2) p. 136, l. 4 (see Chap. I., sec. 2, Q. 11); (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 28.—A mother-in-law and her daughter-in-law live together as a family united in interests. They possess some ancestral property. The question is how the women should share it?

A.—Each of the women should take a half of the property. If the property was acquired by the husband of the mother-in-law she must be considered his heir and entitled to all his property. In this case the daughter-in-law can claim a maintenance only from her.

Sadr Adalat, September 11th, 1852.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I, sec. 2, Q. 4).

REMARK.—The widow whose husband died last is the lawful owner of the property. The other is entitled to maintenance only. As to the Sastri's opinion that the daughter-in-law is entitled to maintenance, see above, pp. 239, 241.

Q. 29.—A man died leaving a widow and mother. The question is: Which of these is the heir?

A.—If the widow is a chaste woman she is the legal heir of her husband. If her character is not good she will be entitled to maintenance only.

Surat, November 7th, 1845.

AUTHORITY.—Mitakshara, f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 30.—A man died. His young wife is under the protection of her father. A separated uncle and cousin of the deceased state that they are the heirs to the property of the deceased, and that they would support the widow till she should marry another husband. The question is: Who is the heir? The father of the girl has passed an agreement to the uncle and the cousin of the deceased that they should take one-half of the deceased's property and permit the widow to take the other half. Has the widow's father a right to pass such an agreement?

A.—The widow is the heir to the deceased's property. The other relatives have no right to contest her heirship on the ground

that she is likely to be remarried. Her father has no right to pass any agreement of the kind described in the question.

Khandesh, October 20th, 1849.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 31.—A representative of a branch of a family passed an agreement to one or two individuals of another branch of the same family whereby he stipulated that he should have his name entered on the records of Government in regard to certain lands. Of these two individuals one died and the other left the country and was not heard of. The widow of the former represents the branch. The question is whether the widow or the person who passed the agreement is the heir of her deceased husband?

A.—Those who take meals and carry on their transactions separately must be considered members of a divided family. According to this description the person who passed the agreement and the two individuals of another branch appear to be separate in interest from each other. The widow will therefore be the heir of the deceased.

Ahmednuggur, April 26th, 1847.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 7); (2) p. 129, l. 2; (3) p. 129, l. 4; (4) p. 140, l. 1; (5) p. 134, l. 6; (6) p. 137, l. 7; (7*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 32.—A man held the watan of a priest, called the "Yajamana-vritti." He died, leaving a widow and a sister. A person, of whose family the deceased was the priest, made a "Dana," or religious gift, of a bed. The sister received it. The question is whether the widow or the sister has the right to the emoluments of the office of the priest? Can a man make a "Dana" of a bed to any other person besides his priest, and if he cannot, is the giver or the receiver responsible for it?

A.—In this case the widow is the heir, and so long as she is alive the right of receiving gifts belongs to her. The sister has no such right, but she cannot be prosecuted for receiving that which a man chooses to give her. The man may, however, be sued on that account.

Ahmedabad, July 24th, 1856.

AUTHORITIES.—(1) Vyav. May, p. 134, l. 4 (see Auth. 3); (2) p. 140, l. 1; (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—See Dig. Vyav., Chap. II., sec. 7, Q. 1. As to the customary laws governing the relations between such classes or persons as priests and astrologers and those entitled to their ministrations, reference may be made to *Damodar Abaji* v. *Martand Abaji* (*r*) and to *Vithal Krishna Joshi* v. *Anant Ramchandra* (*s*). In some cases, though the amount of the fee payable by the layman is not fixed by law, yet a parting with some property is essential to the efficacy of the ceremony performed (*t*). The right to the fees and offerings thus becoming due from particular families or classes is regarded as a family estate, inalienable usually to persons outside the family, but transferable within the family, and a subject for inheritance and partition like other sources of income. Thus it is that even a widow may be entitled under the customary law to the offering by which on a particular occasion a client of the priestly family has to obtain a spiritual sanction to some secular transaction, or simply to acquire religious merit. The requisite ceremonies have in such cases to be provided for by the appointment of a qualified officiating substitute. An intruder subjects himself to an action for damages, as the reported case shows. Whether a suit lies by the representative of the priestly family against an individual who fails to make the proper offering depends on the particular legal relation subsisting in each case (*v*).

Q. 33.—To whom does the ancestral property of the deceased go by the right of inheritance, to his wife or his daughter-in-law?

A.—If a father dies first his son becomes his heir, and after the death of the latter his wife succeeds him. If, however, the son dies before his father, the father becomes his heir, and on his decease the father's wife succeeds him.

Poona, July 10th, 1858.

AUTHORITY.—*Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 34.—Two men, A. and B., of the Vani caste, lived together. A. died, leaving a widow and a daughter. Can the widow have a claim to recover her husband's share of the movable and immovable property?

A.—As the property was acquired by both, each has a right to

(*r*) H. C. P. J. 1875, p. 293.

(*s*) 11 Bom. H. C. R. 6.

(*t*) See Col. Lett. and Ess., Vol. II., p. 347.

(*v*) See *Khondo Keshav Dhadphale* v. *Babaji bin Apaji Gurrav*, H. C. P. J. 1881, p. 337, in which it was said that a temple servant had not a right enforcible against a particular worshipper.

an equal share of it. The widow can therefore claim a moiety of the property.

Broach, June 18th, 1859.

AUTHORITIES.—(1) Mit. Vyav., f. 83, p. 2, l. 5:

"If (one of the partners) emigrate or die, his heirs (that is, sons, grandsons, &c.) or paternal or maternal relations, if they appear, may take his property: on failure of these, the king."

(2) Mit. Vyav., f. 82, p. 2, l. 5; (3*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (4) Manu VIII. 210.

REMARK.—The decision is right only under the supposition that the two Banias were not members of a united family, but only partners in trade.

Q. 35.—A deceased person has left two widows, one of whom is an elderly woman and the other of sixteen years only. How should they divide the deceased's property between them?

A.—Each of them should take a half.

Poona, April 30th, 1849.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2*) p. 137, l. 5:

"But if there be more than one (widow) they will divide it and take shares." Borradaile, p. 103; Stokes's H. L. B. 86.)

REMARK.—See also the note at page 52 of Stokes's H. L. Books. It would seem that they take jointly according to the cases in Norton's Leading Cases, page 508. See above, p. 95. See also *infra*, Chap. IV. B., sec. 6, II. *c*, Q. 1; and *Bhagwandeen Doobey* v. *Byna Baee* (*w*). The Sastri, at 2 Str. H. L. 83, 90, agrees with the view taken above, p. 95.

Q. 36.—A deceased man has left two widows; the elder of them has two daughters and the younger has no child whatever. The property of the deceased has passed into the hands of the elder widow. Can the younger widow claim a share of the property; and who has the right to adopt a son?

A.—The younger can claim a share. The right of adoption belongs to the elder.

Poona, March 31st, 1852.

AUTHORITIES.—(1) Vyav. May., p. 137, l. 5 (see Chap. II., sec. 6A, Q. 35); (2) Samskara Kaustubha. (See Book III., ADOPTION.)

(*w*) 11 M. I. A. 487.

Q. 37.—A deceased husband has left two wives, one married by the "Pat" and the other by the "Lagna" ceremony. Which of these wives will be his heir?

A.—According to the Sastra, both are wives and heirs.

Poona, August 7th, 1847.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remarks.—According to the strict Hindu law of the higher castes the re-marriage of widows is null, and, apart from caste custom, nothing more than concubinage, and consequently the Lagna-wife alone can inherit. But as, by section I., Act. XV. of 1856, the re-marriage is legalised, a Pat-wife has perhaps the same rights as the Lagna-wife under section V.

2. The Pat-wife's son is legitimate and capable of inheriting; but in 1858 the Dharwar Sastri assigned to him a place below the previously adopted son, who was himself postponed to the son by a Lagna-wife, though born after the adoption. The parties seem to have been Lingayats. R. A. 26 of 1873, *Basanagaodo* v. *Sunna Fakeeragaoda.*

Q. 38.—Is a man's Pat-wife or the Lagna-wife his heir?

A.—The Lagna-wife is the heir. The Pat-wife is not. A Pat is not a legal and ceremonial marriage. It is performed without reference to the appearance of the planets Venus and Jupiter, and in defiance of the situation of other stars and of the prohibition of certain days for the performance of marriage.

Dharwar, September 21st, 1855.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 136, l. 4; (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remark.—See Question 39, with reference to which the answer would be wrong as to members of a caste recognising Pat-marriages.

Q. 39.—A deceased person has left two widows, one by Lagna and another by Pat. The latter has a daughter who is married. Is the Pat-widow entitled to the whole or a portion of the deceased's property, or to a maintenance only?

A.—Both the widows are equally entitled to the husband's property, which should therefore be divided between them.

Poona, December 28th, 1848.

Authority.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remark.—See Question 35.

Q. 40.—A deceased man has two wives, one by Lagna (the first marriage) and the other by Pat (re-marriage as respects the woman). The former has daughters, to whom the man has transferred his property as a gift. The question is whether the daughters or the Pat-wife will be his heirs?

A.—The Pat-wife is the nearer relation and better heir of the deceased than his daughters. There is scarcely any difference between a Pat- and a Lagna-wife.

Khandesh, February 6*th*, 1848.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2*) Mit. Vyav., f. 68, p. 2, l. 16 (see Chap. II., sec. 3, Q. 11); (3*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—If the deceased kept back enough of his property to maintain his widow the gift of the rest to his daughters is valid. But if he left his widow unprovided for the gift is ineffectual, and as, according to section I. of Act XV. of 1856, the Pat-marriage is legal, his widow will be his heir, provided that the mother of his daughters be dead. Should she be still alive both the widows will inherit.

2. A widow re-marrying remains personally liable on a bond executed by her (*x*). A married woman contracting jointly with her husband is responsible only in her stridhana. *Narotam Lalabhai* v. *Nanka Madhav*, Bom. H. C. P. J. 1882, p. 161; *Nathubhai Bhailal* v. *Javher Raiji*, I. L. R. 1 Bom. 121; *Govindji* v. *Lakmidas*, *ibid.* 4 Bom. 318.

Q. 41.—A man had two wives, one by Lagna and the other by Pat. He married a third by Pat. This last-mentioned woman had not taken the leave of her first husband to contract a Pat-marriage with the man. She gave birth to a daughter. Can this daughter succeed her father after his death?

A.—It is not legal for a woman to enter into a Pat-marriage without having previously obtained permission of her husband, unless he is dead. The daughter, therefore, can have no share in the property of the deceased father. But as she was the result of the Pat-marriage the heirs who will take the assets of the deceased must support her. The Lagna and the first Pat-wives will be the heirs of the deceased, entitled to take all his property.

Sholapoor, October 19*th*, 1852.

AUTHORITIES.—(1) Manu V. 147; (2) Viramitrodaya, f. 157, p. 2, l. 11; (3) Mit. Achara, f. 12, p. 1, l. 4; (4) Vyav. May., 239, l. 3; (5) p. 137, l. 5;

(*x*) *Nahalchand* v. *Bai Shiva*, I. L. R. 6 Bom. 470.

(6*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (7*) f. 57, p. 1, l. 5 (see Chap. II., sec. 3, Q. 3).

REMARKS.—(1) As the husband of the second Pat-wife is still alive the woman cannot be correctly called a Pat-wife, but is an adulteress and concubine. As a concubine she has no right to inheritance, but only to maintenance for herself and her daughter from the heirs of the man under whose protection she lived. The concubine of a late proprietor is entitled to maintenance from his heirs (*y*), and a sufficient portion of the estate may be invested in order to provide the requisite income during her life (*z*).

2. The recognition of a natural son by his father confers on him that status, though he was not born in the father's house or of a concubine having a peculiar status therein (*a*).

3. Illegitimate children of the Sudra caste inherit the estate of their putative father in default of legitimate children (*b*).

Q. 42.—A man died. His Lagna-wife had lived separate from him. The man kept a woman. His property has passed into the hands of his mistress. The question is: Which of the two women has the right of inheritance?

A.—If the deceased has left no sons, grandsons, or other nearer heirs, the Lagna-wife has the right to inherit the property of the deceased. The mistress cannot lay any claim to it.

Poona, March 20th, 1855.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 134, l. 6; (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 43.—A Kunabi died leaving two widows, A. and B., one of whom, A., he had married as a virgin, and B. as a widow. Can A. mortgage her husband's Miras land?

A.—According to the Sastra, A. is the heir of her husband, and she can therefore mortgage his Miras land.

Poona, September 22nd, 1860.

AUTHORITIES.—(1) Vyav. May., p. 137, l. 7 (see Chap. II., sec. 6A, Q. 17); (2*) Nirnaya Sindhu (see Chap. II., sec. 8, Q. 5).

(*y*) *Khemkor* v. *Umiashankar*, 10 Bom. H. C. R. 381.

(*z*) *Vrindavandas* v. *Yamunabai*, 12 Bom. H. C. R. 229.

(*a*) *Muthusawmy Jagavera Yetappa* v. *Vencataswara Yettaya*, 12 M. I. A. 220.

(*b*) *Inderun Valungypooly* v. *Ramasawmy Pandia et al.*, 13 M. I. A. 141.

Q. 44.—A Lingayat married a virgin A. and a widow B. Which of them has the power of selling his immovable property?

A.—A. has the chief power of disposing of his property.

Dharwar, December 3rd, 1856.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) Vyav. May, p. 137, l. 7 (see Chap. II., sec. 6a, Q. 11); (3*) Nirnaya Sindhu. (See last Question.)

Remark.—The marriage of the widow B. to the deceased would be perfectly valid, the Lingayats ranking only as of the Sudra caste (*c*). (See Q. 35, 40.)

SECTION 6.—WIDOW.

B.—RE-MARRIED.

Introductory Remarks.

The re-marraige by Pat is so foreign to the purer Hindu notions that the simple ceremony (Natra) cannot be performed for a woman who has not been married before. The same rule applies in some castes to males; in others a mere symbolical marriage of a man to a Sami tree or a cotton image qualifies him, though a bachelor, to take a previously married woman to wife. Such is the rule amongst the Surat Soothar Panchalis, Lohars, Malis, Khumbars, Dhobis, Mochis, and others who answered Mr. Borradaile's inquiries.

In some of the Dekhan castes, on a widow's marriage she has to give up to her first husband's family all her property except a pritidatta or gift from her own family (*d*). The nature of this property is discussed under the head of Stridhana. Property in a wife is argued against by Nilakantha (*e*) in terms which imply that by some of the learned even it was asserted. Such property would, of course, imply the wife's incapacity for property except a *peculium* in the proper sense. It would account, too, for the rule of some castes that he who takes the widow, a part of the *familia* of a deceased, becomes responsible for all his debts. See above, pp. 165, 262, 270.

(*c*) See next section and *Gopal Narhar* v. *Hanmant Ganesh*, I. L. R. 3 Bom. 273.

(*d*) Steele, L. C. 169.

(*e*) Vyav. May., Chap. IV., sec. I., para. 10.

Amongst the Jats of Ajmir custom requires that the member of the community who marries a widow shall repay to the family of the deceased husband the expenses of his marriage (*f*). We have here a trace of a joint interest of the family in the wife or widow of each member of it which has been found to prevail in widely separated parts of the world. Without discussing the causes of this custom, we may perhaps gain a clearer view of the position of the widow, especially among the lower castes, by a consideration of the various social conditions through which she has reached her present capacities of freedom, complete or qualified, to dispose of herself, and of succession to property.

The levirate was at one time an institution generally recognised in India (*g*). "It is declared," says Apastamba, "that a bride is given to the family (of her husband, not to the husband alone)" (*h*). Hence the husband could once procure children by the agency of a blood relative (*i*), but that "is now forbidden, on account of men's weakness" (*k*), "the hand (of a gentile relative like that of another is as) that of a stranger"; "the marriage vow is not to be transgressed"; and "the eternal reward to be gained by submitting to the restrictions of the law is preferable to obtaining offspring in this manner" (*l*). In Manu, again (*m*), it is said that connection by one brother with the wife of another is

(*f*) *Madda* v. *Sheo Baksh*, I. L. R. 3 All. 385.

(*g*) Gaut. XXVIII. 22, 23, 32. As to the Vedic period, Muir, S. T., Vol. V., 459.

(*h*) Apast, Pr. II., Pat. 10, Kh. 27. Compare the existing customs described in Tupper, Panj. Cust. Law, Vol. II., pp. 118, 131, 189.

The *pallu* or dower of a widow is resumed in Gujarat by the deceased husband's family on her re-marriage. They may in some castes escape from the liability to maintain her by giving her a formal license to re-marry, without which she cannot, according to the caste usage, form a second union. In most instances a payment must be made to the family, and in some to the caste.

(*i*) Gaut. XVIII. 4, 11. The Athenian heiress taken to wife by an aged husband was directed to supply his defects, should he prove unequal to his responsibilities, by the services of one of his agnatic kindred. See Petit, Leges Attic, p. 444. Baudhayana, Tr., p. 226, might seem not to limit the choice of a subsidiary father to the family of marriage, but this appears from p. 234. Vasishtha XVII., 56 ss. 80, seems to intend that one of the family assembly shall be chosen.

(*k*) That is, their incapacity now to resist the demoralising effect of practices which would have left the higher sanctity of their predecessors unharmed. Comp. Apast. Tr., p. 131.

(*l*) Apast. *loc. cit.*

(*m*) Chap. IX., 58 ss., 120, 121, 143-147; Chap. III., 173. Narada does not impose this condition. Part II., Chap. XII., sec. 80 ff.

degrading, even though authorised, except when such wife has no issue"; but in that case it is approved (*n*). Next follows a qualification of the rule limiting it to the procreation of one child on a widow by a kinsman, and lastly a prohibition of the practice to the twice-born classes. It is placed on a level with the marriage of a widow (*o*); and the only remnant of the earlier law preserved by Manu is that commanding a man to take his brother's betrothed on the death of her (intended) husband, in order to procreate one child (*p*). A similar rule is found in Narada, Part II., Chap. XII., 80, 81, 85, 86, with the condition of authorisation by the relatives, failing which the offspring will be illegitimate (*q*). Provision is made by Yajnavalkya (*r*) for the son thus begotten (kshetraja) next to the son of the appointed daughter as heir to the nominal father (*s*). By Vasishtha he is made to precede the appointed daughter (*t*). The idea of a woman's leaving her family of marriage and of sacrifice by marrying into another was one that to a Brahman would appear far more monstrous than a simple succession of a brother or kinsman to the right of one deceased over his wife (*v*).

The custom, softened as we have seen, and gradually discredited amongst the higher castes, has been preserved amongst the less civilised tribes down to our own day. Many instances of it are given in Mr. Rowney's book on the Wild Tribes of India. It seems itself to have sprung (*w*) from an even coarser usage of polyandry (*x*) which still subsists amongst the aborigines of

(*n*) See, too, Mit., Chap. II., sec. 1, paras. 10-12, 18, 19.

(*o*) On this comp. Apast. Transl., p. 130, and Viram. Tr., p. 61.

(*p*) See Viram. Tr., p. 106 ss.

(*q*) The viniyoga, or disposal of the widow by the husband's family, provided for in Narada, Part II., Chap. XIII., para. 28, is a disposal of her to another lord.

(*r*) II. 128 ss.; Mit., Chap. I., sec. XI., paras. 1, 5.

(*s*) See Mit., Chap. I., sec. X.

(*t*) Vasishtha XVII., 14, 15.

(*v*) Comp. Tupper. Panj. Cust. Law, Vol. II., p. 125, 131, 174. It seems that some Brahmans have adopted or retained the levirate, *ibid.* 132.

(*w*) See M. Müller's Hist. Sansk. Lit., p. 46 ss.

(*x*) See as to Seoraj, Lahoul and Spiti, Mr. Tupper's Collection, Panj. Cust. Law, Vol. II., 186-188. To this custom, perhaps, may ultimately be referred the passage of Manu. IX. 182 : "If among several brothers one have a son born, all are by his means fathers of a son." Though this is referred by Kulloka and other comparatively recent writers to adoption as prevented by the existence of a nephew, such could not have been the purpose when it was first

India (*y*). The wife at one time held in common passes on her sole owner's death as property to his brother (*z*). In many cases she is a valuable property, as by tribal custom she has to do all or nearly all the agricultural work (*a*). Sometimes even the son has to take all his father's widows as his own wives, with the exception of his own mother. There is probably some mixture of humane feeling in such rules, as they provide a home for old widows, while they give the heir the benefit of the younger ones (*b*); but they belong to a constitution of society in which women are not yet regarded as fully the subjects of rights. Amongst the Jews the levirate was part of a system in which a man's wife was regarded as his property, and he might sell his family subject to return at the jubilee year. The capacity of daughters as heirs was grafted on to this system by a special revelation, and accompanied by a necessity of marrying within their own tribe (*c*). In India their right grew out of the developed system of ancestor worship through their capacity to produce sons who could sacrifice to their father's manes. The widow's right grew out of her participation in her husband's domestic sacrifices (*d*).

Such rights as these imply progress beyond the stage at which women were mere chattels, and when the law made no provision for them except by handing them over to a second master on the death of the first (*e*); but the traces of the earlier system are still

uttered. For the polyandrous customs of the Tothiyars and Nairs see Dubois, Manners, &c., p. 3; and above, p. 276.

(*y*) As once in Britain. See Cæsar De B. G. V. 14.

(*z*) Amongst the Thiyens in Malabar an unseparated brother takes to wife the widow whose favours as wife of his brother he previously had a right to share.

In Spiti a brother even leaves a monastery to take his brother's widow and other property. No ceremony is thought necessary. Here, however, Thibetan influences are to be recognised. See Panj. Cust. Law, II., 189. For the semi-Afghans of Peshawar, *ibid.* 228. See McLennan's Studies in Anc. Hist., p. 158 ss. In Rohtak the only Karewar or widow's re-marriage recognised as proper is that to her late husband's brother. See Rohtak Settlement Report, p. 64.

(*a*) See Panj. Cust. Law, p. 194.

(*b*) See Tylor, Anthropology, 404; Tupper, Panj. Cust. Law, Vol. II., p. 125.

(*c*) Numbers XXVII. 1, 7; XXXVI.; Lev. XXV. 10; Milman's Hist. of the Jews, Book V.

(*d*) See Manu IX. 45, 86, 87; III. 18, 262; Mit., Chap. II., sec. 1, para. 6.

(*e*) Comp. the idea of the Vazirs that a woman is a chattel as much as a cow. Panj. Cust. Law, II. 236.

plainly perceptible in the texts, and even more so in the customs of tribes and castes. It is not a wife in general whom the Smritis make a real heir; it is only the "patni," a sharer in her husband's sacrifices. We can see the capture of wives succeeded by the sale of daughters, and this by their endowment when they had to be in some measure provided for otherwise than as mere slaves in their husband's families; and then again their elevation to the rank of heirs to their husbands as competent to perform their Sraddhs. But the older spirit reasserts itself in cutting down the widow's interest to a life enjoyment and then extending to all female successors a single dubious text which in terms applies only to widows. Tribal usage, generally oppressive to females in proportion to lowness in the scale of progress, has still in several instances hit on alleviations of their lot, and on means of giving them dignity and social status, which suggest that civilisation might possibly have been worked out on quite a different type from that which has in fact prevailed. Side by side with the transfer and devolution of women as chattels amongst some tribes (*f*) we find in other tribes, from the Garos and Khasias north of Assam to the Nyars of the south, a system of exclusive female kinship. The Khasya Chief and the Rajah of Travancore alike succeed to their maternal uncles, and a sisterless and nephewless man has to adopt a sister to provide him with legal heirs who are not according to custom the sons of her husband. The Garo has to earn a place by service in his intended father-in-law's household. The scriptural example is sometimes followed in the Dekhan also (*g*). The Koche bridegroom becomes a dependent of the bride's mother (*h*). In some of these cases it is impossible to discover any degradation of the physical or moral being of the tribesmen below that of others placed in similar physical circumstances (*i*), but the arrest, in all of them, of progress at a certain stage suggests the unfitness of these social schemes as a basis for a high form of civilisation.

The Chundavand or patnibhag, prevalent alike though not

(*f*) See Rowney, Wild Tribes of India, *passim*.

(*g*) Steele, Law of Castes, p. 165.

(*h*) A similar custom in Sumatra is described in Marsden's History, p. 262, quoted Lubbock, Orig. Civil, p. 53. In Kulu and Spiti (Panjab) a son-in-law is commonly taken into the family of a sonless man, Panj. Cust. Law, Vol. II., pp. 186, 190. Similar to this is the custom of Illatom in Bellary and Karnool, see *Hanumantamma* v. *Rama Reddi*, I. L. R. 4 Mad. 272.

(*i*) See Panj. Cust. Law, Vol. II., 195.

general (*k*) in Madras and in the Panjab, by which the property is distributed equally to each wife and her offspring, has probably descended from a state, of which there are still instances, of combined polygamy and polyandry, coupled with a distinct recognition of women as the subjects of rights, a respect for them as the sources of families, and a tracing through them of all heritable rights in males. This was adopted into the Brahmanical system so far that the estate was first divisible according to the mothers of the different classes; but the later development which forbade the inter-marriage of different classes (*l*) has deprived the rules in the present day of any practical application except under some special custom of which the instances are rare if not unknown. Some other traces of female gentileship remain (*m*), which are noticed elsewhere (*n*).

Amongst the lower tribes of the Bombay Presidency the tribal ownership of property which in one form or another subsists in Malabar and in the Panjab, is not to be found, owing chiefly, perhaps, to the absence of external pressure forcing the members into close aggregation rather than to a progress beyond the stage of common proprietorship. The advanced Brahmanical law has had so much influence that the levirate in any form is not admitted as it still is in the North of India (*o*); but purchase is common, and a simulated capture is not unknown. The communal right of the family of marriage in women (*p*) having given

(*k*) Panj. Cust. Law, Vol. II., p. 202.

(*l*) With this prohibition may be compared the expulsion from his tribe to which a man is still subject for marrying out of it in the Panjab (Tupper, Panj. Cust. Law, Vol. II., pp. 111, 122) and elsewhere; the penalty of death imposed by the Theodosian Code on a Jew who should marry a Christian, and that of burning alive for the Christian who should take a Jewess as his mistress. See Lecky, Hist. of Rationalism, Vol. II., 13, 275; Milm. Hist. Lat. Christ., Book III., Chap. V.; Döllinger, First Age of the Church (Eng. Trans.), Vol. II., p. 235; and comp. Apastamba, Pr. II., Pat. 10, Kh. 27, 8, 9; Gautama XXIII. 14, 15, 32; Steele, L. C. 170, 33; Dubois, Manners, &c., p. 18.

(*m*) Perhaps the succession of a daughter to a son of the same mother (Col. Dig., Book V. T. 225) may be referred to this. Comp. the converse case, *supra*, p. 273.

(*n*) See above, p. 273 ss. Inscriptions giving the names of the mothers of princes are not necessarily indicative of a rule of female gentileship, since, where polygamy prevails, some are still surnamed as of such and such a mother for the sake of distinction, without any variation of the ordinary law.

(*o*) See Tupper, Panj. Cust. Law, Vol. II., p. 93 ss.; C. S. Kirkpatrick in Ind. Antiq. for March, 1878, p. 86; *Kesari* v. *Samardhan*, 5 N. W P. R.

(*p*) See Tupper, *op. cit.*, p. 101. In some instances it is not (except subordi-

way to the notion of wedlock as a really connubial relation, but one arising in strictness only from a connection by means of the family sacrifices not allowed to the lower castes, the quasi-matrimonial union in those castes is easily dissolved, and at the same time the Pat-marriage of a widow is allowed amongst Sudras to have full validity (*q*), though so strongly condemned by the Brahmanical law.

A husband may generally dismiss a wife at will, giving a "writing of divorcement" (*r*) which none of the higher castes are allowed to do; mere incompatibility of tempers is a recognised ground of separation (*s*); and a paramour buys the husband's rights for money (*t*). These rules show with sufficient plainness that those amongst whom they subsist have never risen to the Brahmanical conception of marriage as a sacred and inseparable union (*v*). Among some tribes and castes in Gujarat a mere agreement dissolves the union (*w*); a fine may be paid as the price of renunciation (*x*) by either party or by the husband only (*y*). Custom allows a woman to abandon her husband and take another (*z*), subject only to the sanction of the caste (*a*).

The High Court has refused to recognise this authority in the caste (*b*), but the usage itself shows how slight is in such cases the tie to which we give the name of marriage. The penalties of

nately) recognised, and the wife set free by her husband is again sold by her father or her brothers.

(*q*) Ahmednagar Sastri, 6th February, 1850 MS.; Steele, L. C. 166, 168.

(*r*) *Ibid.*

(*s*) *Op. cit.* 169, 173.

(*t*) *Op. cit.* 172.

(*v*) Comp. Dubois, Manners, &c., p. 136; and see Baudhayana quoted above, p. 86.

(*w*) Borr. MS., Book F, sheet 39, 57; G. Lohars, Khalpa Pattuni 40, 47.

(*x*) *Ibid.*, sheet 52. Koombar 6, Vaghree 23.

(*y*) *Ibid.*, sheet 56, 57, MS. G. Lohars, Sootars, G. sheet 40.

(*z*) Amongst the Jats of the Panjab it is said a woman may desert her husband and live with another man, her offspring by whom are regarded as legitimate, see Panj. Cust. Law, Vol. II., 160.

(*a*) *Reg.* v. *Dahee* in *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom., at p. 569.

(*b*) *Ibid.*, and *Reg.* v. *Sambhu Raghu*, I. L. R. 1 Bom. 347. Under the Greek and Roman laws a divorce might always be had by the will of the wife as well as of the husband, unless amongst the Romans she had come "in manum." Christian feeling was strongly opposed to this laxity. See Smith's Dict. Ant., Art. Divortium; Milman, Hist. Lat. Ch., Book III., Chap. V.

adultery are so trivial (*c*) that the connection guarded by them cannot be regarded as of a very sacred character. It is the injury to caste by carnal association with an inferior (*d*) rather than the loss of chastity which is looked on as a serious delinquency (*e*). Even amongst the Brahmans of the Dekhan simple adultery entails only a penance, after which the wife "may return to her husband's embraces" (*f*). This is a corruption, though one not without venerable authority (*g*), supposing the connection has not been with a man of a lower caste, but for adultery with a low-caste man the husband may repudiate his wife (*h*), while he himself incurs only a penance by keeping a low-caste concubine (*i*). Adultery by a wife is generally atoned for by penance unless the husband chooses to discard her (*k*), which he can equally do, though at the cost of some discredit, without any reason at all (*l*).

A wife, however, who deserts her husband without sufficient cause is not entitled to separate maintenance (*m*), and he who

(*c*) Thus in Borradaile's Collection, Book G, under Durgee Meerasee Soorti, there is an entry that a woman who deserts her husband and marries another may be divorced, and the second must pay Rs. 10 to the caste (punchayat) and take the woman. See, too, *Kally Churn Shaw* v. *Dukhee Bibee*, I. L. R. 5 Cal. 692. In the Gurgaon District, Panjab, it appears that a wife cannot under any circumstances claim a divorce, see Tupper, P. C. L., Vol. II., p. 130.

(*d*) Comp. Gaut. XXI. 9; XXIII. 14; Vasishtha XXI. 1, 8, 10; Baudh. Tr., p. 232, 233; Narada, Part II., Chap. XII., para. 112.

(*e*) Amongst the Nayars a woman, it is said, may not cohabit with a man of lower caste, and therefore must not marry one. See letter quoted above under Stridhana, p. 272, note (*w*)); and Buch. Mysore, Vol. II., p. 418, 513. Comp. Manu VIII. 365; Yajn. II. 288, 294.

(*f*) Steele, L. C. 33, 172. Comp. Dubois, Manners, &c., 118, and Baudh. *loc. cit.*; Narada, Part II., Chap. XII., paras. 54, 62, 78, 91, 98.

(*g*) See Apast. Tr., p. 164, and the Viramit. Tr., p. 153. But as to the evil of an adulterine son, Manu III. 175.

(*h*) Steele, L. C. 171, 172; Vyav. May., Chap. XIX., paras. 6, 12.

(*i*) *Ibid.* 170. Baudhayana Tr., p. 218, pronounces a man outcaste who begets a son on a Sudra woman, but for mere intercourse the penance is no more than some suppressions of the breath, *ibid.* 313; see, too, p. 319. Comp. Manu VIII. 364; Yajn. II. 286.

(*k*) Steele, L. C. 172.

(*l*) So amongst some low castes in Gujarat, Borr. MS., Book F, sheet 57, &c., and the Nyars. This laxity brings a discredit on marriage which raises concubinage by comparison, and makes open licentiousness amongst the lower castes in no way disgraceful. The same effect followed amongst the Romans from the same cause. See Milm. Hist. Lat. Christ., Book III., Chap. V.

(*m*) *Sidalingappa* v. *Sidava*, I. L. R. 2 Bom. 634.

harbours her is liable to a suit by the husband (*n*). The marriage of a second wife by the husband affords no excuse (*o*).

Repudiation in practice seldom occurs except when the husband's patience has been worn out, or he has received a reward for setting his wife free. She is generally valuable to him as a servant; some mutual affection naturally grows up; and the children must be tended. But the whole system of association between the sexes is as far removed from the higher Brahmanical conception (*p*) as on the other side from the rudest sexual communism. The texts of the Smritis, and for the most part the commentaries also, have no real application to wives and widows and re-married women under the dominion of usages which the Hindu law admits as governing those amongst whom they prevail, but at the same time utterly rejects as part of its own developed system. It recognises no second marriage of a widow, which yet amongst the lower orders is common, and now is legalised for all classes by Act XV. of 1856. It could not be expected, under such circumstances, that the answers of the Sastris should be perfectly consistent; they were not called on to expound caste custom, and had no particular acquaintance with it. They answered the questions put to them either by mere reference to the received texts against re-marriage, without discrimination of whether these could be applicable to the particular cases, or by admitting the "Pat" wife and widow to the same position as the "Lagna" wife according to analogy, or an assumed caste custom. This custom has been greatly acted on by that of the superior castes, and the process of assimilation is hastened by every improvement in the material condition of the people. As they gain wealth they naturally strive to imitate their betters (*q*). It is on custom that the rights of the widow in all the

(*n*) *Yamunabai* v. *Narayan*, I. L. R. 1 Bom. 164.

(*o*) *Nathubhai Bhailal* v. *Javher Raiji*, I. L. R. 1 Bom., at p. 122.

(*p*) The High Courts naturally take the higher view as far as possible. Thus, in a suit for maintenance between Lingayats, it was said that the right and duty do not rest in the ordinary way (merely) on contract, but spring from the jural relation of the parties, *Sidalingappa* v. *Sidava*, I. L. R. 2 Bom. 624.

(*q*) A striking instance of this is the decay of the polyandrous customs of the Nayars under British rule. These have changed from an indulgence at will on the part of the women, after a mere ceremony, to such strictness that even two husbands are now thought discreditable, a brother may not marry his sister-in-law either during his brother's life or after his death. (Letter quoted above, p. 272, note (*w*). Still, however, the Nayar marriage is dis-

lower castes must really rest (*r*), custom modified amongst them, as in all cases, by the Act of the Legislature above referred to, and the equally important Act XXI. of 1850, which prevents loss of caste from affecting the right of inheritance (*s*). An important provision (sec. 5) of the former Act is that a widow re-marrying, while generally forfeiting her rights through her first marriage, shall otherwise have the same rights of inheritance as if her subsequent had been her first marriage (*t*). This extends the favour conceded to the Pat-wife only in particular castes to every widow re-marrying. Another is that (sec. 7) which gives the disposal in marriage of the minor widow to her father and his family instead of her husband's (*v*).

The relation may or may not be created by contract, but once created it cannot, like ordinary contractual relations, be dissolved by contract, but constitutes a status itself the origin of special rights and duties imposed by the law.

Q. 1.—How far can a woman married by "Pat" ceremony have a claim to her husband's property?

A.—She can claim a maintenance only.

Dharwar, 1846.

Authority not quoted.

REMARK.—For this and the following seven cases see the Remarks subjoined to Chap. II., sec. 6A, Q. 37, and sec. 3, Q. 16.

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soluble at will, which places it in an entirely different category from the Brahmanical or Christian marriage.

(*r*) Comp. Sarasvativilasa, § 118.

(*s*) Mit., Chap. II., sec. X.; Steele, L. C. 61, 26, 159.

(*t*) But it seems a marriage between persons of different castes is still generally impossible without a specific allowance by the caste law. See *Narain Dhura* v. *Rakhal Gain*, I. L. R. 1 Cal. 1. There is a *jus connubii* between many pairs of castes. See *ex. gr.* below, sec. 7, Q. 6.

(*v*) The prevailing idea of marriage is that of a transfer of a woman as property to the family of her husband, who on his death have a right to dispose of her, even by sale, as in Gurgaon in the Panjab, and other districts. Pan. Cust. Law, Vol. II., p. 118. See Nar., Part II., Chap. XIII., para. 28, referred to above.

Q. 2.—A man of the Maratha Kunabi caste died. He had no near relation except his "Pat" wife. Can she inherit his immovable property?

A.—If the deceased husband had declared himself separate from the other members of his family, and if he has not left a son, his widow can succeed to all his property.

Rutnagiri, May 22nd, 1849.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 136, l. 4; (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 3.—A man, not being on amicable terms with his first Pat-wife, took another wife by the Pat ceremony. The first Pat-wife, lived for eighteen years with her daughter. The man is now dead. His second Pat-wife, having performed his funeral ceremonies and liquidated his debts, married another husband. The first wife has filed a suit against the second for a moiety of the property of the deceased. The question is whether the claim is admissible, and whether the first or the second Pat-wife has a right to dispose of the property left by the deceased husband?

A.—The widow has a right to prosecute her fellow-widow for the recovery of the property belonging to her husband, because he had not passed a deed of separation to her, according to the usage of his caste. As the second wife has married another husband, her right to the property of the deceased has become extinguished.

Khandesh, March 2nd, 1855.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—See Act. XV. of 1856.

Q. 4.—Is the brother of a Pat-wife the heir to the property of a deceased man?

A.—His brother is the heir.

Dharwar, December 20th, 1850.

AUTHORITY.—*Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 5.—A deceased man of the Berada (*w*) caste has left a Pat-wife, her daughter, and a son of his brother. Who will be his heir?

A.—If the deceased and his brother were separate the widow will be the heir. If they were united in interests the brother's son will be the heir.

Dharwar, July 12*th*, 1851.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 136, l. 4; (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 6.—There are two persons who claim the right of inheritance—viz., a Pat-wife and a son of a separated brother. Which of these is the heir?

A.—The Pat-wife.

Dharwar, March 27*th*, 1856.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 136, l. 4; (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 7.—Is a Pat-wife or a cousin the nearer heir to a deceased individual?

A.—If the cousin was separate in interest from the deceased the Pat-wife is the nearer heir.

Dharwar, December 27*th*, 1851.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 8.—A woman had a son by her first husband. On the death of the husband she took her son to the house of the second husband, to whom she was married by the Pat ceremony. The second husband died. Can the son and the widow be his heirs?

A.—The Pat-wife will be the heir of the deceased, and not the son of her first husband.

Ahmednuggur, January 4*th*, 1849.

(*w*) A caste of cultivators in the Southern Maratha Country.

Q. 9.—A woman married by the Pat ceremony to a Gujarathi of the Bhanga-Sali caste (*x*) twice went on a pilgrimage without his leave. When he died, without issue, the wife returned and claimed his property. Should it be given to her, or to a cousin who lived separately but performed the funeral rites of the deceased?

A.—The wife, who disregarded her husband during his life, can have no claim to his property after his death. It will go to the cousin who lived separately from the deceased.

Rutnagiri, February 14th, 1846.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—It is nowhere mentioned that simple disobedience of the husband's orders disables the wife from inheriting. The wife, therefore, will be her husband's heir.

SECTION 7.—DAUGHTER (*y*).

Q. 1.—A man died, leaving a widow and a daughter. His property consists of a house. The widow married another husband. Which of these should be considered the heir to the house?

A.—The widow, having married herself to another husband by the Pat ceremony, has forfeited her right of heirship. The daughter therefore is the heir.

Poona, April 3rd, 1850.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2) p. 137, l. 6; (3*) p. 137, l. 7 (see Chap. II., sec. 6A, Q. 11); (4*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap I., sec. 2, Q. 4).

REMARKS.—1. According to the Hindu Law, as interpreted by some authorities, the widow loses her right to the estate of her first husband on account of her unchastity. (See Chap. II., sec. 3, Q. 16. But see Chap. VI., sec. 3 *c*, Q. 6.)

2. Though the re-marriage of a widow is legalised by Act XV. of 1856, a re-married widow is debarred from inheriting from her first husband by sec. 2 of the same Act (*z*).

(*x*) Bhanga-Salis are shopkeepers.

(*y*) Some commentators have thought that the daughter came in only as a putrika. The Smriti Chandrika contradicts this (Chap. XI., sec. 2, p. 16). So, too, the Mitakshara, Chap. II., sec. 2, p. 5.

(*z*) So as to the Maravers in Madras, though re-marriage is allowed by the caste law, *Muragayi* v. *Viramakal*, I. L. R. 1 Mad. 226.

3. In a divided family the daughter excludes remoter relatives (*a*), as divided brothers and their sons (*b*), the son's widow (*c*); not so in an undivided family with surviving members (*d*). See *infra*, Questions 4 and 10.

The custom subsisting in some Narvadari villages of excluding a daughter from succession to the village lands rests on a recognised inseparable connection between the original proprietary families and their holdings. So "in the Panjab, where women do not transmit the right of succession to village lands; this is because they marry outsiders. . . . The exclusion . . . is the means of keeping the land within the clan and within the village (community)." Panj. Cust. Law, Vol. II., p. 58. Daughters are generally, but not always, excluded, *ibid.* 145, 175, 177. In the same collection may be noticed a gradual growth of the right of the father to provide for his daughter out of tribal lands, and to take her husband into his family very like what occurred in Ireland, and probably in other European countries, in early times (*e*).

A custom of male in preference to female inheritance to bhagdari lands in Gujarat was recognised in *Pranjivan* v. *Bai Reva* (*f*).

4. There is no general usage of the Maratha Country excluding females from succession to ordinary inam property. A priestly office and the vritti or endowment appendant to it may stand on quite a different footing (*g*). See above Chap. II., sec. 6A, Q. 32. A widow may alien a vritti to provide for her necessary sustenance, Q. 689, MS. Surat, 19th March, 1852.

5. As to the nature of the estate taken by a daughter, reference may be made to *Amritolal Bhose* v. *Rajonee Kant Mitter* (*h*), quoted above, p. 97. According to the Bengal Law, on the daughter's death the property goes to her father's heirs, to the exclusion of her husband and daughter (*i*), and she cannot alien to their detriment (*k*). In Madras and Bengal, indeed, even under the Mitakshara, the daughter is held to take only an estate similar to that of the widow (*l*). In Bombay the doctrine of the Mitakshara and of Jagannath has been maintained except as to widows. It was said that a daughter succeeds to an absolute and several estate in the immovable property of a deceased father, and has full right over such property

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(*a*) *Gorkha* v. *Raghu*, S. A. No. 216 of 1873, Bom. H. C. P. J. F. for 1873, p. 181.

(*b*) *Laxumon* v. *Krishnabhat*, S. A. No. 342 of 1871, *ibid.* for 1872, No. 23.

(*c*) 2 Macn. 43; and Colebrooke in 2 Str. 234.

(*d*) *Vinayek Lakshman et al.* v. *Chimnabai*, R. A. No. 44 of 1876; Bom. H. C. P. J. F. for 1877, p. 170.

(*e*) See Sullivan's Introd. to O'Curry's Lectures, Vol. I., p. 170 ss.

(*f*) I. L. R. 5 Bom. 482.

(*g*) *Vyankatrav* v. *Anpurnabai*, R. A. No. 44 of 1874, Bom. H. C. P. J. F. for 1877, p. 302; *Duneswar* v. *Deoshunkur*, Morris's Reports, Part I., p. 63.

(*h*) L. R. 2 I. A. 113.

(*i*) See Col. Dig., Book V. T. 420, Comm.; 2 Macn. Prin. and Prec. 57.

(*k*) *Doe dem. Colley Doss Bose* v. *Debnarani Koberanj*, 1 Fulton, R. 329; *Musst. Gyan Koowar et al.* v. *Dookhurn Singh et al.*, 4 C. S. D. A. R. 330; 2 Macn. H. L. 224; *Chotay Lall* v. *Chunnoo Lall et al.*, 22 C. W. R. 496 C. R.

(*l*) *Chotay Lall* v. *Chunno Lall*, L. R. 6 I. A. 15; *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar*, L. R. 8 I. A. 99.

of disposal by devise (*m*). In Bombay a daughter succeeds to an absolute and several estate in the immovable property of a deceased father, and has full right over such property as to the share which she takes as one of two or more sisters. (See above, pp. 98, 101, 314, 320.) The property descends as stridhana to the daughter's heirs, not the husband's (*n*). See Question 21. The Privy Council declined to pronounce on this in *Hurrydoss Dutt* v. *S. Uppoornath Dossee et al.* (*o*). But in *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (*p*) the Judicial Committee say definitively that the Mitakshara is not to be construed as conferring on any "woman taking by inheritance from a male a Stridhana estate transmissible to her own heirs." It would seem, therefore, that the heritage taken by daughters must in future be regarded as but a life interest, whether with or without the extensions recognised in the case of a widow, except in cases governed by the Vyavahara Mayukha, Chap. IV., sec. 10, para. 25, 26 ss (*q*). See 2 Macn. H. L. 57.

6. Many replies of the Sastris pronounce an illegitimate daughter incapable of inheriting, but whether that would be so amongst Sudras seems at least doubtful. See Steele, 180. She is entitled to maintenance and marriage expenses as a charge on the shares of both legitimate and illegitimate sons, according to *Salu* v. *Hari* (*r*).

Q. 2.—A widow married a second husband. She has a daughter by her first husband. The question is whether the movable and immovable property of the first husband should be given to his daughter, who is a minor, or to the son of his separated cousin.

A.—The daughter is entitled to the property of her father as his legal heir.

Tanna, July 20th, 1857.

Authority.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remarks.—See the preceding question.

Q. 3.—A deceased person has left a daughter and another daughter's son. How will they inherit the deceased's property?

A.—If the daughter is not married, or if she is in poor circumstances, she will take the property of her father and perform his

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(*m*) *Haribhat* v. *Damodarbhat*, I. L. R. 5 Bom. 171, and cases there referred to; *Babaji bin Narayam* v. *Balaji Gannesh*, I. L. R. 5 Bom. 660.

(*n*) *Navalram* v. *Nandkishor*, 1 Bom. H. C. R. 209.

(*o*) 6 M. I. A. 433.

(*p*) L. R. 8 I. A. 99, 109.

(*q*) *Sengamalathammal* v. *Valayuda Mudali*, 3 M. H. C. R. 312.

(*r*) S. A. No. 315 of 1876 (Bom. H. C. P. J. F. for 1877, p. 34).

funeral rites. The deceased daughter's son, who is a minor, is entitled to one-fourth of his grandfather's property. When both the daughters are married, and are in similar circumstances with regard to their means of livelihood, the surviving daughter and the deceased daughter's son will be equally entitled to the property. Each of them should therefore take a half of it.

Ahmednuggur, June 16th, 1848.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 134, l. 6; (3) p. 156, l. 1; (4*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—The daughter alone inherits, as the daughter's son is one degree further removed. He would, however, share the inheritance with his aunt if his mother died after her father.

Q. 4.—A man's grandson died, leaving a widow. The man died afterwards. There are sons of his daughter. The question is whether the daughter or her sons, or the widow of the grandson, will be the heir entitled to inherit the watan of the deceased grandfather?

A.—If the grandfather was a member of an undivided family his grandson's wife cannot be his heir. The right of inheritance therefore belongs to his daughter and her sons.

Sadr Adalat, September 25th, 1838.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) f. 58, p. 1, l. 5 and 9; (3) Vyav. May., p. 136, l. 4.

By "undivided" the Sastri means without partition having taken place between the grandfather and his son or grandson.

REMARK.—The deceased person's daughter alone inherits the estate. In the case at 2 Macn. Prin. and Prec. of H. L. 43, a daughter is preferred to a daughter-in-law. See also Q. 10, and *Musst. Murachee Koour* v. *Musst. Ootma Koour* (*s*).

Q. 5.—A deceased person has left a stepmother and a daughter. Which of these is the heir?

A.—If the stepmother is a separated member of the family the daughter should be considered the nearest heir of the deceased.

Ahmednuggur, May 19th, 1859.

AUTHORITIES.—(1) Vyav. May., p. 129, l. 3; (2) p. 20, l. 3; (3) p. 28, l. 2; (4) p. 140, l. 1; (5) p. 137, l. 5; (6) Mit. Vyav., f. 46, p. 2, l. 11; (7) f. 15, p. 2, l. 16; (8*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

(*s*) Agra S. Reports for 1864, p. 171.

Q. 6.—A Tapodhana (*t*) died, leaving a son. He had also nominated his sister's son as his son. The son and the foster-son are both dead. The son has left a daughter. The foster-son has left a son. The daughter has been married to a Brahman, whose caste is called Taulkiya Audichya. It appears to be customary for the Tapodhana to intermarry with this caste. The question under these circumstances is whether the right of inheritance belongs to the daughter of the son or the son of the foster-son?

A.—A man who has a son has no right to nominate any other person as his son. It is further to be observed that a man of the Brahman, or Kshatriya, or Vaisya caste cannot adopt a sister's son. The sister's son, therefore, is not the legal heir. The daughter, however she is married, in a Brahman family is the proper heir. Her right is not affected by her marriage into a higher caste.

Ahmedabad, October 17th, 1857.

AUTHORITIES.—(1) Vyav. May., p. 105, l. 8:

"But a daughter's son and a sister's son are affiliated (that is, allowed to be adopted) by Sudras." (Borradaile, p. 70; Stokes's H. L. B. 61.)

(2) Vyav. May., p. 104, l. 7; (3) p. 134, l. 4 (see Auth. 5); (4) p. 137, l. 5; (5*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—But see *Gunpatrav et al.* v. *Vithoba et al.* (*v*). It is not clear, however, that the parties in that case were, as the headnote says, Vaisyas. See *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (*w*) and *Narsain* v. *Bhutton Lall* (*x*) referred to therein.

Q. 7.—There were two brothers who lived separate from each other. One of them died, leaving a daughter only. She did not spend any money for the funeral ceremonies of her father. The brother of the deceased incurred some expense on that account. The deceased has left a will, bequeathing a portion of the property to his daughter. Can she claim more than the bequest, on the ground of her being an heir of the deceased, or should the rest pass into the hands of his brother as heir?

A.—A brother who lived separate from the deceased cannot be

(*t*) The occupation of this person is the same as that followed by Guravas in the Dekhan. It is washing idols, and having charge of a temple.

(*v*) 4 Bom. H. C. R. 130 A. C. J.

(*w*) I. L. R. 3 Bom. 273.

(*x*) C. W. R. Sp. No. for 1864, p. 194.

his heir merely because he performed his funeral rites. The daughter is the heir to the whole property; but if the deceased has left a will specifying the portion to which her claim should be confirmed, and transferring the rest to his brother, the brother will inherit according to the will of the deceased; otherwise the daughter should take the whole property, paying the expenses incurred on account of the funeral rites.

Ahmednuggur, January 10th, 1848.

AUTHORITY.—*Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—A daughter succeeds in preference to a separated brother (*y*).

Q. 8.—Two brothers lived separately from each other. One of them died. Will the daughter, brother, or stepbrother of the latter succeed to his property?

A.—If the deceased was separate, his daughter will be his heir; but if he had not separated, his brother or (if there be no brother) his half-brother will be his heir.

Poona, October 23rd, 1846.

AUTHORITY.—*Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—See *C. Hureehur Pershad Doss* v. *Gocoolanund Doss* (*z*).

Q. 9.—There were two or three brothers, one of whom lived at the distance of three kos from the others. He was there for about twenty years. His daughter and son-in-law also lived with him as the members of the family. He is now dead, and the question is whether his brother or daughter is his heir?

A.—As the deceased lived in a different village, and as he has not left a better heir or adopted son, his daughter will be entitled to his property.

Dharwar, November 18th, 1850.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) Vyav. May., p. 134, l. 4 (see Auth. 1.); (3) p. 131, l. 8:

"Narada . . . Gift and acceptance; cattle grain, houses, land, and attendants must be considered as distinct among separated brethren; as also

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(*y*) *Laxumon Gunesbhat* v. *Krishnabhat*, S. A. No. 342 of 1871 (Bom. H. C. P. J. F. for 1872, No. 23).

(*z*) 17 C. W. R. 129 C. R.

the rules of gift, income, and expenditure. Those by whom such matters are publicly transacted with their co-heirs may be known to be separate, even without written evidence." (Borradaile, p. 97; Stokes's H. L. B. 82.)

Q. 10.—The son of a man died while his father was alive. The father died afterwards. His daughter-in-law is alive. He has also a separated brother and a widowed daughter. The question is: Which of these is the heir?

A.—The rule of succession laid down in the Sastra provides that when a man separated from his brother dies without leaving male issue his widow becomes his heir; that in her absence his daughter; and that in the absence of the daughter some other relatives have a right to inherit in succession. A daughter-in-law is not mentioned in the rule. She cannot, therefore, have any right to inherit the deceased's property. The daughter is the heir. A suitable provision must, however, be made for the support of the daughter-in-law.

Surat, June 19*th*, 1850.

AUTHORITIES.—(1) Vyav. May., p. 137, l. 7 (see Chap. II., sec. 6A, Q. 11); (2) Viramitrodaya, f. 203, p. 1, l. 13; (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—See Remark to Question 4, *supra*, and p. 119.

Q. 11.—A man who was himself adopted died, leaving a daughter. There is a brother of the deceased—that is, a son of his natural father—who belongs to the same family, but he is a distant relation of the branch represented by the deceased, being a cousin of five removes. Who will be the heir to the deceased's property, the daughter or the cousin?

A.—When a separated member of a family dies without leaving any male issue his daughter is the heir. If the deceased had not separated from the other branch his cousin is the heir.

Poona, March 27*th*, 1850.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (3) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 12.—A person has died, leaving a daughter who is under age. Should the certificate of heirship be given to the daughter or to the cousin of the deceased, with instructions to protect the property and the heir and to get her duly married?

A.—If the cousin is united in interests with the deceased he may be granted a certificate, but if he be separate the daughter of the deceased should be declared the heir and placed under the protection of her cousin.

Ahmednuggur, October 12th, 1846.

AUTHORITIES.—(1*) Mit. Vyav., f. 51, p. 1, l. 10:

"But sisters should be disposed of in marriage, giving them, as an allotment, the fourth part of a brother's share." (*a*) (Colebrooke, p. 286; Stokes's H. L. B. 398.)

(2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—1. If the deceased belonged to an undivided family the son or sons of his brother or brothers will inherit, and not his daughter. But she has to be kept by her relations up to the time of marriage, and to be married at their expense.

2. If the deceased was divided from his relations the daughter inherits. As she is a minor she must have a guardian till she is married, which guardian will be the next paternal relation. 1 Str. H. L. 72.

Q. 13.—A man died. There are his male cousin and a daughter of ten years. Which of these is the heir? If the cousin be heir who should be entrusted with the protection of the deceased's daughter?

A.—When a man who has separated from his family dies, his daughter becomes his heir. When a man who is a member of an undivided family dies his daughter, as the nearest relation, is his heir. The cousin, however, will be the heir entitled to inherit the deceased's wátan and land, paying revenue to Government. The heir will be burdened with the obligation of getting the deceased's daughter married. If the daughter has already been married the heir must afford her such protection as she would have received from her deceased father.

Surat, December 29th, 1846.

(*a*) Regarding the explanation of the passage, see Colebrooke on Inheritance, p. 286. (Mit., Chap. I., sec. VII., paras. 4, 5.) Though the passage does not expressly prescribe that the unmarried sisters should receive maintenance, this, of course, follows from the injunction to marry them and to give them a dower.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 51, p. 1, l. 10 (see Chap. II., sec. 7, Q. 12).

REMARK.—The doctrine of the Sastri as to an undivided family is incorrect. See the preceding case. He gives the Bengal rule as laid down in the Daya Bhaga, Chap. XI., sec. II., para. 1. But as Mitramisra points out in the Viramitrodaya, Transl., p. 181, Jimuta Vahana in another place (Daya. Bhag., Chap. III., sec. II., para. 37) says that in a partition portions are not taken by daughters as having a title to the succession, though the quotation from Devala is not there relied on as Mitramisra supposed.

Q. 14.—A Kulakarani died. There are his daughter, some second cousins, and their sons. Which of them will inherit the deceased watan? These relations of the deceased lived separate from him. The deceased received his share separately. When he and his wife died his property was considered heirless, and sold as unclaimed. Who will be the heir to this property?

A.—If the deceased had declared himself separate and had received his share of the property, including the watan, separately, his daughter alone will be his heir. If the watan was not divided his cousins will be the heirs of the deceased.

Ahmednuggur, June 30th, 1848.

AUTHORITIES.—(1) Vyav. May., p. 83, l. 3; (2) p. 137, l. 5-7; (3) p. 157, l. 3; (4) p. 159, l. 5; (5) p. 156, l. 5; (6) p. 155, l. 5; (7) Mit. Vyav., f. 46, p. 2, l. 4; (8) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 15.—A daughter of a person, having orally renounced her right to her father's property, refused to perform his funeral rites. A cousin of the deceased, therefore, performed the rites. The daughter now asserts that she did not renounce her claim to the inheritance, and wishes to have it recognised. Who will be the heir under these circumstances, the daughter or the cousin?

A.—It appears that the deceased has left a will to the effect that his property should be given to him who should perform his funeral rites, whether it were his daughter or the cousin. If it could be proved that the former renounced her claim and directed her cousin to perform the rites and take the property of the deceased, her claim would be inadmissible; but if no proof of this be forthcoming, the daughter by law is the heir and entitled

to the inheritance. In this case the daughter would be obliged to pay the cousin the expenses which he might have incurred in performing the ceremonies.

Tanna, December 29th, 1848.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 137, l. 5; (3) p. 138, l. 3; (4*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 16.—Will a man's property descend to his married daughters or to his brother's wife?

A.—If the deceased was a member of an undivided family, and has left no sons, his brothers will be his heirs, and in the absence of brothers their wives; but if the deceased had separated [from his brothers] his daughters will be his heirs.

Poona, December 31st, 1845.

Authorities.—(1*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remark.—The brother's widow inherits only in case the deceased (A.) and his brother (B.) were united in interests, and A. died before B. For in this case the share of A. would fall first to B. (Authority 1), and next to B.'s wife (Authority 2).

Q. 17.—An inhabitant of Gujarath had a daughter-in-law who was pregnant at his death. He therefore transferred his property by a deed of gift to his son-in-law, on condition that if the result of the pregnancy should prove a son the whole of his property should be given to him; that if a daughter, her marriage expenses should be defrayed from the property and his daughter-in-law supported during her lifetime from the same source. After having made a deed of gift to this effect the man died. His death was followed by that of his daughter-in-law without issue, and of his son-in-law. There is only a daughter of the man—that is, the widow of his son-in-law, who obtained the gift. Can she be considered the legal heir to the property?

A.—When a man makes a gift of any thing and at the same time retains his proprietary right to it, the transaction cannot be considered a gift. This is one of the rules of the Sastra; and another is that when a man dies without leaving male issue and wife, his daughter is his legal heir. In the case under reference the man who made the gift of his property retained his right to

it, as shown by the condition of the grant that the property was wholly to pass to the son of his daughter, in case he should come into existence. The deed of gift is therefore illegal, and when it is set aside the daughter of the man succeeds.

Khandesh, January 4th, 1853.

AUTHORITIES.—(1) Vyav. May., p. 196, l. 5; (2) p. 134, l. 4 (see Auth. 4); (3) p. 121, l. 2; (4*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—The gift may, however, be accompanied by a trust or duty to be fulfilled by means of it or in return for it (*b*) It must be completed by possession (*c*), at least as against a subsequent transferee from the donor (*d*). When the purpose of a gift is not fulfilled, as by non-execution of the trust or other annexed duty, the Hindu Law annuls the donation, and this is so though the proposed consideration (for so it is regarded) fail but in part (*e*). The gift is thus attended with a kind of condition subsequent of defeasance. Under the Roman law, as under the codes derived from it, a gift was revocable by the donor for ingratitude (*f*). For non-satisfaction of charges it could be revoked by his successors (*g*). The Indian Courts do not now cancel the gift; they enforce the annexed duty according to the equitable doctrine of trusts (*h*), subject to the limitations noticed above, pp. 179 ss.

Q. 18.—Can the daughter of a deceased Mahar dedicated as a Murali, as well as her son, be considered heirs to his property?

A.—The Sastras are silent as to the practice of dedicating females as Muralis. The Murali and her son would, however, according to the custom of the caste, succeed to the property left by her father.

Dharwar, August 11th, 1857.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

(*b*) *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 630.

(*c*) *Ibid.*, *Vithalrao Vasudev* v. *Chanaya*, B. H. C. P. J. F. for 1877, p. 324; *Lallubhai* v. *Bai Amrit*, I. L. R. 2 Bom. 299; *Harjiwan Anandram* v. *Naran Haribhai*, 4 Bom. H. C. R. 31 A. C. J.

(*d*) 2 Macn. H. L. 207; 2 Str. H. L. 427.

(*e*) See Col. Dig., Book II., Chap. IV. T. 56, Comm.

(*f*) See Col. Obl., § 657 ss.

(*g*) Goud. Pand., p. 201.

(*h*) See the Transfer of Property Act, IV. of 1882, secs. 126, 129; Indian Trusts Act, II. of 1882, secs. 1, 45, 56, 61; Specific Relief Act, I. of 1877, sec. 54; Acts XXVII. and XXVIII. of 1866; *Ram Narain Singh* v. *Ramoon Paurey*, 23 C. W. R. 76. Acts II. and IV. of 1882 are not in force in Bombay, and where Act II. is in force its operation amongst Hindus is much limited by sec. I., which reserves the classes of trusts which most frequently form the subjects of litigation.

Q. 19.—A deceased person has left no male issue, but has left four daughters. One of them became a widow when she was a child, and therefore lived in her father's house, making herself useful to him as a servant. The deceased has a nephew, who lived separate from him. Which of these two persons will be the heir?

A.—When a deceased person has no widow his daughters are his heirs. Of these the one who is not married has a superior claim, and when all are married the one in poor circumstances has a superior claim. Those who are in good circumstances are, however, entitled to a small share of the property. Small shares of the property should be given to the wealthy daughters and the rest to the one in poor condition. The nephew, whose interests are separate, has no right whatever.

Ahmednuggur, September 21*st*, 1847.

AUTHORITIES.—(1) Vyav. May., p. 137, l. 6:

"If there be more daughters than one they are to divide (the estate) and take each (a share). In case also where some of them are married and some unmarried, the *unmarried one* ALONE (succeeds), by reason of this text of Katayayana: 'Let the widow succeed to her husband's estate provided she be chaste, and in default of her, the daughter inherits, if *unmarried.*

"Among the married ones, when some are possessed of (other) wealth and others are destitute of any, these (last) even will obtain (the estate). From this text of Gautama: 'A woman's property goes to her daughters, unmarried, unprovided for. Unprovided, destitute of wealth. Those acquainted with traditional law hold that the word woman's (wife's) includes the father's also.'" (Borradaile, p. 103; Stokes's H. L. B. 86.)

(2) Vyav. May., p. 83, l. 3; (3) p. 157, l. 5; (4) p. 159, l. 5; (5) p. 156, l. 5; (6) p. 155, l. 5; (7) Mit. Vyav., f. 46, p. 2, l. 14; (8*) f. 58, p. 1, l. 5 (see Auth. 1).

REMARKS.—1. Comparative poverty determines the preference of married daughters to succeed (*i*). Failing a maiden daughter the succession devolves on an indigent married daughter, though childless (*k*).

2. The different position of daughters in relation to each other as heirs of their father's property in Bombay and elsewhere is considered above, pp. 98-101.

3. In *Amritlal Bose* v. *Rajoneckant Mitter* (*l*) (a Bengal case), it is said that a heritable right vested in one of two sisters at her father's death is not extinguished by her becoming a childless widow, in whom as such the right could not have vested. She may therefore succeed to her sister who took at first as the preferable heir, and so exclude that sister's son, contrary to the law in Bombay. The Hindu law does not deprive, on account of

(*i*) *Bakubai* v. *Manchhabai*, 2 Bom. H. C. R. 5; *Poli* v. *Narotum Bapu et al.*, 6 Bom. H. C. R. 183, A. C. J.

(*k*) *Srimati Uma Deyi* v. *Gokoolanund Das*, L. R. 5 I. A. 40.

(*l*) L. R. 2 I. A. 113.

supervening defects (not amounting to an incapacity for holding property), of an inheritance once actually taken or "vested in possession"; see the case of the incontinent widow, below. But where successive heirs are provided to the same person, the analogy of the widow's estate and those following it would seem to point to the temporary estate being regarded as a prolongation of the original one, and the claims of alleged heirs being estimated according to their condition at the end of the derived interest immediately preceding. The judgment, therefore, may be regarded as a substantial extension of the rights of those having latent interests at the death of a father.

Q. 20.—A man of the Sudra caste has left two widowed daughters. Which of them will be his heir?

A.—The one who is wealthy cannot claim the property. The poor one will be his heir. If both are in similar circumstances each should receive half the property.

Sholapoor, September 26th, 1846.

AUTHORITY.—*Vyav. May., p. 137, l. 6 (see Chap. II., sec. 7, Q. 19).

REMARK.—See the Remark to Q. 19.

Q. 21.—A deceased person has left two daughters, one of whom applied for a certificate that she is his heir. Should it be given to her?

A.—The two daughters have equal right to the property of the deceased, and one of them may therefore have a certificate stating her right to one-half of it.

Poona, October 12th, 1846.

AUTHORITY.—Vyav. May., p. 137, l. 6 (see Chap. II., sec. 7, Q. 19).

REMARK.—In the cases of *Kattama Nachiar et al.* v. *Dorasinga* alias *Gaurivallaba* (*m*) and *Radhakishen* v. *Rajah Ram Mundul et al.* (*n*), different views are taken of the devolution of the property inherited by daughters. See the section on Stridhana, p. 257 ss., and above, Q. 1.

SECTION 8.—DAUGHTER'S SON.

Q. 1.—A man died. There is a widowed daughter of his daughter, and a son of his other daughter. Which of these is the heir? And if both are heirs, in what proportion should they share the property?

A.—The daughter's son is the heir.

Surat, June 14th, 1853.

(*m*) 6 M. H. C. R. 310.
(*n*) 6 C. W. R. 147.

AUTHORITIES.—(1) Viramitrodaya, f. 205, p. 2, l. 2 (see Auth. 2); (2*) Mit. Vyav., f. 58, p. 1, l. 9:

"By the import of the particle 'also' (section I., § 2), the daughter's son succeeds to the estate on failure of daughters. Thus Vishnu says: 'If a man leave neither son, nor son's son, nor (wife, nor female) issue, the daughter's son shall take his wealth. For in regard to obsequies of ancestors, daughter's sons are considered as son's sons.'" (Colebrooke, Mit., p. 342; Stokes's H. L. B. 441.)

REMARKS.—1. Daughters' sons take *per capita* (o) They are excluded by the survival of any daughter (p). But in *Radhakishen* v. *Rajnarain* (q), a Bengal case, it was held that the son of a daughter who was unmarried at the time of her succession succeeds to the paternal estate, to the exclusion of her married sisters.

2. According to the Mitakshara a daughter's son takes his maternal grandfather's estate as full owner, and on his death such estate devolves on his heirs, and not on the heirs of his maternal grandfather (r).

Q. 2.—A man, having survived his son, died, leaving a daughter-in-law and a daughter's son. Which of the two succeeds to his property?

A.—The daughter-in-law, by virtue of her heirship to the son of the deceased, will be his heir. The daughter's son will not be the heir. His right is not superior to that of the daughter-in-law, because it is declared in the Sastras that no son should be recognised as heir in the Kali age other than the begotten and the adopted.

Khandesh, 1848.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2*) Mit. Vyav., f. 58, p. 1, l. 9 (see Chap. II., sec. 8, Q. 1).

REMARKS.—1. The daughter's son inherits, according to Auth. 2, if the grandfather died after his son. Otherwise the daughter-in-law is to be preferred, as in *Mahalaxmi* v. *Grandsons of Kripa Shookul* (s), contra *B. Shen Sulrae Singh* v. *Balwunt Singh* (t). In *Ambawow* v. *Rutton Krishna et al.* (v) it was held that a daughter's son precedes a grandson's widow. See sec. 7, Q. 4.

2. The Sastri's remark refers to "the putrika-putra," the son of an appointed daughter, who, according to the ancient law, was reckoned amongst the "twelve sons," but whose heirship in that character would not now be recognised.

(o) *Ram Swaruth Pandey et al.* v. *Baboo Basdeo Singh*, 2 Agra H. C. R. 168; *Ramdhun Sein et al.* v. *Kishenkanth Sein et al.*, 3 C. S. D. A. R. 100.

(p) *Musst. Ramdan* v. *Beharee Lall*, 1 N. W. P. H. C. R. 114.

(q) 2 Wyman's R. Civil and Cr. Reporter, 152.

(r) *Sibta* v. *Badri Prasad*, I. L. R. 3 All. 134.

(s) 2 Borr. 557.

(t) Cal. S. D. A. R. for 1838, p. 490.

(v) Reports of Selected Cases (1820-40), 1st edition p. 132, 2nd edition, p. 150.

Q. 3.—A man died. There are a son of his daughter and a second cousin. Which of these is the heir?

A.—If the deceased was a separated member of the family his daughter's son is the heir. If he and the second cousin have lived as members of an undivided family the cousin will be his heir.

Khandesh, August 25th, 1853.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2) p. 138, l. 2 (see Auth. 4); (3*) Vyav. May., p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (4*) Mit. Vyav., f. 58, p. 1, l. 9 (see Chap. II., sec. 8, Q. 1).

Q. 4.—A Brahman died without male issue. Whilst the funeral rites, including the ceremony of "Sapindi," were performed from the first day by his brother's son, in conformity with the deceased's direction, his daughter's son performed them from the eleventh day. Which of these will be the heir of the deceased? If the brother's son is entitled to the property, can the costs of the funeral ceremonies performed by the daughter's son be paid to her?

A.—When a person who had separated from his family dies without male issue, his first heir is his widow. In her absence his daughter, and if a daughter is not in existence her son, is the heir. In the case under reference the daughter's son, who performed the funeral rites, is the heir. The nephew, who had separated from the deceased and who performed the rites in accordance with the written directions left by the deceased, cannot be considered the heir, though he is entitled to the costs of the rites.

Tanna, September 6th, 1847.

Authorities.—(1) Vyav. May., p. 138, l. 2:

(Vishnu):—"If a man leave neither son nor son's son, nor (wife, nor female) issue, the daughter's son shall take his wealth. For in regard to the obsequies of ancestors, daughter's sons are considered son's sons." (Borradaile, p. 103; Stokes's H. L. B. 87.)

(2) Manu IX. 136:

"By that male child whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son; let that son give the funeral oblation and possess the inheritance." (Colebrooke, Inh., p. 343; Stokes's H. L. B., 441.)

Q. 5.—Can the male offspring of a Sudra woman by her second husband succeed to her father's property?

A.—As there is no prohibition in the Sastra against re-marriage by a woman of the Sudra caste, it is generally resorted to. The male offspring by a re-marriage will therefore be the legal heir to his maternal grandfather's property.

Sadr Adalat, November 17th, 1838.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 58, p. 1, l. 9 (see Chap. II., sec. 8, Q. 1); (3) Manu IX. 132; (4*) Nirnayasindhu, Part III., Pra. I., fol. 63, p. 2, l. 7:

Since (the following passage) is quoted in the Hemadri:

"The re-marriage of a married woman, the (double) share given to an elder brother, the killing of cows, the (appointment of a brother to cohabit with the) brother's wife, and (the carrying of) a water pot, these five (actions) ought to be avoided in the Kali (age)."

REMARKS.—1. The Hindu Law of the Sastras forbids the re-marriage of widows of all classes. (See Auth. 4.) Consequently the son of a re-married woman is to be considered illegitimate, and as such not qualified to inherit except under caste custom. See Chap. II., sec. 3, Q. 16.

2. As the marriage of widows is legalised by Act XV. of 1856, the Pat-wife's son inherits. See above, p. 390.

SECTION 9.—MOTHER.

Q. 1.—A person executed a bond and a deed of separation in the name of a woman and her son. Can the woman sue on the bond after the death of her son?

A.—The mother, being the heir of her son, can do so.

Poona, August 11th, 1845.

AUTHORITY.—*Mit. Vyav., f. 58, p. 1, l. 11:

"On failure of those heirs, the two parents, meaning the mother and the father, are successors to the property.

"Although the order in which parents succeed to the estate does not clearly appear (from the tenor of the text, section I., § 2), since a conjunctive compound is declared to present the meaning of its several terms at once, and the omission of one term and retention of the other constitute an exception to that (complex expression), yet as the word 'mother' stands first in the phrase into which that is resolvable, and is first in the regular compound 'mother and father,' when not reduced (to the simpler form, pitarau, 'parents') by the omission of one term and retention of the other, it follows from the order of the terms and that of the sense which is thence deduced, and according to the series thus presented in answer to an inquiry concerning the order of suc-

cession, that the mother takes the estate in the first instance, and on failure of her the father." (Colebrooke, Mit., p. 344; Stokes's H. L. B. 441-2.)

REMARKS.—1. On the mother's death the succession goes to the then next heir of the son, according to *P. Bachirajee v. V. Venkatappadu* (*w*). See above, pp. 102, 312, 321.

2. Manu gives apparently contradictory directions as to the precedence of the two parents. (See Manu IX. 185, 217.) Vijnanesvara's argument is controverted by Nilakantha, Vyav. May., Chap. IV., sec. 8, p. 14. The Smriti Chandrika, too, rejects it. See Chap. XI., sec. 3 (*x*).

3. In Gujarath the father is preferred to the mother as heir to their son (*y*).

4. A mother of a Girasia was held entitled to receive the Girasi haks from Government upon the death of her son (*z*).

Q. 2.—A son of seven years of age of a man of the Parit caste died. His father is in prison. The son's mother has applied for a certificate of heirship. Can it be granted to her?

A.—The father is the heir of his son if he should die before his marriage, and in the absence of the father his mother is the heir.

Poona, April 13th, 1857.

AUTHORITIES.—(1) Vyav. May., p. 138, l. 3; (2) Mit. Vyav., f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1).

REMARKS.—1. There are no special rules regarding the succession to the property of an infant.

2. If the property of the deceased son is separate property, as the context of the question seems to indicate, consisting in presents from relations or friends, it falls under the general rules which regulate the succession to the property of a separated person who has no male issue, and consequently the mother inherits before the father.

See the case of *Narasapa* v. *Sakharam* (*a*) and the Introduction, section on Stridhana. The estate which the mother takes in the property of her deceased son is, according to the case, similar to that which a widow takes in that of her deceased husband. See also *P. Bachiraja* v. *Venkatappada* (*b*).

(*w*) 2 Mad. H. C. R. 402.

(*x*) In the oldest form of the Salic law the inheritance is given to the mother next after the sons. After her came the brother and sister on equal terms, and after them the mother's sister. In the next stage we have "if there be no mother or father"; then "if no father or mother." The "sorores patris" in like maanner acquire precedence in the later law over the "sorores matris." But female succession, first to land at all, and then to the "terra salica" (probably the estate of the Hall—that is, for maintenance of the household) is throughout excluded. See Hessels and Kern, Lex. Sal. 379-386.

(*y*) *Khodhabhai Mahiji* v. *Badhar Dala*, I. L. R. 6 Bom. 541.

(*z*) *Bai Umedha* v. *The Collector of Surat*, R. A. No. 24 of 1867. Decided 30th November, 1870 (Bom. H. C. P. J. F. for 1870).

(*a*) 6 Bom. H. C. R. 215 A. C. J.

(*b*) 8 M. H. C. R. 402.

Q. 3.—In the case of some money being due to a deceased person, who has a right to claim the payment, his mother or his widow, the latter being notoriously adulterous, and pregnant by illicit intercourse?

A.—The mother has the right to recover the money, even if she be separate. The widow has forfeited her right in consequence of her bad conduct.

Ahmednuggur, September 25th, 1849.

AUTHORITIES.—(1) Vyav. May., p. 136, l. 8:

"But a wife who does malicious acts injurious to her husband, who acts improperly, who destroys his effects, or who takes delight in being faithless to his bed, is held unworthy of separate property." (Borradaile, p. 102; Stokes's H. L. B. 86.)

(2) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (3*), f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1).

REMARK.—"Even if she be separate." It does not matter whether the mother lived with her son or not, since she inherits, on the exclusion of deceased's widow, as the nearest heir to a "separate, not reunited, person who has no male issue."

Q. 4.—A man died, leaving two widows. One of them had a son, who also died afterwards. Which of the survivors is entitled to the property of the deceased as his heir?

A.—The son became heir of the deceased father, and when the son died his mother became his heir. The stepmother is not his heir.

Dharwar, October 13th, 1852.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) f. 55, p. 2, l. 7; (3) f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1); (4) Vyav. May., p. 83, l. 7.

Q. 5.—A man died leaving two sons by two different wives. The son of the younger wife was a minor, and his share was therefore deposited by the father with a banker. The son afterwards died. Has his mother or his stepmother the right to inherit his property?

A.—The mother of the deceased.

Ahmednuggur, April 3rd, 1857.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 8; (2) f. 51, p. 1, l. 3; (3) f. 46, p. 1, l. 9; (4*) f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1); (5) Vyav. May., p. 2.

Q. 6.—On the death of a man his estate was entered in the public records in the name of his son. The son subsequently died, and there remained two claimants—namely, the son's mother, who was married by "Pat," and his stepmother, who was married by "Lagna." In whose name should the estate be entered?

A.—If the widows live together the one who by age and abilities appears superior should be considered entitled to have the property registered in her name. If they are separate, the mother of the deceased son should have a preference to the other.

Dharwar, May 5th, 1858.

Authorities.—(1) Mit. Vyav., f. 20, p. 1, l. 16; (2*) f. 58, p. 1, l. 11 (see Chap. II., sec. 9., Q. 1).

Remark.—The Sastri seems to have thought of the case of two widows who after their husband's death became co-owners of his property (*c*). In this case the land must be entered in the name of the deceased son's mother, since she is the sole heir of his property.

Q. 7.—A man died leaving a widow and a son. He held a Desaigiri Watan, which was his ancestral property. The mother and the son used to manage the watan conjointly. The son afterwards died, leaving a widow and a male child. The latter died subsequently. The question is whether the mother or the grandmother of the male child is entitled by right of inheritance to take the Desaigiri and other property? Are both of them entitled as heirs?

A.—The mother is the nearest relation of the child. She is entitled to inherit the property of her son. She cannot, however, transfer the Desaigiri, &c., to others by sale, gift, or mortgage. She should live upon the proceeds of the property.

Surat, July 20th, 1854.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 13 (see Auth. 2); (2*) f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1); (3) Vyav. May., p. 138, l. 5 (see Auth. 2); (4) p. 135, l. 2 (see Chap. II., sec. 6a, Q. 6); (5) Manu IX. 187.

(*c*) *Bhugwandeen Doobey* v. *Myna Baee*, 11 M. I. A. 487. Above, p. 95.

REMARK.—In *Narsappa* v. *Sakharam* (*d*) it was held that a mother inheriting from a son takes the same estate as a widow from her husband. In *Sakharam* v. *Sitaba* (*e*) this is said to be settled law. The Sastris in such cases as Q. 3 agreed with the answer here given that the mother inheriting becomes herself the *proposita* for any further descent. See further above, p. 314. The Mitakshara, Chap. I., sec. 1, paras. 12, 13, says that where there is heritage there is ownership, and in Chap. II., sec. 1, paras. 12, 39, that the widow, and failing her the parents, take the heritage of a separated sonless man. The daughter's absolute right is recognised as arising under the same rule as applies to the widow and the parents (*f*). The mother's estate, therefore, like the widow's, must, according to the recent decisions, be regarded as anomalous, and limited by principles foreign to the Mitakshara. See above, pp. 312, 316, 319.

Q. 8.—A man possessed a house, and held some cash allowances called Desaigiri, Muglai, Sirpava Chirde, and Vazifa. He died leaving a widow and a son. The latter, who was a minor, died subsequently. The paternal uncle of the man received the Watan allowances. The house was also in his possession. He received a certificate declaring him to be the heir of his nephew. The man's widow has obtained a certificate declaring her to be the heir of her son. On the strength of this certificate she claims the Watan allowances. These allowances are the ancestral property of the family. Supposing the deceased son's grandfather had divided his property between himself and his brother, to whom will the right of claiming the house and the allowances belong; and if the division has not taken place, to whom will the same right belong?

A.—On the death of a man his son becomes his heir. His right is not affected by the separation or union of the father and other members of the family. According to this rule the son in the question became heir of his father. On his death his mother can claim to be the heir of her son. She therefore has a right to the Watan, house, and other property of the deceased.

Surat, July 30th, 1865.

AUTHORITIES.—(1) Vyav. May., p. 83; (2) Viramitrodaya, f. 193, p. 1, l. 2; (3) Manu IX. 137; (4) 163; (5) Mit. Vyav., f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1).

REMARK.—The mother inherits only in case her husband or son had separated from the rest of the family.

(*d*) 6 Bom. H. C. R. 215.
(*e*) I. L. R. 3 Bom. 353.
(*f*) See *Haribhat* v. *Damodharbat*, I. L. R. 3 Bom. 171.

Q. 9.—A woman of the Sudra caste had a son by her first husband. She married herself by the Pat ceremony to another husband, with whom she and her son lived. When the son came to age he was married at the house of his mother's second husband. A few years afterwards the son and his wife died without issue. The question is: Who should be considered his heir?

A.—The mother is the heir, and not her second husband.

Poona, November 26th, 1851.

Authorities.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1).

Remark.—According to Act XV., 1856, sec. II., the re-married mother cannot, it might seem, inherit from her first husband's son; but the decisions recognise her heritable right. (See also Dig. Vyav., Chap. VI., sec. 3 *c*, Q. 7.)

SECTION 10.—FATHER.

Q. 1.—Should the younger brother or the father of a deceased person receive the certificate of heirship?

A.—The father is the proper heir, but the younger brother may obtain the certificate if his father has no objection to it.

Rutnagherry, June 11th, 1846.

Authorities.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) Mit. Vyav., f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1).

Remark.—Vide *Bajee Bapoojee* v. *Venoobai*, quoted in sec. 11, Q. 1.

Q. 2.—A man brought up a son of another man and got him married. At the time of the marriage he bestowed certain necessary jewels and articles of dress on the bride. The son died subsequently without issue. His widow contracted a Pat marriage with another man. It has therefore become necessary for the woman to restore the jewels and the clothes. The question is whether the property should be taken by the father of the boy or the widow of the man who brought him up?

A.—The son was not adopted, but was simply brought up and protected by the man. His father therefore has a right to the property mentioned in the question.

Surat, April 11th, 1850.

Authorities.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see chap. I., sec. 2, Q. 4); (2*) f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1).

SECTION 11.—BROTHERS.

Q. 1.—Two brothers lived separately from each other for thirty-two years. One of them, who had brought up a girl and got her married, died. The question is: Who shall be considered his heir?

A.—The surviving brother is the heir, and not the foster-daughter.

Rutnagherry, March 8th, 1851.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—The brother inherits before the widow of a pre-deceased son (*g*). A separated father would exclude a separated full brother, as well as half-brothers, who, again, being united with their father, would exclude the full brother of the original proprietor (*h*).

Q. 2.—A Paradesi kept a woman by whom he had some daughters. There are also his brothers. The Paradesi is dead, and the question is: Who should be considered his heir?

A.—The brothers.

Tanna, June 4th, 1852.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I. sec. 2, Q. 4).

Q. 3.—A man had three sons and a nephew (brother's son), whose father died when he was only three days old. The man had brought the young child up with his sons. Two sons separated themselves from the rest of the family, while the third and the nephew lived as an undivided family. The nephew died, and his widow remained with the third son, who also afterwards died. The question is whether the widow of the nephew of the two separated sons should succeed to the property of the deceased person?

A.—The wife of the nephew has a better claim, in case the nephew and the third son had an identity of interest.

Dharwar, September 30th, 1857.

(*g*) *Venkata* v. *Holyava*, S. A. No. 60 of 1873 (Bom. H. C. P. J. F. for 1873, No. 101).

(*h*) *Bajee Bapoojee* v. *Venoobai*, S. A. No. 282 of 1871; (*Ibid.* for 1872, No. 41).

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—The facts of the case appear to be these. One, C., of three brothers, A., B., C., was united in interests with a married first cousin (bhratrivya) D. The other two brothers had separated from the third. The first cousin D. died. After his death his share became the property of the brother C., as women cannot inherit in an undivided family. After C.'s death his brothers, A. and B., will therefore inherit, and not D.'s wife, because she is only a Sapinda relation excluded by co-owners.

Q. 4.—A person divided his property between his legitimate and illegitimate sons. One of the (illegitimate) brothers died without issue. Will the legitimate or illegitimate members of the family be his heirs?

A.—The relatives of the illegitimate branch will be the heirs. *Nuggur*, 1845.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) f. 58, p. 2, l. 5 :

"Among brothers, such as are of the whole-blood take the inheritance in the first instance, under the text above cited; 'to the nearest sapinda the inheritance next belongs'; since those of the half-blood are remote through the difference of mothers." (Colebrooke, Mit., p. 347; Stokes's H. L. B. 445.)

REMARK.—It is not clearly stated whether the surviving relations of the deceased are all his brothers, or some brothers and some nephews, and it is therefore impossible to say whether the Sastri's answer is correct. The order of inheritance is this: brothers of the whole-blood, half-brothers, sons of brothers of the whole-blood, sons of brothers of the half-blood (*i*). (See above, sec. 3, Q. 12, and pp. 103, 104.)

Q. 5.—A Marwadi had three wives, of whom the first had two sons and the second and third one each. The husband and two wives died. The widow who survived was the mother of the two sons. One of these sons died before marriage. The question is: Who will be his heir, the uterine brother or the half-brothers?

A.—The order of heirs laid down in the case of death of a person who has no male issue, and who is a "Vibhakta," or a member of a divided family, is as follows: The widow, daughter, daughter's son, father, mother, uterine brothers, and half-brothers. When one fails the other succeeds. If the deceased had separated and was unmarried, his immediate heir will be his

(*i*) So in *Burdum Deo Roy* v. *Punchoo Roy*, 2 C. W. R. 123.

father, and in his absence his mother. If he had not separated, his uterine and half-brothers, who would be entitled to equal shares of the deceased's property.

Khandesh, October 20th, 1849.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 58, p. 1, l. 11 (see Chap. II., sec. 9, Q. 1).

REMARKS.—Father, Mother.—It should be mother, father (*k*). See above, p. 101.

In the case of *Gavuri Devamma Garu* v. *Ramandora Garu* (*l*), there is an exposition of the law relating to impartible property belonging, as an undivided estate, to a Hindu family, or to one branch of such a family, jointly as to the members of the branch, but separately as to the other branches, with which a community of interests exists as to other property. The Court say (p. 109): "We are of opinion, therefore, that the sound rule to lay down with respect to undivided or impartible ancestral property is that all the members of the family who, in the way we have pointed out, are entitled to unity of possession and community of interest according to the Law of Partition, are coheirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near sapindas in the male line, the family heritage, both partible and impartible, passes to the survivors or survivor to the exclusion of the widow. But when her husband was the last survivor the widow's position, as heir relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property."

2. A brother of the whole-blood has precedence in succession over a half-brother in Bengal (*m*). *Gavuri Devamma Garu* v. *Ramandora Garu* is discussed by the Judicial Committee in *Periasami v. Periasami* (*n*). Their Lordships thought that the property, by the elder brother's renunciation, became that of the younger brothers as if it had fallen to them in an ordinary partition. See p. 75 of Report.

Q. 6.—A Sannyasi is dead. There are his brother, a grandson of his other brother, and a widow of the third. Which of these will be his heir?

A.—That person will be the heir to whom the property might have been transferred previous to the man's becoming a Sannyasi. But if the property was not transferred to anyone, and if it constitutes what the man possessed before he became a Sann-

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(*k*) See *Musst. Pitum Koonwar* v. *Joy Kishen Doss et al.*, 6 Cal. W. R. 101 C. R.

(*l*) 6 M. H. C. R. 93.

(*m*) *Sheo Sundri* v. *Pertheo Singh*, L. R. 4 I. A. 147.

(*n*) L. R. 5 I. A. 61.

yasi, it will be inherited by his brother, and in the absence of a brother by a brother's son; and when there is no such son, the widow of a brother. The property which may have been acquired during the time the man was Sannyasi, such as his books, wooden sandals, math, &c., will be inherited by his virtuous disciple.

Ahmednuggur, September 2nd, 1849.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 140, l. 1; (3*) Mit. Vyav., f. 58, p. 2, l. 5 (see Chap. II., sec. 11, Q. 4; (4*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remarks.—1. Nephews cannot take by representation in competition with the surviving brothers of a deceased co-sharer (*o*). See also Mit., Chap. II., sec. 4, p. 8.

2. But it should be borne in mind that by the Mitakshara law the rules of inheritance come into operation only as to the sole estate or the separate estate of the *propositus*. In a united family there is no room for succession of "brothers and their sons," the joint estate is theirs already; it is only a participator who is removed. Even the widow, the first in the series of heirs to a sonless man, succeeds only if he was separate. See Mit., Chap. II., sec. 1, paras. 2 and 39. Much less can the daughter or brother succeed to the same estate (*p*).

SECTION 12.—HALF-BROTHERS (*q*).

Q. 1.—There were two half-brothers of the Rajput caste. One of them died, leaving his property in the possession of his widow. She contracted a Pat marriage with another man. The question is whether the widow or the half-brother has right to the property of the deceased?

A.—The widow of the deceased, having re-married by the rite of Pat, has forfeited her claim to her former husband's property. The nephew has right to inherit it.

Broach, June 29th, 1852.

(*o*) *Rampershad Tewary* v. *Sheochurn Doss*, 10 M. I. A. 504.

(*p*) See above, Chap. I., sec. 2, Q. 6, Remark; and *Rajhubanand Doss* v. *Sadhuchurn Doss*, I. L. R. 4 Cal. 425.

(*q*) As to the precedence of half-brothers over full-brothers' sons, the Smriti Chandrika, Chap. XI., sec. 4, para. 5, follows the Mitakshara, while the Vyav. May., Chap. IV., sec. 8, p. 16, reverses the order. Macn., Vol. 2, p. 11, says that representation does not extend to collaterals, but the case of which he intends to give the effect goes only so far as to say that half-brothers take after full-brothers and exclude half-brothers' sons.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 8; (2) f. 58, p. 2, l. 5 (see Chap. II., sec. 11, Q. 4).

REMARKS.—Regarding the loss of the widow's rights, see also Act. XV., 1856, sec. 2.

2. According to the Vyav. May. a full sister inherits in preference to a half-brother (*r*). Much more, therefore, in preference to remoter relatives (*s*).

SECTION 13.—BROTHER'S SON (*t*).

Q. 1.—A person died, and there is his brother's son as well as a widow of another brother's son. Will the widow be the heir in preference to the nephew?

A.—No.

Tanna, October 11*th*, 1847.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 2.— A man died. His surviving relatives are four nephews and a wife of a nephew. The question is: Which of these is the heir?

A.—The four nephews are heirs. The widow of a nephew cannot be the heir of the deceased.

Ahmedabad, July 18*th*, 1857.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 140, l. 1; (3) p. 140, l. 6; (4*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—In default of brothers, brothers' sons succeed, taking *per capita* (*v*). They succeed directly as nephews, not by representation of their fathers (*w*).

(*r*) *Sakharam Sadashiv Adhikari* v. *Sitabai*, I. L. R. 3 Bom. 353.

(*s*) *Ibid.* 368 (note), 369.

(*t*) See Introduction, p. 116, 117; below, sec. 14 I. B. 1 *a*, Q. 1, and Nirnayasindhu III., p. 95, l. 17, quoted in Book I., Chap. 14, I. B. *b*. 1, Q. 1. Brothers' sons exclude a son's widow, 2 Macn. 75. They are amongst the heirs specially enumerated. The Smriti Chandrika, Chap. XI., sec. 4, para. 26, places the son of a half-brother next after a son of a full-brother. Brother's sons exclude the widows of the deceased in a united family, *Totava et al.* v. *Irapa*, R. A. No. 26 of 1869, decided 4th July, 1871. (Bom. H. C. P. J. F. for 1871.)

(*v*) *Brojo Kishoree Dossee* v. *Shreenath Bose*, 9 C. W. R. 463. See Q. 6.

(*w*) *Brojo Mohun Thakoor* v. *Gouree Pershad et al.*, 15 C. W. R. 70.

Q. 3.—Who will be the heir to a deceased person, a brother's son or a brother's daughter?

A.—The brother's daughter cannot be the heir.

Dharwar, 1845.

AUTHORITY.—*Mit. Vyav., f. 55, 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—Nandapandita and Balambhatta give equal shares to the brother's daughters. See Stokes's H. L. B. 445. See *infra*, Dig. Vyav., Chap. II., sec. 15, B. II. (2).

Q. 4.—A man died, leaving neither wife nor children. He has left two relatives—namely, a sister-in-law and a nephew. Which of these is the heir of the deceased? The sister-in-law has sold a house of the deceased without the consent of her son. Is this a legal sale?

A.—When a man dies without male issue his widow becomes his heir. When there is no widow his daughter, and in her absence, her son, is the rightful heir. In the absence of a daughter's son, the parents, and in their absence the uterine brothers, and in their absence, the nephews, are th eheirs. This is the rule of succession laid down in the Sastra. According to it a sister-in-law cannot be the heir while there is a nephew alive. The sale effected by the widow without her son's consent cannot be considered legal.

Ahmedabad, January 31*st*, 1852.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 5.—A man died. His surviving relatives are a nephew and a son of another nephew. Which of these is his heir?

A.—The nephew is the heir. The son of a nephew cannot be considered the heir while a nephew is alive.

Ahmednuggur, July 8*th*, 1856.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav , f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 6.—If a deceased person has left a sister and some nephews, which of them will be his heir?

A.—If the deceased and his nephews were undivided in interest the nephews will be his heirs; but if they were separated the sister will be his heir.

Ahmednuggur, December 31*st*, 1846.

AUTHORITY.—*Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—The nephews (brother's sons) are the heirs in every case. They take *per stirpes* according to the Subodhini, but this is met by Balambhatta with the argument that, as a brother has not a vested interest like a son, he cannot transmit it, and therefore the brothers' sons take *per capita*. (See 1 Macn. 27.) The discussion brings out the difference between the successive possibilities of ownership, each excluded by the preceding one, in "obstructed" as compared with the successive outgrowths of actual co-ownership in unobstructed "daya," (= participation) commonly rendered "inheritance." See above, pp. 57, 60, 63.

2. Where there is no reunion, all co-sharers participate according to their relationship in the lapsed share of a deceased co-sharer in each of the several parts of the original estate in which his share was settled by agreement so as to constitute a partition (*x*).

Q. 7.—A man separated from the rest of the members of his family. Afterwards he died. His sisters claim the right of inheritance. The grandmother and the nephew of the deceased have objected to their claim. The question is: Which of these three relatives is the heir of the deceased?

A.—If the deceased was a separate member of his family, and if he had no son, his nephew is his heir. When there is no nephew, the mother of the deceased's father, and in her absence his sisters, are his heirs.

Surat, October 11*th*, 1845.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) Manu IX. 217:

"The mother also being dead, the paternal grandfather and grandmother take the heritage on failure of brothers and nephews."

(*x*) *Amrit Rav Vinayak* v. *Abaji Haibat*, Bom. H. C. P. J. F. for 1878, p. 293.

Q. 8.—Who will be the heir of a deceased person, his kept woman or his brother's son?

A.—The nephew is the heir, but the kept woman will be entitled to a maintenance.

Dharwar, 1846.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 57, p. 1, l. 5 (see Chap. II., sec. 3, Q. 3).

REMARK.—See *Vrindavandas* v. *Yemunabai* (*y*).

Q. 9.—There were two brothers, Uderam and Huma. The latter had kept a woman, by whom he had a son. After his death Uderam protected the son and got him married. The woman and Uderam died. Can the illegitimate son of Huma be the heir of the deceased Uderam?

A.—He may be considered the heir if, according to the custom of the Marwadis, there is no objection to his succession; but if it is contrary to the custom he will be entitled to whatever he may have received from his uncle as a mark of his affection, and if the son is a minor, the Sirkar should make a provision or his protection till he attains to the proper age, and the rest of the property may be taken by Government.

Ahmednuggur, March 8th, 1847.

AUTHORITY.—Vyav. May., p. 7, l. 1:
"Thus Brihaspati says: 'Let all rules of each country, caste and family that have been divided and preserved from ancient times be still observed in the same way, otherwise the subjects will rise in rebellion.'" (Borradaile, p. 7; Stokes's H. L. B. 15. Comp. also Manu VIII. 41.)

Q. 10.—A village was granted on hereditary Inam tenure to a younger brother. The grantee subsequently died without issue, but there are sons of his brother. Can the Sanad, declaring the grant to be "Vamsaparampara," be construed to extend the benefit of the grant to the nephews of the grantee?

A.—The grantee was a Brahman. By reason of the grant he became proprietor of the village. After his death the surviving members of his family have a right to his property. A king is prohibited from taking any property of a Brahman, even though he may have at his death left it without an heir. If the deceased

(*y*) 12 Bom. H. C. R. 229.

has left no other heir than his nephews, they will be his heirs entitled to the village.

Sadr Adalat, September 8th, 1837.

AUTHORITIES.—(1*) Amarakosa, Book II., Chap. 7, 1: Amarasimha here enumerates *vamsa* amongst the words for lineage. See also Wilson's Sanskrit Dictionary.

(2*) Viramitrodaya, f. 204, p. 1, l. 1: "A son and a daughter both continue the race of the father."

REMARKS.—1. By the term "Vamsa-parampara" are understood "male" and "female" descendants in the direct line, but never brothers or brothers' sons. Consequently the nephews, in the case stated, have no title to the property.

See above, section 6A, Q. 8, for the case of a widow succeeding to separate property, such as an inam would generally be. See also Book II., Introd.

2. A grant to a man and his heirs does not constitute an estate inalienable (*z*).

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*SECTION 14.—I. (*a*) GOTRAJA SAPINDAS.

A.—HEIRS MENTIONED IN THE MITAKSHARA AND VYAVAHARA MAYUKHA.

1. *A*.—FULL-SISTER (*b*).

Q. 1.—A man died. He possessed certain property acquired by himself and his ancestors. The question is whether the sister or the sister-in-law of the deceased is the heir?

A.—The sister, and not the sister-in-law, is the heir.

Surat, August 15th, 1858.

(*z*) *Krishna Rao Ganesh* v. *Rang Rao et al.*, 4 Bom. H. C. R. 1 A. C. J.; *Bahirji Tannerji* v. *Oodatsing et al.*, R. A. No. 47 of 1871 (Bom. H. C. P. J. F. 1872, No. 33). As to grants, see Book II., Introd. 5 A. 2.

(*a*) For references to the Introductory Remarks to this section in the earlier editions, see above, p. 107 ss.

(*b*) The Smriti Chandrika, Chap. XII., para. 35, admits the sister as successor to a reunited parcener on failure of children, wife, and father, though it excludes her as heir to a divided brother. Chap. XI., sec. 5. See *Icharam* v. *Permanund*, 2 Borr. R. 515. A sister succeeds to a brother, after the latter's widow has entered into a Natra marriage with another, under Act XV. of 1856, in the absence of custom excluding her from succeeding to Bhagadari Vatan, *Bhaiji Girdhur et al.* v. *Bai Khusal*, S. A. No. 334 of 1872, Bom. H. C. P. J. F. for 1873, No. 63. See the next section. *Biru valad Sadu* v. *Khandu valad Mari*, I. L. R. 4 Bom. 214.

Under the earlier Roman law a whole group of agnates standing equally near to the deceased succeeded together without distinction of sex. The females being always dependent, no inconvenience arose from their joint

AUTHORITIES.—(1) Vyav. May., p. 140, l. 1:

"In default of her (the grandmother) comes the sister; under this text of Manu: To the nearest Sapinda (male or female) after him in the third degree the inheritance belongs" (c). (Borradaile, p. 106; Stokes's H. L. B. 89.)

(2) Mit. Vyav., f. 69, p. 1, l. 16; (3) f. 45, p. 1, l. 5; (4) f. 55, p. 2, l. 1 (see Chap I., sec. 2, Q. 4).

REMARKS.—1. Hindu sisters inherit equally from their deceased brother; the unendowed has not a preference over the one provided for, as in the case of daughters inheriting from a mother (d).

2. The sister (by adoption) of an adopted son succeeds before other kinsmen (deceased's uncle's widow) (e). A sister succeeds before remote kinsmen (males) (f).

A full sister is preferred to a paternal first cousin (g).

In the case of *Sakharam* v. *Sitabai* (h) one of two separated half-brothers having died was succeeded by his mother. On her death a contest as to inheritance arose between her daughter and her stepson, which was disposed of in favour of the former. The judgment places her precedence (i) on the succession to reunited brethren which is referred to in Vyav. May., Chap. IV., sec. IX., p. 25, and *Vinayak Anandrav* v. *Lakshmibai* is relied on as having, not only on the authority of the Mayukha but also on Nanda Pandita's and Nilakantha's interpretations of the Mitakshara (making brethren include sisters) settled the law for the Bombay Presidency generally. Any divergence from the rule must, it is said, be supported by "an ancient and invariable usage to the contrary . . . alleged and proved by him who uses it." The case was dealt with entirely on a consideration of who was heir to the pre-deceased son, not of who was heir to his mother. The mother, Mathurabai, it is laid down, "on succeeding on the death of her son Nana to his moiety of the immovable property, took only such a limited estate in it as a Hindu widow takes in the immovable property of her husband dying without leaving male issue."

There can be no doubt as to the sister's succession before the half-brother according to the Mayukha and to Nanda Pandita's and Balambhatta's con-

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ownership. When the Lex Voconia afterwards prohibited legacies to females they began to be thought unfit members of the heritable group of agnates, but an exception was maintained in favour of full sisters. It would seem that an analogous exception in favour of full sisters, in virtue of their consanguinity, may, at one stage of progress and in some provinces, have prevailed under the Hindu law. Str. H. L.; see Q. 4, Rem.

(c) See p. 130 for Balambhatta's doctrine. The poverty qualification does not give a preferential claim amongst sisters as it does amongst daughters. See *Bhagirthibai* v. *Baya*, I. L. R. 5 Bom. at p. 268.

(d) *Bhagirthibai* v. *Baya*, I. L. R. 5 Bom. 264.

(e) *Mahantapa* v. *Nilangowa*, B. H. C. P. J. F. for 1870, p. 390.

(f) *Dhondu* v. *Ganga*, I. L. R. 3 Bom. 369.

(g) *Lakshmibai* v. *Dada Nanaji*, I. L. R. 4 Bom. 210.

(h) S. A. 34 of 1875, in which judgment was delivered on 3rd March, 1879 (P. J. 335 of 1879); S. C. I. L. R. 3 Bom. 353.

(i) Vyav. May., Chap. IV., sec. 8, p. 16, 20 (supported by a passage of Brihaspati, cited Col. Dig., Book 5, T. 407).

struction of the Mitakshara. But the same authorities give the deceased son's estate to his mother, so that for the further succession we should, according to them, seek her heirs, not the son's heirs (*k*). The sister of the deceased Nana was entitled to the property, according to the native authorities, in succession to her mother, not to her brother. With the cases relied on of *Narsappa* v. *Sakharam* and *Bachiraja* v. *Venkatapadda* should be compared those cited in *Vijiyarangam's Case.*

3. The property inherited by a sister from her brother is Stridhana, passing on her death, in the first place, to her daughters (*l*).

Q. 2.—A man died. He had no wife or children, and there is no member of his family except a sister. She has two daughters; one of them is a widow and the other is a married woman and has a male child. The question is whether the son should be considered the heir of his mother's maternal uncle in preference to the claims of his mother and grandmother?

A.—In the absence of a near relation a distant relation becomes heir of a deceased person. The sister is a gotraja relation, and must be preferred to all others mentioned in the question.

Ahmedabad, May 28th, 1847.

AUTHORITIES.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (2) p. 134, l. 4 (see Auth. 3); (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

(*k*) See above, p. 312. The same view is taken by the Vivada Chint., by Jagannatha, the author of Col. Dig., and in fact by all the authorities except the Daya Bhaga and the works which have since adopted its forced construction of a single text applicable only to a widow succeeding to her husband's property. According to both the Mit. and the Mayukha, property which a woman acquires by inheritance is stridhana (above, pp. 137, 261-2, 284, 311), heritable by her heirs. The "limited estate" which a widow takes from her deceased husband may be identical in kind with that which a mother inherits from her son, but the character of the estate must in each case now be determined by the decisions rather than by the doctrines of the principal native authorities recognised in Bombay. See above, pp. 138, 317.

(*l*) *Bhaskar Trimbak* v. *Mahadeo*, 6 Bom. H. C. R. 1 O. C. J.; *Vinayak Anandrao et al.* v. *Lakshmibai et al.*, 1 Bom. H. C. R. 117, and 9 M. I. A. 516.

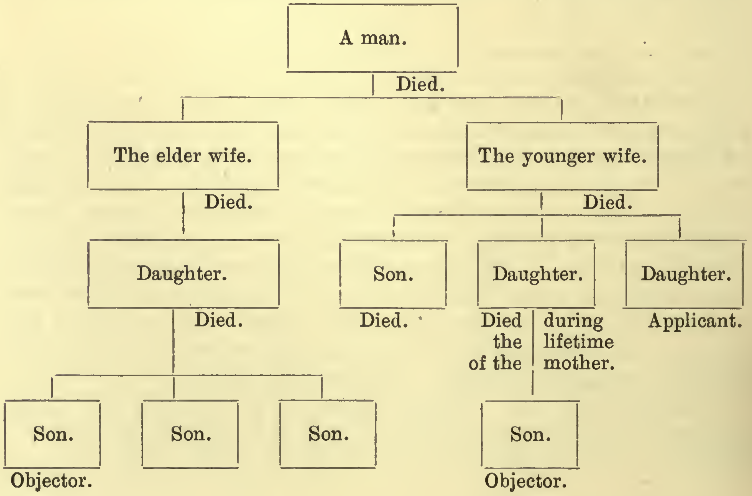
Q. 3.—A man had two wives. The elder of them had a daughter. The daughter had three sons. The second, or the younger wife, had a son and two daughters. One of the last-mentioned daughters died when her mother was alive. She has left a son. The second, or the younger wife, and her son died. Her surviving daughter has applied for a certificate of heirship of the deceased mother and brother. The deceased daughter's son and the sons of the daughter of the elder wife have brought forward objections to their claim. It must be observed that the uterine brother and sister of the applicant died when their mother was alive, and that the elder wife and her daughter died when the younger wife was alive. The question is: Which of the survivors is the heir of the deceased younger wife?

A.—When a man dies his widow, daughter, and other near relations become his heirs; and in the absence of these the uterine sister; and failing her and her son the daughter is the heir of the deceased younger wife. In the absence of the daughter the daughter's son will inherit the property of his maternal grandmother. The applicant (*m*) is therefore the heir of the two deceased persons.

Surat, September 28th, 1857.

AUTHORITIES.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (2) p. 138, l. 4; (3) p. 137, l. 5; (4) p. 137, l. 8; (5) Mit. Vyav., f. 48, p. 1, l. 14:

(*m*) The following genealogical table will illustrate the answer:



"The daughters share the residue of their mother's property after payment of her debts." (Colebrooke, Mit., p. 266; Stokes's H. L. B. 383.)

Q. 4.—A man died. He has left neither a wife nor children. His sister and her son claim to be his heirs. The question is: Which of them should be considered the heir?

A.—If there are none of the man's following relations, viz.:

A son,	A daughter's son,	A uterine brother,
A wife,	The mother,	A half-brother and
A daughter,	The father,	A brother's son,

a gotraja relation becomes heir; and among the gotraja relations the father's mother is to be preferred to all others. The next gotraja and heir is the sister, and then the sister's son.

Ahmedabad, April 20th, 1847.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remarks.—In the case of *Sakharam* v. *Sitaram* (*n*) it was held that a full-sister succeeds before a half-brother, both according to the Vyav. Mayukha (Chap. IV., sec. VIII., paras. 16-20) and according to the Mitakshara (Chap. II., sec. IV., paras. 1, 6, and notes) construed according to Nanda Pandita and Balambhatta so as to make "brothers" include sisters (*o*). It is strange that the Mitakshara, if it intended "brothers" to include "sisters," did not say so; but, amongst reunited brethren at any rate, it is clear from Mit., Chap. II., sec. IX., paras. 12, 13, that Vijnanesvara recognised full-sisters as having a right with full-brothers preferable to that of half-brothers as heirs to a deceased member.

Regarding the sister's son, see Introductory Note to Chap. II., sec. 15, Cl. 4.

Q. 5.—Who is entitled to inherit from a deceased person, his sister or the sister's son?

A.—If there is a sister she succeeds first; a sister's son does so after her.

Ahmednuggur, November 1st, 1847.

Authorities.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1,

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(*n*) I. L. R. 3 Bom. 353.

(*o*) See *Thakoorain Sahiba* v. *Mohun Lall*, 11 M. I. A., at p. 402.

Q. 1); (2) p. 134, l. 4 (see Auth. 6); (3) p. 141, l. 7; (4) p. 181, l. 5; (5) p. 142, l. 8; (6*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—See above, pp. 107, 124.

Q. 6.—A deceased man leaves a sister who has two sons. Who will be the heir?

A.—If a nearer relation cannot be found a sister will be the heir, and in the absence of a sister her sons will be the heirs.

Ahmednuggur, January 6th, 1846.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Q. 7.—A woman's husband died and she married another man. On his death she lived with her son by her first husband, and they both acquired property. The son afterwards died without issue. His sister lives with her husband in his house. Is the sister or the mother the heir of the deceased?

A.—The mother does not belong to the family of her first husband. The sister alone is the heir of the deceased.

Sholapoor, August 27th, 1846.

AUTHORITY.—*Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—The mother would lose her right to inherit from her first husband, but not, according to the cases, from the son (*p*) under Act XV., 1856, sec. 2. (See sec. 9, Q. 9.)

I. *A.* 2.—HALF-SISTER.

Q. 1.—Is a stepmother or a half-sister the heir of a deceased man?

A.—The right of a full-mother is recognised by the Sastra, but that of a stepmother is nowhere defined. The right of a brother is likewise recognised by the Sastra, and it is stated that on failure of a brother a half-brother has the right of inheritance. The right of a sister is also admitted by the Sastra, and, by inference, a half-sister may be considered an heir. A half-sister

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(*p*) See *Okhorah Soot* v. *Bheden Barianee*, 10 C. W. R. 35 C. R.; 11 C. W. R. 82 C. R.

is born in the gotra, and she will therefore have a better right than the stepmother to inherit the deceased's property.

Sadr Adalat, June 10th, 1844.

AUTHORITIES.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (2) p. 142, l. 6; (3) Nirnayasindhu III., f. 98, l. 26.

REMARKS.—1. The Sastri appears to have followed the Mayukha, which places the sister immediately after the paternal grandmother; at the same time, he must have understood the term "bhagini" ("sister") to include the sister both of the full and of the half blood. This interpretation is from a philological point of view admissible. According to the Mayukha's interpretation of the term Gotraja as *born in the same family as the deceased* (*q*) the stepmother could not inherit before the half-sister, she being necessarily descended from a different stock, but that Nilakantha does not confine Gotraja to this sense is plain from his calling the grandmother the first of the gotrajas in the order of succession. Custom, however, seems to have given to natural birth in the family of the propositus precedence over the second birth by marriage into the same family, though the latter also is a source of heritable right See below, I. A. 4 Q. 9. In *Kesserbai* v. *Valab Ravji* (*r*) even a half-sister is preferred to a stepmother and a paternal uncle's widow. In *Trikam Purshotham* v. *Natha Daji* the half-sister excluded the paternal uncle of the deceased (*s*).

The marginal note in *Sreenarain Rai* v. *Bhya Jha* (*t*) to the effect that in Mithila a half-sister ranks as a sister goes much beyond the Vyavastha in the text. All that the Sastri says is that if custom assigns the half-sister this rank it will not be inadmissible according to the method of interpretation adopted by the Mithila law writers. In this he refers *inter alia* to Vachaspati in the Vivada Chintamani (Translation, p. 240), who construes the text of Brihaspati (Col. Dig., Book V. T. 85) so as to make matarah include stepmother. See below, Rem. 2. As between stepmother and half-sister this mode of interpretation would give precedence to the former. The Vyav. Mayukha, Chap. IV., sec. VIII., p. 16, 20, refuses recognition to half-blood except in virtue of descent from a common ancestor, and except in the case of a sister makes no provision for representation of a collateral line by a daughter. See above, pp. 121, 122. The passages cited below, sec. 15, Book II. (2), Q. 1, are those at Stokes's H. L. B. 86, pl. 10, and p. 89, pl. 19, which relate only to the succession of a daughter to her father and of a sister to her brother. Nilakantha assigns no place to the brother's daughter or to the grandfather's daughter (paternal aunt). Her son is a Bandhu, *infra*, sec. 15, Book I., (1). The Sastri, at sec. 14 I., B. *b* 2, Q. 3 *infra*, refers to the passages, Stokes's H. L. B., p. 85, pl. 7, to Brihaspati, quoted *ibid*, p. 89, pl. 19, and *ibid*, p. 93, pl. 5. See above, p. 326, Q. 4. Those passages do not support a doctrine of female representation. If half-sisters are brought in by analogy

(*q*) See above, p. 122.

(*r*) I. L. R. 4 Bom. 188. Herein may be found a support for the doctrine propounded by Sir M. Westropp, C.J., in *Tulijaram's Case*, above, p. 320.

(*s*) I. L. R. 36 Bom. 120.

(*t*) 2 Cal. S. D. A. R. 28.

that can only be a mode of interpretation which concurrently makes stepmothers mothers, as in Vyav. Mayukha, Chap. IV., sec. 4, pl. 19. Still, however, the half-sister is a gotraja-sapinda according to Vyav. May. 1, Chap. IV., sec. VIII., p. 19, as said by the Sastri.

2. Regarding the right of the stepmother to inherit (*v*), as recognised in the case just discussed, Sir T. Strange, H. L. 144, states that "stepmothers, where they exist, are excluded"; against this opinion it may be remarked that Balambhatta asserts that they inherit immediately after mothers, as in his opinion the term mata stands for janani, "*genitrix*," and sapatnamata "*noverca*." Most likely his opinion is based on a verse attributed to Manu (*w*), which declares that all the father's wives are mothers, as well as on Manu IX. 183: "If among all the wives of the same husband one bring forth a male child, Manu has declared them all, by means of that son, to be mothers of male issue"; but it is inadmissible, as the arguments brought forward by Vijnanesvara in the discussion on the claims of the mother do not apply to the stepmother, and this author consequently cannot have included stepmother in the term "*mother*" (*x*). Nevertheless it is not probable that either Vijnanesvara or Nilakantha intended to exclude stepmothers entirely from inheriting. The high reverence which, according to Manu, is to be paid to stepmothers, as well as the fact that stepsons inherit from their stepmothers, may furnish an *à priori* argument that Hindu lawyers who admit women, though not authorised by special texts, to inherit, would not object to the stepmother's claims; and, in fact, if the interpretations of the terms "Sapinda" and "Gotraja" given above at pp. 119, 122, hold good, then, according to the doctrines of both the Mitakshara and the Mayukha, stepmothers must be allowed to inherit. The Mayukha adopts the Mitakshara doctrine of Sapinda relationship. See p. 112 above.

According to the Mitakshara a stepmother would be by her marriage a "Gotraja" relation of her stepson, and for the same reason also a "Sapinda" relation. Consequently she would take inheritance amongst the Gotraja-Sapinda relations. According to the opinion of the learned Sastri who assisted in the original compilation of this Digest, she ought to be placed, on account of her near relationship to the deceased, immediately after the paternal grandmother, up to whom only the succession is settled by special texts.

(*v*) The grandmother takes before the stepmother, Macn. Cons. H. L. 64. In Bengal the latter seems excluded. See 1 Cal. S. D. A. R. 37 (*Bishenpirea Munee* v. *Ranee Soogunda*); 2 Macn. Prin. and Prec. 62; *Lala Joti Lall* v. *Musst. Durani Kower*, Beng. L. R. 67, F. B. R., rules similarly under the Mitakshara. In Madras a male gotraja sapinda, grandson of the great-grandfather of the propositus, inherits before either his half-sister or his stepmother, *Kumaravelu* v. *Virana Goundan*, I. L. R. 5 Mad. 29. Reference is made to *Kutti Ammal* v. *Rada Kristna Ayyana*, 8 M. H. C. R. 88, to show that even a full-sister is postponed to a gotraja sapinda, which rank she has not, according to the Smriti Chandrika, Chap. XI., sec. 5. See above, p. 120, note (*i*). In Madras, as in Bengal, a stepmother is postponed to a paternal grandmother, *Muttamal* v. *Vengalakshmi Ammal*, I. L. R. 5 Mad. 32. See above, p. 106.

(*w*) Nirnayasindhu, III. Purvardha, f. 6, p. 1, l. 12.

(*x*) See Mit., Chap. II., secs. 3, 32, 51; and Colebrooke's note to 1 Cal. S. D. A. R. 37 (*Bishenpirea Munee* v. *Ranee Soogunda*).

According to the Mayukha the stepmother would not be Gotraja in the sense of *born* in the same family as the stepson, but certainly a Sapinda relation. The Vyavahara Mayukha, Chap. IV., sec. 4, p. 19, assigns to stepmothers and step-grandmothers an equal share with mothers and grandmothers on partition amongst their husbands' descendants. The passage of Vyasa on which this rests, and a corresponding text of Brihaspati, are discussed in Colebrooke's Digest, Book V., T. 84, 85, Comm. The limitations proposed by Jimutavahana and Raghunandana are there rejected, and the declaration of Brihaspati that janani and *matarah* are *entitled* to equal shares is taken as showing that *matarah* means stepmothers. The Daya Krama Sangraha also (Chap. VIII., pl. 7, 8) refers the rights of the stepmother, admitted by the Mithila School, to a similar interpretation. If Nilakantha can be supposed, in accepting its consequence, to have adopted this construction of the texts, his doctrine would not differ materially from that of the Mitakshara as above stated (*y*). The alternative seems to be that in omitting stepmothers from the Gotrajas whose claims he discusses he intends to exclude them. According to this view they would rank only as Sapindas, and consequently inherit like other Sapindas, sprung from a different family after the Bandhus (see sec. 15). The step-mother's right of maintenance, it was said, is not that of a parent such as can be dealt with by an order under sec. 10 of Act. XX. of 1864 (*z*).

In the Vyav. May., Chap. IV., sec. 4, p. 19, it is said that the stepmother is entitled to a share on partition. This is the rule of the Benares School, though the Viramitrodaya contends (Transl., p. 79) that mother, being used as strictly correlative to "sons," the sons dividing, the stepmother cannot, under the text of Yajnavalkya, take a "like" share, but is entitled only to a maintenance, and the Sastris, at 2 Macn. 63, say that "mata" (=mother) in the Mitakshara, &c., includes stepmother, whose right to a share the Viramitrodaya (Tr., p. 79) admits to be recognised, though erroneously, by the Mit., Chap. I., sec. 7, para. 1, on a partition by sons after their father's death. But the position and the right of stepmothers to inherit at all are questioned by Macn. 2 H. L. 64, note.

I. *A*. 3.—THE PATERNAL UNCLE.

Q. 1.—A man died. His uncle is absent in a distant native State. The aunt has applied for a certificate of heirship. Should it be granted to her?

(*y*) In answer to Q. No. 1832 MSS, the Sastri at Ahmedabad said that step-sons were bound to support their stepmother in virtue of Manu's text commanding children to maintain aged parents. See also next section, Q. 2. A stepson succeeds to the Stridhana of his stepmother, *Teencowree Chatterjee* v. *Dinanath Banerjee et al.*, 3 Cal. W. R. 49. A stepmother's heritable right is recognised in the answer to Q. 3 in Chap. IV. B, sec. 6 II B. The first and last of these cases being from Ahmedabad seem to show how the law is understood in Gujarath.

(*z*) *Lakshmibai* v. *Vishvanath Narayan*, S. A. No. 352 of 1875 (Bom. H. C. P. J. F. for 1876, p. 23).

A.—The aunt has no right to be the heir of the deceased, because her husband is alive.

Poona, June 30th, 1855.

AUTHORITIES.—(1) Vyav. May., f. 134, l. 4 (see Authority 3); (2) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (4*) f. 58, p. 2, l. 13:

"On failure of the paternal grandmother the (Gotraja) kinsmen sprung from the same family with the deceased, and (Sapinda) connected by funeral oblations—namely, the paternal grandfather and the rest—inherit the estate. For kinsmen sprung from a different family, but connected by funeral oblations, are indicated by the term cognate (Bandhu). Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles, and their sons. On failure of the paternal grandfather's line, the paternal great-grandmother, the paternal great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same general family and connected by funeral oblations" (*a*). Colebrooke, Mit., p. 350; Stokes's H. L. B. 446-7).

Q. 2.—The paternal uncle of a deceased person claims his property. The deceased's wife wishes to marry another husband, and has consequently no objection to the uncle's application. The deceased's father has left a Pat-wife who stands in the relation of a stepmother to the deceased. Who will be the heir?

A.—So much of the property of the deceased as will suffice for the maintenance of the mother should be given to her, and the rest to the applicant.

Dharwar, August 30th, 1846.

AUTHORITY.—*Mit. Vyav., f. 58, p. 2, l. 13 (see Chap. II., sec. 14 I. A. 2, Q. 1).

REMARKS.—1. Regarding the legalisation of Pat marriages, see Chap. II., sec. 6 B.

2. Regarding the right of stepmothers to inherit, see Chap. II., sec. 14, I. A. 2, Q. 1; above, p. 441.

I. *A.* 4.—FATHER'S BROTHER'S SON.

Q. 1.—Will a Brahman's illegitimate son or his cousin, who has declared himself separate, be his heir?

(*a*) According to the Sanscrit text the words "to the seventh degree" ought to be added. As to the translation, see *Lulloobhoy* v. *Cassibai*, L. R. 7 I. A., at p. 235; above, p. 3 (*k*).

A.—The cousin is the legal heir. The illegitimate son will be entitled to whatever he may have received from his father as a mark of affection or as a reward for service.

Ahmednuggur, February 27*th*, 1847.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (3*) f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1); (4) Vyav. May., p. 98, l. 6; (5) p. 236, l. 6; (6) Manu IX. 155 (*b*).

Q. 2.—Who will be the heir of a deceased Sudra, his father's brother's son or his sister's son?

A.—The right of the sister's son will be superior to that of the cousin.

Tanna, April 27*th*, 1850.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 140, l. 1; (3*) Mit. Vyav., f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1); (4*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—The father's brother's son inherits, since he is a Gotraja Sapinda, whilst the sister's son is only a Sapinda. The Sastri has taken "brothers and their sons," in Vyav. May., Chap. IV., sec. 8, pl. 1, as including "sisters and their sons." See Balambhatta, cited above, p. 121.

Q. 3.—There were four cousins, who lived separate from each other. One of them died leaving a widow, and another without issue or widow. The question is: Who will be the heir of the latter, whether the two cousins or they *and* the widow? If the widow is not to be counted an heir, give reasons for her exclusion.

A.—The two cousins must be considered the heirs of the deceased. The widow must be excluded, because she has no son. Had her husband been alive at the time of the death of the cousin he would have been counted an heir, and he, having become an heir, in this way would have been able to transmit his right to his widow.

Dharwar, April 10*th*, 1856.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 130, l. 5; (3*) Mit. Vyav., f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1); (4*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—Regarding the reason of the widow's exclusion, see above, p. 122.

(*b*) As to the grant to the illegitimate son, see above, pp. 254-256.

Q. 4.—A man died. There are sons of his maternal and paternal uncles. Which of these is the heir of the deceased?

A.—So long as there is a son of the paternal uncle the son of the maternal uncle cannot be his heir. The son of his paternal uncle is his heir.

Broach, August 21*st*, 1848.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1).

Q. 5.—A deceased person has left a cousin, some daughters, their sons, and a son of a cousin twice removed. The daughters and their sons state that they have no objection to the cousin realising the debt due to the deceased. Which of these relations will be the legal heir of the deceased?

A.—If the daughters and their sons resign their claims to the property, the cousin and the son of another cousin twice removed will be the heirs.

Sholapoor, January 25*th*, 1856.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 4); (2) p. 138, l. 4; (3*) Mit. Vyav., f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1); (4*) f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—According to Authority 3, the cousin alone will be the heir, in case the daughter and her sons refuse the inheritance.

Q. 6.—A man, who had already separated from his kinsman, died. There are two cousins who have separated from the deceased, the son of a separated cousin and the daughter of a sister. The question is: Which of these is the heir?

A.—The order of heirs laid down in the Sastra does not mention the daughter of a sister. The nearest kinsmen, therefore, are the two cousins, and they are the heirs of the deceased.

Surat, *November* 24*th*, 1855.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1); (3) Manu. IX. 187 (see Auth. 4); (4*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1).

Q. 7.—A Gujar died. There are his cousins and cousin's sons. Which of these are his heirs?

A.—The rule for finding the proper heir is to take the one that is the nearest among the Gotraja and Sapinda relatives. According to this rule the cousins appear to be the nearest in degree (and heirs).

Khandesh, October 18*th*, 1855.

AUTHORITY.—*Mit. Vyav., f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1).

Q. 8.—A man of the Brahman caste died. The surviving relatives are a daughter of a daughter, a cousin who has separated, and some second cousins. They have all applied for certificates of heirship, to enable them to succeed to the Inam property of the deceased. The question is: Which of them should be recognised as heir?

A.—If the deceased has left no wife or son the cousin who has separated will become his heir. The second cousins and the granddaughter are not the heirs.

Tanna, December 18*th*, 1851.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1).

REMARK.—A second cousin excludes a third (*c*).

Q. 9.—A Desai died. The right of inheritance is claimed by the following persons:

(1) A sister's son whom the deceased has by his will constituted his sole heir.

(2) Two widowed sisters-in-law of the deceased. They have applied to have their right to heirship recognised, on the ground that the deceased was the uterine brother of their husbands, and that the deceased was not married.

(3) Four cousins and three of his father's cousins. They apply for a certificate of heirship in regard to the Desai Watan, &c.

The question is: Which of these is the heir of the deceased?

A. 1.—A man may give away his movable and immovable property when it was acquired by his own industry, and when he is

(*c*) *Mahabeer Persad et al.* v. *Ramsurun*, 3 Agra S. D. A. R. 6 A. C.

not married. When a man possesses immovable property acquired by his ancestors he cannot make a gift of it. The son of the deceased Desai's sister cannot, therefore, be heir to the whole of his property under the will made in his favour.

2.—The two sisters-in-law are "Sagotra" (Gotraja) and "Sapinda" relatives of the deceased. Their husbands, when they were alive, took their shares of the family property and separated. The sisters-in-law, however, cannot be said to be "Sapinda" relations in the fullest sense of the word, and consequently they are not heirs.

3.—Of the four cousins and three sons of the father's paternal uncles the three grand-uncles' sons are "Sapinda" and "Gotraja" relations; but they are very distantly related to the deceased. The cousins are "Sapinda" and "Gotraja," and very nearly related to the deceased. The cousins are therefore the legal heirs.

Ahmedabad, September 28th 1848.

Authorities.—(1*) Vyav. May., p. 133, l. 2:

"Narada states the duties of separated co-heirs: When there are many persons, sprung from one man, who have their (religious) duties (dharma) apart and transactions (kriya) apart, and are separate in the materials of work (karmaguna), if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." (Borradaile, p. 98; Stokes's H. L. B. 82.)

(2*) Mit. Vyav. f. 46, p. 2, l. 13 ff:

"The following passage, 'Separated kinsmen, as those who are unseparated, are equal in respect of immovables, for one has not power over (the whole) (*d*) to make a gift, sale or mortgage,' must be thus interpreted: 'Among unseparated kinsmen the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common; but among separated kindred the consent of all tends to the facility of the transaction, by obviating any future doubt whether they be separate or united. It is not required, on account of any want of sufficient power in the single owner, and the transaction is consequently valid even without the consent of separated kinsmen.'" (Colebrooke, Mit., p. 257; Stokes's H. L. B. 376).

Remarks.—1. According to the two passages quoted, the deceased would have been entitled to give away his immovable property during his lifetime. It would seem, therefore, that there is no reason to alter the dispositions made by him. See also 1 Str. H. L. 26, note (*a*), Book II., Chap. I., sec. 2, Q. 8 (*e*).

2. Regarding the Sastri's decision that the sister-in-law is not "Sapinda in the fullest sense of the word," see above, p. 121.

(*d*) Lit. "over them"—that is, "the immovables."

(*e*) *Muttayan Chetti* v. *Sivagiri Zamindar*, I. L. R. 3 Mad., at p. 378.

Q. 10.—There were two brothers who had no male issue. The elder of them adopted a son. The younger died, and his widow, having permission from her husband, adopted a son. She gave one-half of the property of her husband to her adopted son, and left the other half for charitable purposes. As her adopted son was young, she appointed an agent to take care of the property. Subsequently she and her adopted son died. The adopted son of the elder brother has filed a suit for the recovery of the whole property. The agent who represents the family from which the adopted son was selected has raised objections. The question is: Who should be considered entitled to the property?

A.—The portion set aside by the woman for charitable purposes could not have been claimed even by the deceased adopted son. It should therefore be applied to the intended purposes by the agent, under the superintendence of the adopted son of the elder brother. The portion allotted to the deceased adopted son of the widow should be given to the adopted son of the elder brother.

Poona, January 23rd, 1857.

AUTHORITIES.—(1*) Mit. Vyav. f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1); (2) Vyav. May., p. 127, l. 6; (3) p. 198, l. 2:
Katyayana: "What a man has promised in health or sickness for a religious purpose must be given, and if he die without giving it his son shall doubtless be compelled to deliver it." (Borradaile, p. 169; Stokes's H. L. B. 136.)

REMARK.—See above, sec. 2, Q. 3 and 4; Col. Dig., Book II., Chap. IV., sec. 2, T. 45, 46; Book V. T. 111; above, pp. 203, 285-6.

I. *A*. 5.—PATERNAL GRANDFATHER'S BROTHER'S SON.

Q. 1.—A man died. There are a daughter of his uterine sister and a grand-uncle's son. Which of these is the heir of the deceased?

A.—The grand-uncle's son being a "Sagotra" (Gotraja) relation, the daughter of the sister cannot be his heir.

Surat, April 3rd, 1847.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1); (3) Vyav. May., p. 140, l. 1 (see Auth. 4); (4*) Manu IX. 187 (see Chap. II., sec. 14, I. B. *b*. 1, Q. 1).

Q. 2.—Two men died. There is a grand-uncle's son and a son of their father's sister. Which of these is the heir?

A.—The grand-uncle's son is the heir. The son of their father's sister cannot be the heir.

Broach, July 23rd, 1849.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 58, p. 2, l. 13 (see Chap. II., sec. 14, I. A. 3, Q. 1).

I. *B.*—HEIRS NOT MENTIONED IN THE LAW BOOKS.

a.—MALES.

1.—BROTHER'S GRANDSON.

Q. 1.—A deceased man has left three sons of his first cousin. Which of these is the heir?

A.—If any one of these cousin's sons was united in interests with the deceased he will be the heir; but if all are separate, all are equal heirs.

Dharwar, May 17th, 1853.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—See above, p. 110.

Q. 2.—Who will be the heir to a deceased man when there are his brother's grandson and daughter's grandson?

A.—The brother's grandson is the heir.

Ahmednuggur, December 13th, 1847.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—See above, pp. 123, 126-8, and Introductory Remarks to sec. 15, clause 4; *Brojo Kishore Mitter* v. *Radha Govind Dutt et al.* (*f*).

(*f*) 3 B. L. R. 435 A. C.; 12 C. W. R. 339.

I. *B*. *a*. 2.—PATERNAL UNCLE'S GRANDSON.

Q. 1.—Can a man's paternal uncle's grandson be his heir after his death?

A.—The deceased has left a sister and a son of a first cousin. Of these the latter is his heir.

Dharwar, 1845.

AUTHORITY.—*Mit. Vyav. f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—1. See above, p. 119; and Introductory Remarks to sec. 15, clause 4.

2. Great-grandsons, through different sons of the same man, are Gotraja Sapindas (*g*).

I. *B*. *b*.—FEMALES.

1.—DAUGHTER-IN-LAW.

Q. 1.—The father of a widow's deceased husband died. He had certain rights in land and other property. There is no male member of the family who has any claim to the property. Can the widowed daughter-in-law of the deceased claim the property?

A.—There being no better heir than the daughter-in-law, and she being the nearest relation of the deceased, she is the legal heir.

Surat, December 15*th*, 1853.

AUTHORITIES.—(1) Manu IX. 187:

"To the nearest Sapinda, *male or female*, after him in the third degree, the inheritance next belongs; then, on failure of Sapindas and of their issue, the Samanodaka or distant kinsman, shall be the heir; or the spiritual preceptor, or the pupil or the fellow-student of the deceased."

(2) Nirnayasindhu III., p. 95, l. 17:

It is stated in the Smriti Sangraha: "The son, the son's son, the son's son's son, and the daughter's son, the wife (*patni*), the brother, the brother's son, the father, the mother, and the daughter-in-law (*h*), the sister, the sister's son, the Sapindas and Sodakas; in default of the first-mentioned, the latter-mentioned persons are said to present the funeral oblation."

REMARK.—1. See above, pp. 122-3, and above Dig. Vyav., Chap. II., sec. 8, Q. 2.

2. The second passage seems to be intended as an explanation of the term "Sapinda," which the Sastri understood to mean "connected by giving funeral oblations."

(*g*) *Brojo Kishore Mitter* v. *Radha Gobind Dutt et al.*, *supra*.

(*h*) This is cited in the Sraddha Mayukha, referred to in Mayukha, Chap. IV., sec. 8, p. 29.

3. A daughter precedes a daughter-in-law (*i*). So does a separated brother, being one of the enumerated heir (*k*). So does a brother's son (*l*); but the widow and daughter-in-law were preferred in a claim advanced by divided distant cousins (*m*). See Chap. II., sec. 1, Q. 10; Chap. IV. B., sec. 6, II. f. A daughter-in-law was preferred in succession to a widow as heir to a first cousin (paternal uncle's son) of the deceased husband. The Court said "the question is, which of these two is to be preferred as heir to Sarasvati's (deceased widow's) husband?" (*n*).

I. *B*. *b*. 2.—BROTHER'S WIFE.

Q. 1.—In the case of a Brahman's death will his sister-in-law or his sister's son be his heir?

A.—The sister-in-law is the heir (*o*).

Tanna, February 28th, 1852.

AUTHORITIES.—(1) Vyav. May., p. 140, l. 1 (see Auth. 2); (2*) Manu IX. 187 (see Chap. II., sec. 14, I. B. *b*. 1, Q. 1).

REMARK.—See above, pp. 121, 122-3, and Chap. II., sec. 11, Q. 6.

Q. 2.—A man died. There are his sister-in-law and a male cousin, who have separated from the deceased. Which of these is the heir?

A.—The sister-in-law, though separate, is nearer, and the preferable heir.

Khandesh, September 5th, 1847.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—1. See above, pp. 116-7 ss.

2. If the male "cousin" is a brother's son he inherits, according to Authority 2 (comp. sec. 12), before the sister-in-law.

3. The Sastri puts the widow next to her husband erroneously in this particular case, on account of the express signification of brother's sons after brothers. See above, pp. 119, 122-3.

(*i*) *Musst. Murachee Koour* v. *Musst. Ootma Koour*, Agra S. R. for 1864, p. 171; 2 Macn. H. L. 43.

(*k*) *Venkuppa* v. *Holyawa*, S. A. No. 60 of 1873, Bom. H. C. P. J. F. for 1873, No. 101.

(*l*) *Wittul Rughoonath* v. *Huribayee*, S. A. No. 41 of 1871, decided 12th June, 1871, *ibid*. 1871.

(*m*) *Baee Jetha* v. *Huribhai*, S. A. No. 304 of 1871, Bom. H. C. P. J. F. for 1872, No. 38.

(*n*) *Vithaldas Manickdas* v. *Jeshubai*, I. L. R. 4 Bom. 219.

(*o*) See Dig. Vyav., Chap. II., sec. 14, I. A. 1, Q. 4 to 6.

Q. 3.—Three brothers lived as an undivided family. The eldest of them died leaving a widow, afterwards the second and the youngest died successively. The widow of the eldest has applied for a certificate of heirship. A distant member of the family, four or five times removed from the deceased, has objected to the application. The question is, which of these relations is the heir?

A.—All the brothers died as members of an undivided family. Each surviving brother, therefore, became heir of the pre-deceased. The last surviving brother, therefore, was the heir of the two who died before him. The widow of the eldest brother, being the nearest heir to the deceased, is entitled to inherit the property.

Surat, August 10*th*, 1853.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) Manu IX. 187 (see Chap. II., sec. 14, I. B. *b*. 1, Q. 1).

REMARK.—See above, pp. 116-7 ss.

I. *B*. *b*. 3.—PATERNAL UNCLE'S WIDOW.

Q. 1.—A dumb son of a deceased man lived, with his property, under the protection of his sister. He afterwards died, leaving his sister and a paternal uncle's widow. Which of these is his heir?

A.—The aunt, though she may have separated herself from the deceased, is his heir. If the aunt had no existence, the sister, according to the rule laid down in the Mayukha, would have been the heir, and in her absence other relatives would have succeeded to the property.

Rutnagherry, February 4*th*, 1852.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (3*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—1. See above, pp. 109, 116-7; and sec. 14, I. A. 1.

2. In the case of *Upendra Mohan Tagore et al.* v. *Thanda Dasi et al* (*p*) it is said that the uncle's widow does not succeed, but this is not the law in Bombay. See below, *b* 4.

(*p*) 3 B. L. R. 349 A. C. J.

Q. 2.—If there are a paternal uncle's wife and a maternal uncle of a deceased person, which of them will be his heir?

A.—If the deceased has left no male issue his heir will be the paternal uncle's wife, and not the maternal uncle.

Ahmednuggur, October 16th, 1846.

Authority.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remark.—See above, pp. 116-7, and Introductory Remarks to next section.

Q. 3.—A man died, and there are his father's second cousin and paternal aunt. Which of these will be his heir?

A.—If the father's second cousin had not separated from the deceased he will be the heir; but if he had, the aunt will be the heir.

Tanna, June 25th, 1852.

Authorities.—(1) Vyav. May., p. 136, l. 4; (2) p. 144, l. 8; (3) p. 140, l. 1 (see Auth. 5); (4*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (5*) Manu IX. 187 (see Chap. II., sec. 14, I. B. *b*. 1, Q. 1).

Remark.—See above, pp. 116-7.

I. *B. b.* 4.—PATERNAL UNCLE'S SON'S WIFE.

Q. 1.—A man died. Is his cousin's wife or her daughter-in-law his heir?

A.—The cousin's wife, and not the daughter-in-law, is the heir.

Ahmednuggur, May 4th, 1854.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remarks.—See above, pp. 116-7.

2. The widow of a first cousin of the deceased on the father's side was held to have become by her marriage a Gotraja Sapinda of her husband's cousin's family, and to have a title to succeed to the estate of that cousin on his decease in priority to male collateral Gotraja Sapindas, who were seventh in descent from an ancestor common to them and to the deceased, who was sixth from that common ancestor (*q*).

At Allahabad, on the other hand, it was held that according to the Mitakshara none but females expressly named can inherit, and that the widow of the paternal uncle of a deceased Hindu, not being so named, is not entitled to succeed to his estate in preference to the deceased's father's sister's two

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(*q*) *Lallubhai* v. *Cassibai*, I. L. R. 5 Bom. 110, S. C. L. R. 7 I A. 212.

sons (*r*). These, however, being but Bandhus, could not come in until the Gotrajas were exhausted (*s*).

I. *B. b.* 5.—THE WIDOW OF A GENTILE WITHIN THE FOURTH DEGREE.

Q. 1.—A man died. A widow of his distant male cousin, four times removed from the deceased, is alive, and the question is whether she is his heir?

A.—If there is no nearer relation of the deceased the widow of a cousin four times removed from the deceased may inherit from him.

Surat, September 17th, 1845.

AUTHORITY.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—1. See above, pp. 116-7.

2. The widow of a joint cousin succeeds in preference to descendants of a long-severed branch (*t*). The Sastri said the widow's right was equally good to joint and to separately-acquired property of her husband's cousin, but he seems to have grounded his opinion partly, if not wholly, on the widow's having lived in community with the cousin.

3. The widow of a collateral does not, it has been ruled, take an estate in the property of her husband's Gotraja Sapinda which she can dispose of by will after her death (*v*).

II. SAMANODAKAS.

(GENTILES WITHIN THE THIRTEENTH DEGREE.)

Q. 1.—Should a deceased person have no near relation, can a distant relation inherit his property, and what may be the degree of distance?

A.—In the absence of a near relation, if it can be shown that the party claiming to be the heir and the deceased are descendants of the same ancestor, he will be the heir.

Ahmednuggur, December 24th, 1851.

(*r*) *Gauri Sahai* v. *Rukko*, I. L. R. 3 All. 45.

(*s*) See Mit., Chap. II., sec. 1, para. 2, and *Lallubhai's Case*, *supra*.

(*t*) *Musst. Bhuganee Daiee et al.* v. *Gopaljee*, Agra S. R. for 1862, Part I., p. 306.

(*v*) *Bharmangavda* v. *Rudrapgavda*, I. L. R. 4 Bom. 181. See above, pp. 318-9 ss. See Tupper's Panj Cust. Law, Vol. II., p. 148, where a widow of a collateral ending the line, or one of a group of brothers ending it, takes the share that would have fallen to her husband had he been alive.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Chap. I., sec. 2, Q. 4); (2) p. 140, l. 1 and 6; (3*) Mit. Vyav., f. 58, p. 2, l. 15:

"If there be none such (Sapindas), the succession devolves on kindred connected by libations of water, and they must be understood to reach seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of knowledge as to birth and name extend." (Colebrooke, Mit., p. 351; Stokes's H. L. B. 448.)

Remark.—See above, pp. 122-3.

Q. 2.—A Brahman, who held the Joshi and the Kulakarani Watans, died. His surviving relations are distant eight or nine removes. Can they inherit the Inam?

A.—Yes, they can.

Poona, August 29th, 1851.

Authority.—Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

Remarks.—1. See the preceding case, and *Nursing Narain et al.* v. *Bhuttun Lall et al.* (*w*); *Musst. Dig. Daye et al.* v. *Bhuttun Lall et al.* (*x*).

2. A great-grandson of the fifth in ascent from propositus succeeds before his father's sister's son (*y*).

3. In *Thokoorain* v. *Mohanlal* (*z*) it was held that a sister's son does not inherit according to the Mitakshara. His position as a Bandhu had been abandoned, and the decision only excluded him from the nearer Sapindas.

4. A male descendant in fifth degree from great-grandfather of propositus succeeds before sister's son (*a*). The possibility of the latter's succession only is questioned.

(*w*) C. W. R. for 1864, p. 194.

(*x*) 11 C. W. R. 500.

(*y*) *Thakoor Jeebnath Singh* v. *The Court of Wards*, L. R. 2 I. A. 163.

(*z*) 11 M. I. A. 386.

(*a*) *Kooer Goolabsingh et al.* v. *Rao Kurum Sing*, 10 Beng. L. R. 1 P. C.; S. C. 14 M. I. A. 176.

SECTION 15.—BANDHUS—*i.e.*, COGNATES (*b*).

Introductory Remarks.

1. Under the heading Bandhu, " cognate kindred," the Mitakshara, Chap. II., sec. 6, clause 1, and the Mayukha, Chap. IV., sec. 8, p. 22, enumerate nine persons only—namely:

The man's own cognates.	1. The father's sister's sons.
	2. The mother's sister's sons.
	3. The maternal uncle's sons.
His father's cognates.	4. The father's paternal aunt's sons.
	5. The father's maternal aunt's sons.
	6. The father's maternal uncle's sons.
His mother's cognates.	7. The mother's paternal aunt's sons.
	8. The mother's maternal aunt's sons.
	9. The mother's maternal uncle's sons.

Or, in other words, sons of the paternal aunt and of the maternal aunt and uncle (1, 2, 3), and the same relatives of father (4, 5, 6), and of mother (7, 8, 9).

The enumeration may perhaps be intended to mark merely the extreme terms of the Sapinda relationship, the connection on one side or both being established through a mother and extending only to four steps between the persons regarded as Bandhus. It seems very likely that an extension was given to the terms seven and five as marking the gradation of Gotraja-Sapindaship and Bandhuship corresponding to that devised by the Canon lawyers on the basis of the Roman law. By this the degrees were counted only upwards from the more remote of two collateral descendants to the common stock which had previously been counted both up and down to determine the nearness of relationship. It would seem appropriate that when definite connection with names for each grade must be traced on the father's side from the same great-grandfather, it should on the mother's side be traced from one point lower or from the same grandfather. This is confirmed by the early laws of the other Aryan nations. But in the modern law there is no doubt but that the four steps may be counted upwards on either side to coincidence of origin. See above, p. 235.

2. From this enumeration, and the fact that the word Bandhu is frequently used to designate these nine relations exclusively,

(*b*) In Bengal the Bandhus come next after the nearer Sapindas—that is, before descendants from ascendants beyond the great-grandfather, *Roopchurn Mohatpur* v. *Anundlal Khan*, 2 C. S. D. A. R. 35; *Deyanath Roy et al.* v. *Muthoor Nath Ghose*, 6 C. S. D. A. R. 27. But according to *Inderjeet Singh et al.* v. *Musst. Her Koonwar et al.*, Cal. S. D. A. R. for 1857, p. 637, Gotraja Sapindas and Samanodakas are preferred to Bandhus.

it might be inferred that the list was intended to be exhaustive, and to preclude the wider interpretation of Bandhu in the sense of "relation," or "distant relation" in general. Consequently the other relations, as the maternal uncle, maternal grand-uncle, &c., would be excluded from inheriting.

3. This inference, however, becomes very improbable if another passage of the Mitakshara is taken into account, where Vijnanesvara apparently gives a different interpretation of the word Bandhu (*c*). He says that the term "gentiles," Gotrajas, includes "the paternal grandmother, Sapindas (relations within the sixth degree) and Samanodakas (relations within the thirteenth degree)." Pursuing the same subject, he adds (*ibid.* in cl. 3), "on failure of the paternal grandmother the kinsmen sprung from the same family as the deceased, and Sapindas (within the sixth degree) . . . inherit the estate. For kinsmen within the sixth degree (Sapindas), and sprung from a different family, are indicated by the term Bandhu." So also the Vyavastha referred to, though doubted by, the Privy Council in *Thakoorain Sahiba* v. *Mohun Lall* (*d*). Hence it would seem that Vijnanesvara interpreted Yajnavalkya's term "Bandhu" as meaning "relations within the sixth degree, who belong to a different family," or at least that all such persons who come under the term "Sapinda," according to the definition given in the Acharakanda (see above, p. 110), are included in the term "Bandhu." Consequently the maternal uncle, the paternal aunt, &c., would also be entitled to inherit as Bandhus. In the passage translated, Mit., Chap. II., sec. 12, p. 2, the word "Matribandhu" is explained as including the maternal uncles, and Goldstücker (On the Deficiencies, &c.) refers to Vijnanesvara's Commentary on Yajn. III., p. 24, for the same sense.

4. For the correctness of this wider interpretation a passage of the Viramitrodaya may be adduced, where Mitramisra likewise contends that other relations, "the maternal uncle and the rest," are comprised by the term Bandhu (*e*). For, says he, if maternal uncle's sons were allowed to inherit and their fathers not, this would be very improper, as nearer relations would be excluded to

(*c*) Col. Mit., Inh., Chap. II., sec. 5, Cl. 1; Stokes's H. L. B. 446.

(*d*) 11 M. I A. 386.

(*e*) The father's maternal uncle inherits, *Gridhari Lall Roy* v. *The Bengal Government*, 12 M. I. A. 448.

the advantage of more distant kindred (*f*). A similar opinion was given by the Sastris also in *Musst. Umroot et al.* v. *Kulyandass et al.* (*g*). They state that the Bhinnogotra Sapindas, or blood relations within seven degrees, not belonging to the deceased's family, inherit. But this assertion is too wide and vague to be of use, because Yajnavalkya I., 53 (*h*) says that, in the mother's line the Sapinda relationship ceases with the fifth person (*i*). Consequently a man's Sapindas in his mother's family cease with her great-grandfather in the direct ascending line, and with her grandfather's fifth descendant in the collateral line (*k*). This principle must also be borne in mind in the case of descendants from daughters of gotraja relations. Thus the deceased's great-great-granddaughter's son would be no longer a Sapinda. The view here taken has been adopted by the Privy Council in *Gridhari Lall* v. *The Government of Bengal* (*l*). In the answers to the questions of the following section the Sastris allow, besides the so-called nine Bandhus, the following Bhinnogotra Sapindas to

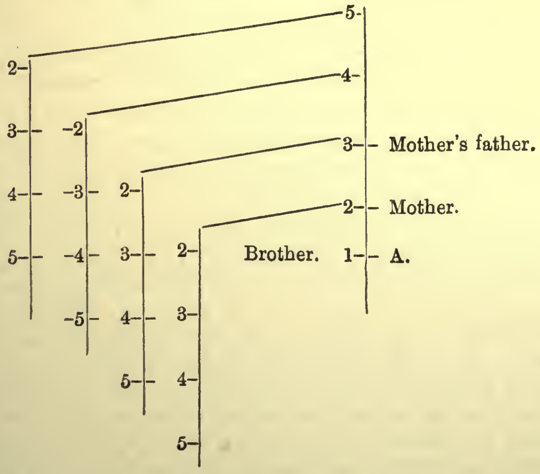
(*f*) Viramitrodaya, f. 209, p. 21, l. 6, Tr. p. 200. See also Macnaghten's Principles and Precedents, Ed. H. H. Wilson, p. 37, note.

(*g*) 1 Borr. R. 323.

(*h*) See above, pp. 126-8.

(*i*) It is for this reason that the prohibition to marry a person of the same kindred extending on the father's side to the seventh, extends on the mother's side only to the fifth degree (Narada, Part II., Chap. XII., para. 7). So Vyav. May. (as to an adopted son), Chap. IV., sec. 5, pl. 32.

(*k*) Table of a man's (A) Sapindas in his mother's family :



(*l*) 1 B. L. R. 44, P. C.; S. C. 12 M. I. A. 448.

inherit—1, sister's son; 2, maternal uncle; 3, brother's daughters; 4, sister's daughters. They quote as authorities partly the passage of Yajnavalkya authorising the Bandhus to inherit, partly the verse of Manu, which prescribes "that the nearest Sapinda inherits," and for the maternal uncle the passage of the Viramitrodaya above cited.

The passage cited in the Vyav. May., Chap. IV., sec. 10, p. 30 (Stokes's H. L. B. 106), is quoted in the Daya Bhaga, Chap. IV., sec. 3, p. 31 (Stokes's H. L. B. 257), and in Col. Dig., Book V. T. 513, to show the order of succession to woman's property. The nearness of the relationship is by Jimuta Vahana made a ground of succession through the benefits conferred by the oblations offered by a sister's son, &c., and a passage of Vriddha Satapa is quoted to prove the obligation to present these oblations. In translating this Colebrooke has confined its import to offerings for the wives of the maternal uncle, sister's son, &c.; but Goldstücker, "On the Deficiencies, &c.," p. 11, says that the duty is, according to the comment of the Dayaniraya, reciprocal between the maternal uncle and his nephew, and that it is due by a son-in-law, a pupil, a friend, and a daughter's son to their several correlatives. As the maternal uncle thus performs a Sraddha for his nephew, he is on this theory entitled to succeed to his property, and before the cousin, more remotely beneficial to the manes of the ancestors of the propositus.

5. Regarding the order in which the Bhinnogotra Sapindas succeed to each other, it is difficult to speak with certainty. It would seem, however, that the "nine Bandhus" mentioned in the law books ought to be placed first, if effect is to be given to the principle of the Mayukha that "incidental persons are placed last" (*m*). Amongst the other Sapindas "nearness to the deceased ought, as the Sastris also seem to indicate, to be the principle regulating the succession (*n*). In the case of *Mahandas*

(*m*) See Mayuka, p. 106, Borradaile; Stokes's H. L. B. 88. So also the Sastris in *Musst. Umroot et al.* v. *Kulyandass et al.*, 1 Borr. Rep., p. 323.

(*n*) A sister's son was preferred to a maternal aunt's son, *Gunesh Chunder Roy* v. *Nilkomul Roy et al.*, 22 C. W. R. 264 C. R. The great-grandson, through his mother, of an ancestor, common to a great-grandson by purely male descent, is not in Madras heir to the latter, *K. Kissen Lala* v. *Javallah Prasad Lala*, 3 M. H. C. R. 346. (See above, p. 451.) A paternal uncle's daughter's son is an heir according to Bengal law, *Guru Gobind Shaha Mandal et al.* v. *Anand Lal Ghose et al.*, 5 Beng. L. R. 15 F. B. S. C., 13 C. W. R. 49 F. B., which apparently supersedes *Raj Gobind Dey* v. *Rajessuee Dossee*, 4 C. W. R. 10 C. R. The Sastris, at 1 Borr. 323 (*Musst. Umroot et al.* v.

v. *Krishnabai* (*o*) it was held that this latter principle must prevail over the rule as to incidental persons even amongst the Bandhus, and that a mother's sister's son was excluded by maternal uncles of the propositus. Reference is made to *Amrit Kumari Debi* v. *Lakhinarayan* (*p*), as well as to *Gridhari Lall Roy's Case* (*q*), and it may probably be considered as now finally settled that the mention of the Bandhus in the rule is not exhaustive, and does not give to any one enumerated precedence over others nearer to the propositus in the same line of connection. The following cases have been arranged on the same principle as those regarding the Gotrajas.

SECTION 15.—BANDHUS OR COGNATES.

A.—Mentioned in the Law Books.

1.—FATHER'S SISTER'S SON.

Q. 1.—A man died, and none of his relatives are alive except his father's sister's son, who performed his funeral rites and receives emoluments as priest from his clients. Is he the heir of the deceased, and is he responsible for his debts?

A.—If the deceased has no wife, his father's sister's son will be his heir, and he, having received the emoluments belonging to the deceased, is responsible for his debts.

Surat, *January* 31*st*, 1846.

Authority.—*Mit. Vyav., f. 59, p. 1, l. 2:

"On failure of gentiles the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father, or to his mother, as is declared by the following text:

Kulyandass et al.) say that descendants through the daughter of propositus to the seventh degree are his asagotra sapindas. The grandson of a maternal grandfather's brother is an heir by Bengal law, *Brajakishor Mitter* v. *Radha Gobind Dutt*, 3 Beng. L. R. 435. A propositus being third in descent, a collateral, fifth in descent from the common ancestor, inherits to him in preference to his paternal aunt's son, *T. Jibnath Sing* v. *The Court of Wards*, 5 Beng. L. R. 443.

Two female links in the same line of descent are not recognised in any of these cases. It is doubtful whether the right transmitted through a female passes without being realised by actual succession more than one step further. See below, B. II. (3).

(*o*) I. L. R. 5 Bom. 597.

(*p*) 2 Beng. L. R. 28.

(*q*) 12 M. I. A. 448.

"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred." (Colebrooke, Mit., p. 352; Stokes's H. L. B. 448.)

REMARK.—The Dayabhaga, Chap. XI., sec. 6, p. 9, says that the grandsons through daughters of ascendants inherit through a connection with their mother's gotra of birth by the oblations that they must offer to her father in each instance. They thus stand in a manner on a par with grandsons through sons. (See Smriti Chandrika, Chap. XI., S. 5, para. 15.)

A. 2.—MATERNAL UNCLE'S SON.

Q. 1.—Can a deceased male's mother's brother's son be his heir?

A.—Yes.

Nuggur and Khandesh, 1845.

Authority not quoted. See the preceding case.

Q. 1.—A man died. There is a son of his maternal uncle. He claims to be the heir of the deceased, and he is not opposed by the near relations. Can he, under these circumstances, be recognised as heir?

A.—If the maternal uncle's son is not opposed by any near relation of the deceased, there is no objection to his claim on the ground of the Hindu law.

Surat, January 25th, 1855.

AUTHORITY.—Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1).

B.—NOT EXPRESSLY MENTIONED IN THE LAW BOOKS.

I.—MALES.

(1)—SISTER'S SON.

Q. 1.—Can a man's sister's son be his heir?

A.—Yes.

Tanna, October 5th, 1855.

AUTHORITY.—Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1).

REMARKS.—1. See Introductory Remark to sec. 15, clause 4.

2. According to the Mithila law and to that of Madras, a sister's son, it was once held, does not inherit as a Bandhu (*r*). But a sister's son is a Bandhu (*s*), and inherits in this character, though not as a gotraja sapinda (*t*). The Nirnaya Sindhu, quoted above (sec. 14 I. B. *b*. 1, Q. 1), expressly names a sister's son as heir (*v*), and gives to the sister's son a place amongst those who may present funeral oblations, and this is adopted in the Sraddha Mayukha, referred to in the Vyavahara Mayukha, Chap. IV., sec. 8, pl. 29.

3. Sister's sons have no right so long as a sister survives, but take before sister's daughters (*w*).

4. In a Vyavastha of the Sastris of the Sadar Court, N. W. P., dated 28th December, 1860, the sister's son, it is said, inherits before the paternal aunt's son (*x*), and a sister's son was preferred to a maternal aunt's son. These cases are opposed to the general principle that the persons actually specified take before those only implied, unless the specification in this case be meant merely to indicate the extreme points of heritable connection. See above, pp. 124, 461.

(*r*) *Thakoorain Sahiba* v. *Mohun Lall*, 11 M. I. A. 386; *Doe Dem. Kullammal* v. *Kuppu Pillai*, 1 M. H. C. R. 85.

(*s*) See Prof. H. H. Wilson's works, Vol. V., p. 14; Introductory Remarks to this section; 2 Macn. Prin. and Prec. 84; *Omrit Koomari Dabee* v. *Luchee Narain Chuckerbutty*, 10 C. W. R. 76 F. B.; *Amrita Kumari Debi* v. *Lakhinarayan Chuckerbutty*, 2 B. L. R. 29; *Srinivas Ayangar* v. *Rengasami Ayyangar*, I. L. R. 2 Mad. 304, followed in *Sadashiv* v. *Dinkar*, Bom. H. C. P. J. F. 1882, p. 17.

(*t*) *Amrita Kumari Debi* v. *Lakhinarayan*, 2 Beng. L. R. 28 F. B.; *Chelikani Tirupati* v. *R. S. Venkata Gopala Narasimha*, 6 M. H. C. R. 278; *Gridhari Lall Roy* v. *The Bengal Government*, 12 M. I. A. 448.

(*v*) *Amrita Kumari Debi* v. *Lakhinarayan*, 2 Beng. L. R. 28 F. B.

(*w*) *Icharam* v. *Purmanand*, 2 Borr. 515. In Madras it has been ruled that a sister is indeed in the line of heirs as being a bandhu, but that she is to be postponed to a sister's son [*Lakshman Ammal* v. *Tiruvengada*, I. L. R. 5 Mad. 241; *Kutti Ammal* v. *Radakristna Aiyan*, 8 M. H. C. R. 88]. The doctrine of sapinda relationship explained above, at p. 112 ss., and adopted in Bengal as that of the Mitakshara [*Umard Bahadur* v. *Udvi Chand*, I. L. R. 6. Cal. 119] is fully accepted by the learned judges, but combined with that of a woman's losing her sagotraship by passing into another family. Nilakantha, as we have seen, says this is not decisive, as the right of a sister depends on an original consanguinity which cannot be lost. In Bombay, as the Sastri's reference shows (though it is not pointed), the Mitakshara is not thought to be opposed to the precedence of a sister over a sister's son, and the preference which in a collateral line of gotraja sapindas may be claimed by a son over his own mother or grandmother rests on his connection with the main stem through his father, whose place he may be supposed to take in preference to the widow. In the case of a male deriving his right only through his mother, this reason for preferring him to her or to one standing on an equality with her in relation to the propositus does not exist, the mother or her sister stands one degree nearer to the propositus in the same line as the son. See *Mohandas* v. *Krishnabai*, I. L. R. 5 Bom. 597.

(*x*) *Gunesh Chunder Roy* v. *Nil Komul Roy et al.*, 22 C. W. R. 264.

5. In *Laroo* v. *Sheo* (*y*) the property came to a deceased intestate, apparently from his maternal uncle, and the Sadr Adalat decided that property inherited through the female (maternal) heir must continue to descend in that line.

6. A fifth descendant from the grandfather takes precedence of the sister's son (*z*)

Q. 2.—A man died. His property is in the possession of his sister's son. There is, however, a half-sister's son besides the sister's son. The question is: Which of these is the heir?

A.—The sister's son is the heir. The half-sister's son is not the heir.

Surat, August 5th, 1845.

Authorities.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1).

Remark.—See sec. 14, I. A. 2, Q. 1.

B. I. (2)—MATERNAL UNCLE.

Q. 1.—Can a maternal uncle be the heir of his nephew?

A.—Yes.

Tanna, February 12th, 1859.

Authority.—Viramitrodaya, f. 209, p. 2, l. 6, Transl., p. 200:

"In the law-book of Manu the word Sakulya—(which is used in verse IX. 187): On the failure of them (Sapindas) the Sakulyas are (heirs of a separated male), or the teacher, or also a pupil—includes Sagotras (gentiles within the sixth degree), Samanodakas (gentiles within the thirteenth degree), the maternal uncles, and the other (Sapindas belonging to a different family), and the three (classes of relations called) Bandhu. In the passage of Yogisvara (Yajnavalkya, see Chap. II., sec. 2, Q. 2) also the word Bandhu indicates the maternal uncle. Otherwise, if the maternal uncles were not included (by the word Bandhu), a great impropriety would take place, since their sons would be entitled to inherit, and they who are more nearly related (to the deceased) than the former would not have the same right."

(*y*) 1 Borr. 80.
(*z*) *Kooer Goolab Singh et al.* v. *Rao Kurun Sing*, 10 Beng. L. R. 1.

Q. 2.—If a man applies for a certificate of heirship on the ground that the deceased was his foster-son, should this application be granted?

A.—In the case to which this question refers it appears that the deceased was applicant's sister's son. He should therefore call the deceased not his foster-son but his nephew, and as the maternal uncle of the deceased he should be granted a certificate.

Dharwar, November 16th, 1846.

AUTHORITY.—*Viramitrodaya, f. 209, p. 2, l. 6. See the preceding case.

B. II.—FEMALES.

(1)—GRANDDAUGHTER.

Q. 1.—Has a granddaughter the same right to the property of her grandfather as a grandson?

A.—No.

Tanna, September 15th, 1851.

AUTHORITY.—Mit. Vyav., f. 50, p. 1, l. 7.

REMARKS.—1. In an undivided family the granddaughter cannot inherit.

2. In a divided family she might inherit on failure of nearer heirs as a "Sapinda relation belonging to a different family." See Introductory Remark to sec. 15, clause 5.

3. It has been ruled at Madras that a granddaughter's son is not entitled to inherit to a second cousin, great-grandson in a male line of the same ancestor (*a*), but this is not so in Bombay. See the Introductory Remarks to this section.

B. II. (2)—BROTHER'S DAUGHTER.

Q. 1.—A man, who was not married, died. There are two daughters of his brother. One of these daughters has a son. The son's father is his guardian. He claims the possession of the deceased's property. The daughters have no objection to the claim of the son's father. The question is whether the son of a daughter can be recognised as heir while there are two daughters of the deceased, and whether the father of the son has right to be his guardian?

(*a*) *K. Kissen Lala* v. *Javallah Prasad Lala*, 3 M. H. C. R. 346.

A.—The brother's two daughters are the nearest relations of the deceased. They are therefore legal heirs, and while they are alive the son of one of them cannot be considered an heir. It is therefore unnecessary to discuss the question of the right of the father to be the guardian of his son.

Ahmedabad, March 25th, 1855.

AUTHORITIES.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (2) p. 137, l. 4.

REMARKS.—1. See Introductory Note to sec. 15, clause 4.

2. In the case of *Choorah Monee Bose et al.* v. *Prosonno Coomar Mitter* (*b*), it was held that a brother's daughter's son is not an heir, and so in *Govindo Hureehar* v. *Woomesh Chunder Roy* (*c*). But the Sastris, in *Umroot* v. *Kulyandas* (*d*), pronounce in favour of the niece's sons and even grandsons. And a brother's daughter's son was recognised as an heir in *Musst. Doorga Bibee et al.* v. *Janaki Pershad* (*e*). The brother's daughters were postponed to a first cousin once removed (first cousin's son) in the male line, in *Gangaram v. Ballia et al.* (*f*). Comp. Q. 2, p. 498.

B. II. (3)—SISTER'S DAUGHTER.

Q. 1.—A man died. There were three daughters of his sister. Two are alive, and one died before the man's death, leaving a son. The question is: Which of these is the heir?

A.—The two surviving daughters of the sister are the heirs. The son of the third daughter, who died before the man's death, has no right to inherit from the deceased.

Ahmedabad, June 26th, 1855.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (3*) Mit. Vyav. f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARK.—See Introductory Note to sec. 15, clause 4.

Q. 2.—Can a "Bhachi," or a daughter of a sister, of a man of the goldsmith caste be his heir?

A.—Yes.

Ahmednuggur, December 28th, 1853.

(*b*) 1 C. W. R. 43.
(*c*) C. W. R. F. B. R. 176.
(*d*) 1 Borr. R. 314.
(*e*) 10 Beng. L. R. 341.
(*f*) S. A. No. 519 of 1873 (Bom. H. C. P. J. F. for 1876, p. 31).

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) Vyav. May, p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1).

REMARKS.—1. Grand-nephews through the mother of a deceased succeed to him, *Musst Umroot et al* v. *Kulyandas et al.* (g). A sister's daughter's son is, it is said, an heir according to the Mitakshara, and as such can question a gift by the deceased's widow as invalid in law, *Unaid Bahadur* v. *Udoichand* (h). This, however, seems questionable. "It is clear that a son of a daughter of a father's brother is much further removed in the order of succession than the son of a father's brother or a son of such a son" (i). Thus the intervention of even one female link is a cause of postponement. Much more where the heritable right is traced through a daughter and then again through her daughter to a grandson or granddaughter. The sacrificial connection, which at least indicates heritable relation, is lost in the case of a maternal grandmother's family. Only one female link is properly admitted between the claimant and the stem, but it is not certain, as the case cited shows, that the principle will be rigorously followed by the Courts.

2. A maternal grand-niece inheriting property takes it with the same power of alienation as a daughter or sister (k).

3. The grandson of the maternal uncle of the mother of propositus is in the line of heirs (l).

4. A sister's grandson succeeds to property inherited from her father by a woman in preference to her own daughter, under the Bengal law (m). The Pandit relied on Vishnu's Dharmasastra (Transl., p. 68). A nephew's daughter is not an heir, according to Bengal law (n).

(g) 1 Borr. 314.

(h) I. L. R. 6 Cal. 119.

(i) Pr. Co. in *Rani Anand Kunwar* v. *The Court of Wards*, I. L. R. 6 Cal., at p. 772.

(k) *Tuljaram Morarji* v. *Mathuradas Dayaram*, I. L. R. 5 Bom. 662.

(l) *Ratnasubbu Chetti* v. *Ponappa Chetti*, I. L. R. 5 Mad. 69.

(m) *Sheo Sehai Singh et al.* v. *Musst. Omed Konwur*, 6 Cal. S. D. A. R. 301.

(n) *Radha Pearee Dossee et al.* v. *Doorga Monee Dossia et al.*, 5 Cal. W. R. 131 C. R. See *Lallubhai* v. *Mankiwarbai*, I. L. R. 2 Bom. 435, and above, p. 456.

CHAPTER III.

HEIRS TO MALES WHO HAVE ENTERED A RELIGIOUS ORDER.

SECTION 1.—HEIRS TO A YATI.

Q. 1.—Can the relatives of a "Sannyasi" claim his property?

A.—No relative can claim any property acquired by a man during the time he was "Sannyasi."

Dharwar, 1846.

AUTHORITY.—*Mit. Vyav., f. 59, p. 1, l. 15 :

"A virtuous pupil takes the property of a yati or ascetic. The virtuous pupil, again, is one assiduous in the study of theology, in retaining the holy science, and in practising its ordinances." (Colebrooke, Mit., p. 355; Stokes's H. L. B. 451.)

Q. 2.—How should property be divided among three disciples of a deceased Guru? And if some of them are absent, should their shares be held in deposit or made over to those that are present?

A.—The Sastras do not provide for division of a Guru's property among his disciples. One of them should therefore take it and perform the funeral rites of the deceased, according to custom.

Ahmednuggur, September 26*th*, 1845.

Authorities not quoted. See the preceding question.

SECTION 2.—HEIRS TO A NAISHTHIKA BRAHMACHARI.

Q. 1.—Is an Acharya or Guru the heir of his disciple?

A.—Yes.

Sholapoor, October 27*th*, 1846.

AUTHORITY.—*Mit. Vyav., f. 59, p. 1, l. 14 :—

"It has been declared that sons, grandsons (or great-grandsons) take the heritage, or, on failure of them, the widow or other successors. The author (Yajnavalkya) now propounds an exception to both those laws. The heirs of

a hermit, of an ascetic, and of a professed student are, in their order, the preceptor, the virtuous pupil, and the spiritual brother and associate in holiness.

"The heirs to the property of a hermit, of an ascetic, and of a student in theology are, in order (that is, in the inverse), the preceptor, a virtuous pupil, and a spiritual brother belonging to the same hermitage.

"The student (Brahmacharin) must be a professed or perpetual one (Naishthika (*o*), for the mother and the rest of the natural heirs take the property of a temporary student (Upakurvana) (*p*), and the preceptor is declared to be heir to a professed student as an exception [to the claim of the mother and the rest]." (Col. Mit. 354; Stokes's H. L. B. 450-1.)

REMARK.—Only if the deceased was a Naishthika Brahmachari—that is, a student who had renounced the world and professed his intention to live all his life with his preceptor.

Q. 2.—Can a preceptor (Guru) be the heir of his disciple (Sishya)?

A.—As the parents of the disciple had devoted him to the service of the Guru, and as he was not married, the Guru is his heir.

Sholapoor, July 15*th*, 1846.

Authority not quoted. See the preceding Question.

(*o*) See Smriti Chandrika, Chap. XI., S. 7. Naishthika is derived from *nishtha*, "fixed resolve," and means literally a person who has taken the fixed resolution (to stay with his preceptor until death).

(*p*) "Upakurvana" means literally a person who pays or gives a present (to the preceptor at the end of his studentship).

CHAPTER IV.

HEIRS TO A FEMALE.

A.—Heirs to an Unmarried Female (*q*).

SECTION I.—BROTHER.

Q. 1.—Can a brother inherit his sister's property?

A.—Yes.

Dharwar, 1846.

Authority.—*Mit. Vyav., f. 62, p. 1, l. 7:

"But her uterine brothers shall have the ornaments for the head and other gifts which may have been presented to the maiden by the maternal grandfather (or the paternal uncle) or other relations, as well as property which may have been regularly inherited by her. For Baudhayana says: 'The wealth of a deceased damsel let uterine brothers themselves take. On failure of them it shall belong to the mother, or if she be dead to the father.'" (Col. Mit. 373; Stokes's H. L. B. 465.)

Remarks.—1. The text of Vijnanesvara quoted refers in the first instance to a maiden who died after her betrothal, but before her marriage. As Baudhayana's passage contains no such restriction, its rules seem to apply also to a girl who died before her betrothal. So Narada quoted in the Daya Krama Sangraha, Chap. II., sec. 1. (Stokes's H. L. B. 487.)

2. Regarding the case of a married sister, see Chap. IV. B., sec. 7, II. *b*.

A.—SECTION 2.—THE FATHER.

Q. 1.—If a daughter has no relatives except her father, will he be her heir?

A.—Yes.

Ahmednuggur, January 10*th,* 1846.

Authority not quoted.

Remarks.—1. See the preceding case.

2. Regarding the father's succession to the estate of a married daughter, see Chap. IV. B., sec. 7.

(*q*) The uncles and cousins of an unmarried damsel, daughter of their deceased coparcener, exclude her from inheritance, but are bound to defray her marriage expenses out of the joint estate (2 Macn. H. L. 47).

A.—SECTION 3.—THE SISTER.

Q. 1.—Can a sister of a deceased Murali be her heir?

A.—Yes.

Poona, September 23rd, 1852.

AUTHORITIES.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (2*) Manu IX. 187 (see Chap. II., sec. 14, I. B. *b*. 1, Q. 1).

REMARK.—The above text of Manu, declaring the "nearest Sapinda entitled to inherit," applies in the first instance to the succession to a male's estate. In the Mayukha, p. 159, l. 5 (Stokes's H. L. B. 105), Nilakantha uses it in regard to a female's estate also.

B.—MARRIED.

SECTION 1.—DAUGHTER.

Q. 1.—A woman of the Kunabi caste died. Her daughter, who was abandoned by her husband, lived with her mother for about six years. Can this daughter be the heir of the deceased mother?

A.—As there are no other and better heirs the daughter will be the heir of the deceased. If the daughter, however, is a notoriously bad character the Sirkar should pay the expenses of the funeral rites, assign a maintenance to the daughter, and hold the rest in deposit pending a reform in her character.

Ahmednuggur, January 14th, 1847.

AUTHORITIES.—(1) Vyav. May., p. 142, l. 2; (2) p. 137, l. 5; (3) p. 156, l. 5; (4) p. 159, l. 5; (5) p. 136, l. 8; (6) p. 162, l. 1; (7) Mit. Vyav., f. 45, p. 1, l. 5; (8) f. 58, p. 1, l. 7; (9) f. 58, p. 2, l. 16; (10) f. 57, p. 1, l. 5; (11*) f. 60, p. 1, l. 13; (12) f. 60, p. 2, l. 2; (13) f. 60, p. 2, l. 1; (14*) f. 48, p. 1, l. 13:

"It has been declared that sons may divide the effects after the death of their father and mother. The author states an exception in regard to the mother's separate property: 'The daughters share the residue of their mother's property after payment of her debts.' Let the daughters take their mother's effects remaining over and above the debts—that is, the residue after the discharge of the debts contracted by the mother. Hence the purport of the preceding part of the text is that sons may divide their mother's effects, which are equal to her debts or less than their amount. The meaning is this: A debt incurred by the mother must be discharged by her sons, not by her daughters; but her daughters shall take her property remaining above her debts." (Colebrooke, Mit., p. 266; Stokes's H. L. B. 383.)

(15) Mit. Vyav., f. 61, p. 1, l. 16:

"In all forms of marriage, if the woman 'leave progeny'—that is, if she have issue, her property devolves on her daughters." (Colebrooke, Mit., p. 368; Stokes's H. L. B. 461.)

Q. 2.—Who will be the heir of a deceased widow, her daughter or her husband's illegitimate son?

A.—A daughter only is entitled to inherit her mother's Stridhana; an illegitimate son of the deceased widow's husband has no right to it. If the parties concerned be of the Sudra caste, a daughter and an illegitimate son will be entitled to equal shares of their father's property. If the property is Stridhana a daughter has a prior and superior right to it. The illegitimate son and the daughter should therefore take equal shares of the property of the deceased.

Ahmednuggur, January 31st, 1848.

Authorities.—(1) Vyav. May., p. 99, l. 1; (2) p. 151, l. 2; (3) p. 155, l. 7; (4) p. 156, l. 5; (5) p. 157, l. 7; (6) p. 159, l. 5; (7*) Mit. Vyav., f. 48, p. 1, l. 13 (see Chap. IV. B., sec. 1, Q. 1); (8) f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1).

Remark.—The Sastri in his last direction treats the property as that of the predeceased husband, and applies to it the construction of Yajnavalkya's text supported by Devanda Bhatta in the Dattaka Chandrika, sec. 5, pl. 31 (Stokes's H. L. B. 660).

Q. 3.—A woman died leaving a son by her first and a daughter by her second husband. She had taken no property belonging to her first husband. The deceased's property was left in possession of her daughter and son-in-law. The question is whether the daughter or the son should be considered the heir?

A.—If there is no proof that the property in question did not belong to her first husband, the daughter alone is the heir.

Khandesh, March 4th, 1851.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2*) Mit. Vyav., f. 48, p. 1, l. 13 (see Chap. IV. B., sec. 1, Q. 1).

Remark.—The words "did not belong" are evidently a mistake for "belonged."

Q. 4.—A woman died leaving a daughter and a son of a predeceased daughter. Which of these will be heir of the deceased?

A.—The grandson is a distant relation. The daughter should be considered the heir of the deceased.

Khandesh, October 22nd, 1847.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2*) Mit. Vyav., f. 48, p. 1, l. 13 (see Chap IV., B., sec. 1, Q. 1).

Q. 5.—A woman died. She possessed some waste land. She had had three daughters. The second is alive: the eldest died leaving a son. The youngest died without issue, but her husband is alive. The question is how the land should be divided among the heirs?

A.—The land should be equally divided between the daughter's son and the surviving daughter. The husband of the deceased daughter has no right to any part of the property.

Surat, October 12th, 1857.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2*) f. 48, p. 1, l. 13 (see Chap. IV., B., sec. 1, Q. 1); (3) Viramitrodaya, f. 205, p. 2, l. 2.

REMARK.—The daughter's son will inherit only in case his mother died after his grandmother. In this case he inherits his mother's share of the grandmother's property. If his mother died before his grandmother the surviving daughter of the latter takes the whole.

Q. 6.—A man had two sons. The younger of these died leaving a widow. The elder subsequently died, leaving a son. The last-mentioned died leaving a widow and a daughter. The widow also died, and the question has arisen whether the daughter of the deceased or the widow of the younger son who died first should be considered the eldest son's heir?

A.—The widow of the last deceased man is his heir, and on her death the right of inheritance devolves on her daughter. The widow of the younger son who died first cannot have any right to inherit the property of her husband's elder brother's son.

Bombay, Sadr Adalat, July 30th, 1857.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2*) f. 48, p. 1, l. 13 (see Chap. IV. B., sec. 1, Q. 1).

Q. 7.—A deceased woman of the Sonara caste has left a daughter and a grandson of her husband's cousin. The daughter incurred the expense of the funeral ceremonies of her mother. The grandson underwent the ceremony of shaving his head, and actually performed the obsequies. He was separate, but used to

keep up a friendly intercourse with the deceased as a relation. Which of the two will be her heir?

A.—The daughter must be recognised as the heir, her relationship being nearer than that of the grandson.

Khandesh, May 31*st,* 1848.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2*) Mit. Vyav., f. 48, p. 1, l. 13 (see Chap. IV. B., sec. 1, Q. 1).

Q. 8.—A woman died. Her surviving relatives are a daughter who has no issue and a separated member of the family of her husband. The question is: Which of these is the heir?

A.—The rule is that when a separated member of a family dies his wife becomes his heir. In the absence of a wife his daughter is the legal heir. If the daughter, however, is a widow, and without male issue, she cannot be the heir. The separated member of the family of her husband will be her heir.

Surat, February 10*th,* 1846.

Authority.—*Mit. Vyav., f. 48, p. 1, l. 13 (see Chap. IV. B., sec. 1, Q. 1).

Remark.—The daughter alone is the heir. The Mitakshara and the Mayukha do not mention barrenness as an impediment to a daughter's inheriting. The Surat Sastri seems here, as in some other instances, to have given Bengal law. (See Dayabhaga, Chap. XI., sec. 2.)

Q. 9.—A., a man, and B., his son, lived separate. When B. died his son C. inherited his property. When C. died, D., the widow of B., inherited her son's property. D. died leaving two married daughters. A., the father-in-law of D., is alive. The question is: Who has the right of inheriting the property of D.?

A.—As A., the father-in-law of D., was separate from B., the husband of D., the daughters are the legal heirs (*r*).

Bombay, Sadr Adalat, August 6*th,* 1849.

Authorities.—(1) Mit. Vyav., f. 61, p. 1, l. 16 (see Chap. IV. B., sec. 1, Q. 1); (2) f. 45, p. 1, l. 5; (3) f. 55, p. 2, l. 1; (4*) f. 48, p. 1, l. 13 (see Chap. IV. B., sec. 1, Q. 1).

(*r*) This case illustrates pp. 313, 316, 319, 321.

Q. 10.—It cannot be ascertained whether the husband and brother-in-law of a woman were separate or united in interests. It cannot also be ascertained whether, after the death of her husband, the woman was supported by her father-in-law or brother-in-law. Will the daughter or the brother-in-law of the woman, under these circumstances, inherit the property acquired by the woman?

A.—When two uterine brothers are separate, and one of them dies, his widow will become his heir, and after the widow's death her daughter. The daughter alone can inherit the property acquired by the woman alluded to in the question. The brother-in-law, whether separate or otherwise, can have no right to it.

Surat, January 25th, 1845.

AUTHORITIES.—(1) Vyav. May., p. 137, l. 5; (2) p. 157, l. 3 (see Auth. 3); (3*) Mit. Vyav., f. 61, p. 1, l. 16 (see Chap. IV. B., sec. 1, Q. 1).

REMARK.—A sum of money, on the death of her husband, was given to a widow by his undivided brother in lieu of maintenance. With this she bought land. It was held that the property was her own absolutely, and, being disposable *inter vivos* at her pleasure, could be equally disposed of by her will (*s*). See above, pp. 110, 214, 299-300; and also Book II., "PARTITION BETWEEN BROTHERS."

Q. 11.—Can a daughter inherit all her mother's property or only her Stridhana?

A.—If the mother should have no son the daughter will be her sole heir; but if the mother has a son the daughter can inherit only her "Stridhana." The rest will pass into the hands of her sons.

Dharwar, 1845.

AUTHORITY.—*Mit. Vyav., f. 48, p. 1, l. 13 (see Chap. IV. B., sec. 1, Q. 1).

REMARK.—The Sastri seems to have intended to express the Mayukha doctrine (See above, p. 135.)

Q. 12.—A woman died. Her husband had a Vatan. She has two daughters, one of whom has some children and the other has none. There are distant relations of the husband. The question is whether the husband's relations or the daughter of the deceased woman has a right to inherit the Vatan?

(*s*) *Nellaikumara Chetty* v. *Marakathammal*, I. L. R. 1 Mad. 166, referring to *Doorga Daye et al.* v. *Poorun Daye et al.*, 5 C. W. R. 141 C. R., and to *Rajah Chandranath Roy* v. *Ramjai Mazumdar*, 6 B. L. R. 303.

Should a custom prevalent in a family or caste be respected when it is inconsistent with the law of inheritance laid down in the Sastra?

A.—In the above case it appears that the wife inherited her husband's property. On her death her daughter becomes the heir.

If a custom has uniformly and for a long time been respected by a family or caste, and if the observance of it is not prejudicial to the rights of any individual or contrary to religion or morality, it may continue to be respected.

Bombay, Sadr Adalat, May 17th, 1847.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2) p. 137, l. 4; (3) p. 7, l. 1 (see Chap. II., sec. 13, Q. 9); (4) Mit. Achara, f. 52, l. 1, p. 13 (see Auth. 3); (5) Viramitrodaya, f. 9, p. 2, l. 6 (see Auth. 3); (6*) Mit. Vyav., f. 48, p. 1, l. 13, and f. 62, p. 1, l. 16 (see Chap. IV. B., sec. 1, Q. 1).

REMARK.—It is obvious that the rights of the individual must themselves depend on the custom in so far as the custom is binding. See above, p. 151, sec. V. As to the conditions of a good custom, see *Mathura Naikin* v. *Esu Naikin* (*t*).

Q. 13.—A man of the Vani caste died. His wife also died shortly after him, leaving a daughter-in-law, who was a widow, and three daughters, two of whom were young and unmarried, and consequently under the protection of the daughter-in-law. The last-mentioned has applied for a certificate of heirship to the deceased, and the question is whether the two daughters have a right to any portion of the property of their mother, or whether the whole should be made over to the daughter-in-law alone?

A.—The daughter-in-law is the heir to all the property left by her mother-in-law. If the mother-in-law should have any property which can be called her "Stridhana," the daughters would be entitled to it. Those daughters who are unmarried will have a superior claim to it. Out of this property these daughters must be maintained and married, and the remainder, if any, should be equally divided among the married and the unmarried.

Ahmednuggur, October 21st, 1851.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (2) Vyav. May., p. 134, l. 4 (see Auth. 1); (3) p. 137, l. 5; (4) p. 151, l. 1; (5) p. 159, l. 5; (6) p. 156, l. 5; (7) Vyav. May., p. 157, l. 3:

"These distinctions are declared by Gautama: 'A woman's property goes to her daughters, unmarried or unprovided.'" (Borradaile, p. 125; Stokes's H. L. B. 103).

(*t*) I. L. R. 4 Bom. 545, 571.

REMARKS.—1. The Sastri's answer is right only if the son died after his father, since in this case only his widow (the daughter-in-law of the question) would inherit his property.

2. If the son died before his father his rights revert to the latter (*v*). After the father's death his widow inherits the property, and from her her daughters. See above, pp. 135, 138, 308.

Q. 14.—A Lingayat woman died. Her stepson has lived separate from her for the last twenty years, and her daughter is a married woman. Which of these will be her heir?

A.—The daughter will inherit her mother's Stridhana, and the son will inherit such property of his father as may have remained in the possession of the deceased.

Dharwar, August 6th, 1851.

AUTHORITIES.—(1) Vyav. May., p. 83, l. 7; (2) p. 158, l. 4; (3*) Mit. Vyav., f. 48, p. 1, l. 13 (see Chap. IV. B., sec. 1, Q. 1).

REMARK.—The Sastri, as in answer to Q. 11, intends to give the Mayukha doctrine. (See Borradaile, 126; Stokes's H. L. B. 104.)

B.—SECTION 2.—GRANDDAUGHTER.

Q. 1.—There are two relatives of a deceased woman. The one is her daughter's daughter, and the other her husband's brother's daughter. Which of these should succeed to the deceased's property?

A.—The daughter's daughter is the heir to the property.

Dharwar, December 24th, 1847.

AUTHORITIES.—(1) Viramitrodaya, f. 217, p. 1, l. 15; (2) Mit. Vyav., f. 61, p. 2, l. 5:

"On failure of daughters, her granddaughters in the female line take the succession under this text: 'If she leave progeny it goes to her (daughter's) daughters.'" (Colebrooke, Mit., p. 369; Stokes's H. L. B. 462.)

B.—SECTION 3.—DAUGHTER'S SON.

Q. 1.—A woman who held a Kulakarani Vatan died. There are her relations of ten days (*w*) and a son of her daughter. Which of these should succeed to the Vatan?

(*v*) See *Udaram Sitram* v. *Ranu Pandujee et al.*, 11 Bom. H. C. R. 76.

(*w*) Ten days here show the duration of the mourning and the impurity supposed to result from the death of a relation. The more remote the relationship the less is the duration. Hence relations are called in Marathi according to their various degrees, as of ten days, three days, one day, or of ablution (Sapindas).

A.—There is an order of heirs laid down in the Sastras in the case of persons who, having separated themselves from and not having united with the other members of a family, have died without male issue. The order commences with wife, who is followed by other relatives having a right to succeed one after another. The Sastra also declares that all the heirs of a man living and about to come into life expect to inherit his Vatan, and that no man should therefore alienate it to his family's prejudice. From these it appears that the daughter's son should inherit all the property of the deceased except the Vatan, which should be given to the (nearest) relations of the same Gotra as the deceased.

Khandesh, October 5th, 1853.

Authorities.—(1) Vyav. May., p. 134, l. 4 (see Auth. 3); (2) p. 196, l. 3; (3) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. 1, sec. 2, Q. 4); (4*) Mit. Vyav., f. 61, p. 2, l. 7:

"On failure of daughter's daughters the daughter's sons are entitled to the succession. Thus Narada says: 'Let daughters divide their mother's wealth; or on failure of daughters, their male issue.' For the pronoun refers to the contiguous term 'daughters.'" (Colebrooke, Mit., p. 370; Stokes's H. L. B. 462.)

Remark.—The decision as to the Vatan is based on the supposition that the Vatan is not Stridhana or separate property subject to the ordinary rules of descent. But see Chap. I., sec. 2, Q. 5, and Chap. II., sec. 8, Q. 1.

B.—SECTION 4.—SONS.

Q. 1.—A woman died. Her husband and son have survived her. Which of these is her heir? And who has a right to inherit her Palu?

Supposing the husband has a right to inherit her Palu, will his right be destroyed because the Palu has been applied towards the purchase of some property, and because the deed of purchase sets forth that the property purchased was intended for the benefit of the woman's children?

A.—It is not mentioned in the question whether the woman had obtained her Palu from her husband or from her father, or whether it was earned by her by following any particular trade. It is not also stated whether the deceased woman has any daughter.

The son of a deceased woman has a right to inherit all the property of his mother. When a woman has children her husband has no right to her property. In the absence of a daughter a son has a right to inherit her Palu. Though the Palu has been applied

towards purchasing some property, the husband can have no claim on it.

Surat, June 14th, 1848.

Authorities.—(1) Mit. Vyav., f. 48, p. 1, l. 14 (see Chap. II., sec. 14, I. A. 1, Q. 3); (2) Vyav. May., p. 156, l. 1; (3*) Mit. Vyav., f. 61, p. 2, l. 9: "If there be no grandsons in the female line sons take the property, for it has already been declared the (male) issue succeeds in their default." (Colebrooke, Mit., p. 370; Stokes's H. L. B. 462.)

Q. 2.—A woman received a house from her father. She had two sons. One of them died, leaving a widow. The mother died after the death of her son. The question is whether the surviving son or the daughter-in-law should inherit the house given to the woman by her father?

A.—The son, and not the daughter-in-law, has the right to inherit the property of his maternal grandfather.

Surat Adalat, June 7th, 1827.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 61, p. 2, l. 9 (see Chap. IV. B., sec. 4, Q. 1).

Remark.—The son inherits the property as heir of his mother, not as heir of his maternal grandfather.

Q. 3.—A woman of the Sudra caste died. One of her sons is in gaol, undergoing the sentence of imprisonment for life. The other died, leaving a son. The question is whether the grandson or the son is the heir to the woman's property?

A.—The grandson, as well as the son, has a right to inherit the property.

Poona, May 13th, 1851.

Authorities.—(1) [Vyav. May., p. 90, l. 2]; (2*) Mit. Vyav., f. 61, p. 2, l. 9 (see Chap. V. B., sec. 4, Q. 1).

Remark.—If the grandson's father died before his mother the grandson cannot inherit, as grandsons inherit their mother's Stridhana on failure of sons only.

Q. 4.—A man died, and his property was taken possession of by his mother. After the death of the mother her daughter came into possession of the property. On the death of the daughter her

son assumed possession. He is now sued by a separated cousin of the original proprietor for the recovery of the property, and the question is whether it should be made over to him?

A.—The several successions described in the question appear to be legal, and the possession of the grandson cannot be disturbed.

Rutnagherry, September 3rd, 1855.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2) [p. 151, l. 2]; (3) p. 157, l. 3; (4) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (5) f. 61, p. 1, l. 16 (see Chap. IV. B, sec. 1, Q. 1); (6*) f. 61, p. 2, l. 9 (see Chap. IV. B., sec. 4, Q. 1).

Q. 5.—A. married a woman, B., who had been previously married, and who brought to his house the son C., whom she had borne to her first husband. A. died without having either a son or a daughter born of his marriage with B. On his death his wife B. inherited his property. After B.'s death will the property of A. pass to his blood relations or to C., the son of B. by her first husband?

A.—If A. died without issue his widow B. was his heir, and any property which she inherited from A. became her Stridhana. As she had neither a son nor a daughter by A., and had a son by her former hlusband, this son will be her heir, and on her death will succeed to the property of which she may die possessed, in preference to any relatives of her husband A.

Broach, September 11th, 1851.

Authorities.—(1) [Mit. Vyav., f. 60, p. 2, l. 16]; (2*) f. 61, p. 2, l. 9 (see Chap. IV. B., sec. 4, Q. 1).

Remark.—See above, pp. 137-8, 308, 315; but also p. 318 ss. A stepson has, as such, no right of succession to his stepfather's property (*x*). He can claim only maintenance.

Q. 6.—A woman of the Maratha caste adopted a son. The witnesses have proved the fact. Can the adopted son be legal heir to the property of the deceased?

A.—It having been proved that the adoption was solemnised with due ceremonies, the adopted son is the proper heir.

Rutnagherry, September 26th, 1845.

(*x*) Comp. Tupper, Panj. Cust. L., Vol. II., p. 150. It is as heir to his mother's estate that he is entitled. As to the *quantum* of this estate, see *Brij Indar's Case*, I. R. 5 I. A., at p. 14.

Authority not quoted.

REMARK.—There is no special authority to show that the adopted son inherits his adoptive mother's Stridhana. It follows from his occupying in all respects the position of a son where there is not one by birth.

B.—SECTION 5.—HUSBAND.

Q. 1.—A woman died. Her husband lived with his father as a member of an undivided family. His age was about nineteen years. Is he or his father entitled to receive the "Palu" of the deceased woman?

A.—If the deceased has left no children her husband has the right to receive her "Palu."

Surat, March 28th, 1848.

AUTHORITY.—Mit. Vyav., f. 61, p. 1, l. 12:

"The property of a childless woman married in the form denominated Brahma, or in any of the four (unblamed modes of marriage), goes to her husband; but if she leave progeny it will go to her (daughter's) daughters, and in other forms of marriage (as the Asura, &c.) it goes to her father (and mother on failure of her own issue)."

"Of a woman dying without issue, as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha, Prajapatya, the (whole) property, as before described, belongs in the first place to her husband." (Colebrooke, Mit., p. 368; Stokes's H. L. B. 460.)

REMARK.—According to Manu, whose view is adopted in the Vyav. May., the property of a woman married according to the Gandharva form of marriage goes likewise to the husband. The reason is that Manu and others consider the Gandharva rite as lawful for the Kshatriya (*y*). As to the Bengal law of inheritance to Stridhana, see *Judoonath Sircar* v. *Bussunt Coomar Roy* (*z*).

Q. 2.—A woman received certain property from her father at or after the time of her marriage. She is now dead. Who is entitled to this property, her husband or her relations on the side of her father?

A.—The property which may have been granted to the woman by her father on the occasion of her marriage or afterwards must be considered her Stridhana. After her death her children are

(*y*) See May., Borr., p. 178; Stokes's H. L. B. 106.

(*z*) 11 B. L. R. 286, 295; S. C. 19 C. W. R. 264, which overrules the decision at 16 C. W. R. 105.

entitled to inherit it. If she has no children her husband will be her heir. Her father has no right whatever to such property.

Broach, February 12th, 1852.

AUTHORITY.—Mit. Vyav., f. 61, p. 1, l. 12 (see Chap. IV. B., sec. 5, Q. 1).

REMARK.—Similarly ruled in *Judoonath Sircar* v. *Bussunt Coomar Roy* (*a*), and *Bistoo Pershad* v. *Radha Soondernath* (*b*).

Q. 3.—A woman received some property, consisting of a house and other things, from her father. She has neither a son nor a daughter. In case of her death can her Pat-husband inherit her property?

A.—By the custom of the caste, the Pat-husband is the heir.

Sadr Adalat, April 2nd, 1852.

AUTHORITIES.—(1) Mit. Vyav., f. 61, p. 1, l. 12 (see Chap. IV. B., sec. 5, Q. 1); (2) f. 61, p. 1, l. 10; (3) Mit. Achara, f. 8, p. 1, l. 8; (4) Vyav. May., p. 160, l. 2; (5) Nirnayasindhu, p. 203, l. 26.

REMARK.—As re-marriages of widows have been legalised by Act XV. 1856, the decision seems in accordance with the present law.

Q. 4.—A woman, leaving her husband, lived with a man, from whom she received some ornaments. On her death the authorities seized her property and treated it as heirless. A creditor, who holds a decree against her husband, attached the ornaments. The question has therefore arisen whether the ornaments should be held liable for her husband's debts, restored to the man who originally presented them to her, or considered as heirless property?

A.—As the ornaments are not the property of the woman's husband his creditor cannot attach them. If the woman lived and died as a faithful concubine of the man who presented her with the ornaments he will inherit her property. If the woman died as a public prostitute the Sirkar may spend a suitable sum for her funeral rites, and take the rest as heirless property.

Ahmednuggur, November 1st, 1848.

(*a*) *Supra* (2).
(*b*) 16 C. W. R. 115.

AUTHORITIES.—(1) Vyav. May., p. 236, l. 4; (2) p. 199, l. 4; (3) p. 200, l. 3 and 7; (4) p. 202, l. 17; (5) p. 24, l. 1; (6) Mit. Achara, f. 16, p. 1, l. 13; (7) Mit. Vyav., f. 68, p. 2, l. 16; (8) f. 60, p. 2, l. 12; (9) f. 57, p.1, l. 5; (10) f. 61, p. 1, l. 12 (see Chap. IV. B., sec. 5, Q. 1).

REMARK.—If the ornaments were the property of the deceased, and her husband had not been divorced from her, he will be her heir, and consequently his creditors may attach them.

Q. 5.—A Kunabi kept a woman in his house. Her husband was then alive. The Kunabi gave her some ornaments, a nose-ring, &c. She died, and the question is: Who is the heir to her ornaments?

A.—The Kunabi is the heir to the woman's ornaments, even though they may have been given to her as a present or as a token of his affection, for the heir of a slave is her master. If they were granted merely for her use, his right to them cannot be considered to have ceased.

Ahmednuggur, February 17*th*, 1847.

AUTHORITIES.—(1) Vyav. May, p. 152, l. 8; (2) p. 153, l. 8; (3) p. 202, l. 7.

REMARKS.—1. According to the Hindu Law, the woman who commits herself into the keeping of a man becomes his slave (see Vyav. May., p. 171, Borradaile; Stokes's H. L. B. 137, and above, Chap. II., sec. 3, Q. 12), and gifts made to her revert at her death to her master. But as any title to property based on slavery is abolished by Act V. of 1843, the property of the woman will, if she was not divorced from her husband, fall to the latter.

2. The acceptance of property earned by a wife by prostitution would be sinful on the part of the husband. But the sin may be expiated by penance, and cases where this actually has been done are said to have occurred only recently.

Q. 6.—A woman of the Simpi (tailor) caste, having lived the life of a prostitute, died during the absence of her husband. Her husband's brother has applied for the property of the deceased. Can he get it?

A.—If the deceased woman had acquired her property by prostitution, and if she was out of the caste, her husband's brother can have no right to it. If the property in her possession belongs to her absent husband his brother cannot claim it while he is alive. After his death his brother can inherit it.

Poona, December 17*th*, 1859.

AUTHORITY.—Mit. Vyav., f. 61, p. 1, l. 12 (see Chap. IV. B., sec. 5, Q. 1).

REMARK.—The property acquired by the woman belongs to her husband. See preceding cases.

B.—SECTION 6.—THE HUSBAND'S SAPINDAS.

INTRODUCTORY REMARKS.

1. The same discrepancy which prevails between the Mitakshara and the Mayukha in regard to the definition of Stridhana, or "woman's property," shows itself again in the rules on the succession to this kind of property, and the difficulties arising therefrom are considerably increased by the circumstance that the Viramitrodaya also departs from the line laid down by the Mitakshara.

2. Vijnanesvara, who declares every kind of property acquired by a woman by any of the recognised modes of acquisition to be Stridhana (*c*), gives the simple rule (*d*) that the property of a childless wife goes, if she was married according to the Brahma, Daiva, Arsha, or Prajapatya rites, to her husband, and on failure of him "to his nearest Sapindas." If she was married according to the Asura, Gandharva, Rakshasa, or Paisacha rites, it goes to her mother, her father, and their nearest Sapindas successively. The latter part of this rule has no immediate interest, as no case in which the inheritance to a woman married according to the last four rites was disputed occurs amongst the questions which follow (*e*).

It will therefore only be necessary to consider the first part of the rule. According to the passage from Acharakanda of the Mitakshara, quoted (*supra*, pp. 112, 113,) it appears that the term "Sapinda" includes, on the father's side, all blood relations within six degrees, together with the wives of the males, and on the mother's side those within four degrees. As regards the expression *tat prtysannanam*, "to his nearest," Mitramisra in the Viramitrodaya (*f*) and Kamalakara in the Vivadatandava both

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(*c*) Colebrooke, Mit., Chap. II., sec. 11, cl. 2 ff. (See above, sec. XI., p. 257 ss.)

(*d*) *Ibid.*, cl. 11 and 25.

(*e*) See the case of *Vijiarangam* v. *Lakshman*, 8 Bom. H. C. R. 244 O. C. J. :—"The husband's nearest kinsman is heir to a woman's separate property." (Col., in 2 Str. H. L. 412.)

(*f*) Viramitrodaya, f. 219, p. 1, l. 3 :—"On failure of him (the husband) the succession goes to the husband's nearest (Sapindas). For, as it is by the husband that the nearness to the possessor is barred, the nearness to the husband must be made the principal consideration." See Transl., p. 240.

explain it to mean "the Sapindas of the husband succeed according to the degree of their nearness to him."

Moreover, Kamalakara is of the opinion that the "nearness" is to be determined by the rule given in the Mitakshara (*g*) in regard to the succession to the property of a male who died without male descendants, and that consequently first the wife —that is, the rival wife of the deceased—succeeds; next, the daughter, that is the deceased's stepdaughter; thirdly, the deceased's stepdaughter's son; fourthly, the husband's mother, and so on.

This opinion seems to be based on the consideration that, as the Sapindas inherit only through the husband, they virtually succeed to property coming from him, and that consequently they must inherit in the order prescribed for the succession to a male's estate. Against this it may indeed be urged that the word "pratyasanna," "nearest," if employed in regard to persons generally, has the sense of "nearest by relationship," and that the list of heirs to a man without male descendants is not made solely with regard to nearness by relationship, since, for instance, it places the daughter's son before the parents and brothers, though he is further removed than the former, and not nearer related than the latter. If the objection be admitted we should take the word "pratyasanna" in its first sense, and assume that Vijnanesvara really intends "nearness by relationship" to be the principle regulating the succession of the Sapindas.

On this interpretation the heirs of childless widows in the first instance would be those kinsmen related to the husband in the first degree—that is, rival wives of deceased, their offspring, and the husband's parents, all inheriting together; next the kinsmen related to the husband in the second degree, as the husband's brothers, deceased's stepchildren's children, &c., and so on to the sixth degree inclusive. (See Dig. Vyav., Chap. IV. B., sec. 6, II. *c.*, Q. 2.) But, the identity of the wife with her husband being accepted as a leading principle of the Mitakshara, the rule seems on the whole most consonant to it, whereby precedence in heritable relation to him gives a like precedence and order of succession in relation to his widow. Such appears to be the rule, too, which custom has preferred in this part of India.

3. In opposition to these doctrines Nilakantha in the Mayukha

(*g*) Colebrooke, Mit., Chap. II., sec. 1, cl. 2; Stokes's H. L. B. 427.

makes a twofold division of the Stridhana of a childless woman (*h*)—I., into *paribhashika*, " Stridhana proper," as defined by the texts of Manu, Katyayana, and others—that is, property presented at the time of marriage (*yautaka*), and subsequent presents of the relations (*anvadheya*), and of the husband (*pritidatta*); and II., into *paribhashikatiriktavibhagakartanadilabdha*, Stridhana other than Stridhana proper, acquired by division and the like—that is, property acquired by division, inheritance, or any of the other recognised modes of acquisition. For each kind he gives a different order of heirs: I. " Stridhana proper " goes (a) if the woman was married according to the Brahma, Arsha, Prajapatya, Daiva, or Gandharva rites, to the husband, and (*b*) if she was married according to the Asura, Rakshasa, or Paisacha rites, to her parents (*i*). The next heirs after the husband and the parents are in either case (*k*) 1, the widow's sister's son; 2, the husband's sister's son; 3, the husband's brother's son; 4, the widow's brother's son; 5, the son-in-law; 6, and the husband's younger brother. After these " the woman's Sapindas in the husband's family according to the degree of their nearness to her through him " (*l*) inherit if she was married according to one of the five first-mentioned rites. If she was married according to one of the last-mentioned three rites her father's Sapindas succeed (*m*). II. " Property other than Stridhana proper " devolves, according to the rules which are given for the descent of a separated male's property, on the sons, son's sons, &c. (*n*). See Stokes's H. L. B. 105.

(*h*) See Borradaile, May., Chap. IV., sec. 10, cl. 26 and 27; Stokes's H. L. B. 105.

(*i*) See Borradaile, May., Chap. IV., sec. 10, cl. 28, 29; Stokes's H. L. B. 105-6.

(*k*) Borradaile, *ibid.*, cl. 30; Stokes's H. L. B. 106. See also Stokes's H. L. B. 499. The Smriti Chandrika, distinguishing between the constituents of Class I. and those of Class II., assigns the *yautaka* to the unmarried daughters alone in equal shares. The *anvadheya* and the *pritidatta* it assigns in equal shares to sons and daughters. The second class it assigns in equal shares to the unmarried daughters and the married ones who are indigent. (See Smriti Chandrika, Chap. IX., sec. 3.)

(*l*) Borradaile, *ibid*, cl. 28; Stokes's H. L. B. 105.

(*m*) The Smriti Chandrika, *loc. cit.*, para. 30, quotes Katyayana to the effect that gifts from kinsmen go only on failure of kinsmen to the husband. In case of an *Asura* marriage the kinsmen who actually gave, Devanda Bhatta says, take back their property. The Sulka goes in every case to the uterine brothers, Mit., Chap. II., sec. 11, p. 14; Stokes's H. L. B. 461.

(*n*) Borradaile, May., *ibid.*, cl. 26; Stokes's H. L. B. 105. See above, p. 138.

4. As the Mitakshara is the highest authority in the Bombay Presidency, the subjoined questions have been mainly arranged according to the principle laid down in that work. There occurs, however, one deviation from it. The Sapindas have been divided into Sagotra or Gotrajas—that is, those belonging to the same family as the husband, bearing the same name—and Bhinnagotras—that is, those belonging to a different family; and the former, as a body, have been placed before the latter. The opinion that the Sagotras inherit before the Bhinnagotras seems to have been held by most of the Sastris also, who wrote the following Vyavasthas, and was shared by the Law Officer who assisted in the compilation of the Digest. It is based on the principle which prevails in the case of a male's property—namely, that no property should be allowed to pass out of the family through inheritance as long as a single member of the family survives. Though the Mitakshara does not expressly state that this principle holds good in the case of Stridhana also, this may be inferred not only from the general consideration that Hindu lawyers regard the family connected by name as a closely united whole, but especially also from the circumstance that, according to the Mitakshara, the sonless husband's property merges on his death in the Stridhana. In accordance with these principles the questions referring to the rights of Sapindas in general have been placed first (sec. 6., I.); next come those referring to the rights of the Gotraja-Sapindas (sec. 6, II.); and lastly those referring to the Bhinnagotra-Sapindas (sec. 6, III.). Both the Gotrajas and Bhinnagotras have been arranged according to the degree of the nearness of their relationships.

B.—SECTION 6.—THE HUSBAND'S SAPINDAS.

I.—Sapindas in General.

Q. 1.—A widow died. A relation claims to be her heir. He is the sixth descendant, while the widow's husband was the fifth descendant, from one and the same ancestor. Should he be declared her heir?

A.—Yes.

Tanna, February 16th, 1847.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 58, p. 2, l. 16; (3) f. 61, p. 1, l. 14:

"On failure of him (the husband) it (the woman's property) goes to his nearest kinsmen (Sapindas) allied by funeral oblations." (Colebrook, Mit., p. 368; Stokes's H. L. B. 461.)

Q. 2.—A man claims to be the heir of a deceased woman. He appears to be her husband's relation by consanguinity. Can he be her heir?

A.—As the man belongs to the same family he will be the heir of the deceased.

Ahmednuggur, November 27th, 1848.

Authorities.—(1) Vyav. May., p. 159, l. 3 (see Auth. 5); (2) p. 151, l. 7; (3) p. 142, l. 8; (4) p. 181, l. 5; (5*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6, I., Q. 1).

Remark.—Provided that the claimant, if a Gotraja, is related to the deceased's husband within the sixth degree; or if a Bhinnagotra-Sapinda, within the fourth degree.

Q. 3.—A widow of the Prabhu caste lived with her brother, who not only afforded her maintenance but defrayed the expenses of her pilgrimages. She inherited no property from her husband. So situated the woman died, and the question is whether her brother or the relatives of her husband are entitled to her property?

A.—As the woman did not inherit any property from her husband, and as she lived under the protection of her brother, the latter is the heir.

Ahmednuggur, February 14th, 1850.

Authority.—Vyav. May., p. 159, l. 2.

Remarks.—1. According to the Mitakshara Vyav., f. 61, p. 1, l. 14, the husband's Sapinda relations are the heirs. (See Chap. IV. B., sec. 6 I., Q. 1.)

2. According to the Mayukha the property would fall to her brother only if she was married by one of the three blameable rites. (See Introductory Remarks, cl. 3.) (*o*).

(*o*) This would not generally occur or be presumed except in a caste in which the purchase of wives is recognised. See *Vijiarangam* v. *Lakshman*, 8 Bom. H. C. R. 244 O. C. J.

II. Husband's Sagotra Sapindas.

a.—STEPSON.

Q. 1.—Will a man inherit the property of his stepmother?

A.—If the stepmother has neither a daughter nor a son her stepson will be her heir.

Ahmednuggur, July 30th, 1846.

Authority.—*Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

Remark.—The stepson cannot take before the husband. "He takes the property on failure of offspring, husband, and the like." (Smriti Chandrika, Chap. IX., sec. 3, p. 38.)

Q. 2.—A wife, having been abandoned by her husband, became a Murali (*p*) and adopted a son. Will this adopted son or the son of the second wife of her husband be her heir?

A.—The son of her husband's second wife is her heir.

Poona, June 23rd, 1846.

Authority not quoted.

Remarks.—1. The answer is correct. For though abandoned by her husband the Murali remains his wife. The second wife's son is therefore entitled to receive her property as Sapinda relation of her husband. The adoption made by her was null.

2. When a person has more than one wife, and when one of them has a son, the other cannot adopt. The object of the Sastra is to create, by adoption, an heir to the husband, and not to the wife, except incidentally.

3. See the authorities of the preceding Question.

II. *b*.—THE HUSBAND'S MOTHER.

Q. 1.—Can a mother-in-law inherit her daughter-in-law's property?

A.—Yes.

Poona, October 26th, 1858.

Authorities.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (2) p. 160, l. 4; (3*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

(*p*) A Murali is a woman nominally devoted to the worship of Khandoba, but really a beggar, singer, and prostitute.

Q. 2.—A man had two wives. Each of them had a son and a daughter-in-law. The elder wife and her son died first. The man also died afterwards. His death was followed by the death of his son born by the younger wife. His widow, under a decree of the Civil Court, obtained possession of the property of the family. When the daughter-in-law died the property passed into the hands of the mother-in-law. The daughter-in-law of the elder wife has sued the stepmother-in-law for possession of the property. The question is: Who is the nearer heir of the daughter-in-law of the man's younger wife?

A.—The nearer heir is the younger wife of the man. The elder wife's daughter-in-law must be considered as a somewhat distant relation.

Rutnagherry, June 25th, 1852.

Authorities.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (2) p. 83, l. 3; (3) p. 134, l. 4; (4) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

Remarks.—1. The authorities quoted by the Sastri refer to the succession to the estate of a male.

2. The mother-in-law is related to the deceased daughter-in-law's husband in the first degree, the elder wife's daughter-in-law in the third.

Q. 3.—A woman of the Vani caste died. She has two mothers-in-law, one direct, and the other a stepmother-in-law. Which of these is the heir of the deceased?

A.—As the direct mother-in-law of the deceased had brought up and protected her husband, she will be her heir. In the absence of the mother of the husband the stepmother will have the right to inherit the property of the deceased.

Ahmedabad, October 22nd, 1859.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2*) f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1); (3*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1).

Remarks.—1. The authorities quoted by the Sastri refer to the succession to a male's estate.

2. The answer nevertheless seems correct, as the mother is more nearly related to her son than the stepmother.

II. *c.*—FELLOW-WIDOW.

Q. 1.—A property was equally divided between an aunt and her nephew. When the latter died his two widows divided his share between them. One of these widows is dead, and the question is: Who should take her share as heir, the other widow or the aunt?

A.—The other widow, and not the aunt.

Ahmednuggur, July 17th, 1846.

AUTHORITIES.—(1*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (2*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

Q. 2.—Government settled upon a widow an annual allowance of Rs.300. At her death certain arrears were due to her by Government. The surviving members of the family are a fellow-widow and some others. The deceased widow, when she was alive, had authorised her brother to draw the arrears and to spend the money in the performance of her funeral rites. The question is whether the right of receiving the arrears should belong to her brother or her fellow-widow?

A.—The arrears are on account of an allowance for the maintenance of the widow; they must therefore be considered Stridhana. The fellow-widow is entitled to them as her heir.

Surat, August 29th, 1846.

AUTHORITIES.—(1*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (2*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

REMARKS.—The assignment by the deceased to her brother is inoperative according to Hindu law, as the contemplated duty cannot be performed by him, but only by her husband's family, so long as any of the latter survive.

2. The son of a stepdaughter of a widow deceased, by her co-wife who died before the husband, is heir to such widow (*q*). As the widow inherited from her husband, the succession would, according to the Bengal theory, be to the same person as heir to the deceased widow's husband, his own maternal grandfather. See above, pp. 128, 316, 318.

(*q*) *Motiram Sukram* v. *Mayaram Barkatram*, Bom. H. C. P. J. for 1880, p. 119.

II. *d*.—THE HUSBAND'S BROTHER.

Q. 1.—A number of uterine and half-brothers divided their property and entered into a mutual stipulation that when any one of them died his property should be divided among the survivors, who should support the deceased's widow. Subsequently one of them died. His widow lived separately from her brothers-in-law, but was supported by them. When she died the question arose whether her husband's uterine brothers, or his half-brothers, or both, should be considered her heirs?

A.—When a separated brother dies his widow is his heir. When she dies her heir is her husband's uterine brother. If her husband had not separated from his brothers, and if she was supported by the uterine brothers as well as the stepbrothers, they are all her heirs.

Ahmednuggur, October 21st, 1848.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4 (see Auth. 9); (2) p. 135, l. 5; (3) p. 140, l. 1; (4) p. 133, l. 2; (5) p. 159, l. 3 (see Auth. 10); (6) p. 136, l. 2 (see Chap. I., sec. 2, Q. 3); (7) p. 152, l. 4 and 5; (8) p. 108, l. 3; (9*) Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4); (10*) f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I, Q. 1).

Q. 2.—A deceased woman has no sons or other near relations, but there are one brother-in-law and four sons of another brother-in-law, who are all united in interests. The question is: Which of these will be her heir?

A.—The brother-in-law and the sons of brother-in-law will all be her heirs (*r*).

Ahmednuggur, November 24th, 1859.

AUTHORITIES.—(1) Vyav. May., p. 159, l. 2 and 5 (see Auth. 3); (2*) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (3*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

Q. 3.—Of four brothers three died. Their widows, having received the shares due to their respective husbands, lived together. They did not divide their property. One of them after-

(*r*) The brother-in-law must have the preference as nearer by one degree.

wards died, and the question is: Who is her heir, the surviving brother or the other two widows?

A.—The surviving brother is the heir.

Ahmednuggur, May 26th, 1859.

Authorities.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (2*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q.1).

Q. 4.—A woman of the Maratha caste died. She had neither a son nor any other near relation. There are, however, two brothers-in-law and a separated second cousin's son. Which of these should be considered the heir of the deceased?

A.—The brothers-in-law must be considered nearer than the nephew (*s*), and they should therefore take each a half of the deceased's property.

Tanna, January 19*th*, 1853.

Authorities.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (2) p. 159, l. 2; (3*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6, I., Q. 1.)

Q. 5.—A man of the Mali caste died. He left a widow and some property. The widow subsequently died. There are now two heirs, the widow's sister and a brother of her husband. The question is: Which of these is the heir?

Suppose a woman of the Mali caste had certain property, and that she died during the lifetime of her husband; if the husband die afterwards, and there be a sister of the woman and son of a brother of her husband, which of them will be the heir?

A.—If a man and a woman of the Mali caste should die without issue the property of the husband goes to his brother, and not to his wife's sister.

If a woman of the Mali caste has some property given to her by her father, and if her husband dies before her, her father—and, among his near relations, her sister—will have the right to take her property.

Broach, June 29th, 1852.

(*s*) That is, *Even* than the nephew—much more than their competitor here.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

REMARK.—The second part of the answer would only be right in the case of an Asura or other disapproved marriage. In the case of the Brahma, &c., approved rites, the husband inherits from his wife. See the following Question.

Q. 6.—Who will inherit a woman's property, her own brother or her husband's brother?

A.—The brother-in-law may inherit so much of the woman's property as belonged to her husband, and that which she may have acquired from her parents and others will pass to her brother.

Dharwar, 1845.

AUTHORITIES.—(1*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1); (2) Viram., f. 219, p. 2, l. 6:

"The property of a childless woman, which she received from her relations, goes on her death to them, and on failure of them to her husband. For Katyayana says: '(Stridhana) which has been given by the (wife's) relations goes to them; on failure of them to the husband.'"

REMARK.—The Sastri's answer agrees with the doctrine laid down in the passage quoted above. But the decision can hardly stand, for—

(1) The Mayukha, p. 160, l. 7 (Borradaile, p. 129; Stokes's H. L. B. 106) refers the passage of Katyayana to women only who were married according to one of the blamed rites (Asura). Moreover, instead of "goes to her husband," the reading is there "goes to her son."

(2) According to the Mitakshara the whole property of the deceased goes to the husband's brother (*t*).

Q. 7.—A widow of a "Sudra" became a "Jogtin" (*v*), and remained in that order for about twelve years. About a fortnight before her death she came to the house of her brother, and there died. The question is whether her brother or her husband's brother should inherit her property?

A.—If any money was received by the woman's father from her husband at the time of her marriage her brother will be her heir. If her father received no money, or if it cannot be ascer-

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(*t*) Col. Mit. 368; Stokes's H. L. B. 461. See *Musst. Thakoor Deyhee* v. *Rai Baluk Ram;* 11 M. I. A. 169.

(*v*) A woman devoted to the worship of the goddess called Yellumma, near Dharwar. She is to Yellumma what a Murali is to Khandoba in the Dekhan, what a Bhavin is to Rawalnatha in the Konkan.

tained whether any money was received or not, her husband's brother will be her heir.

Dharwar, June 3rd, 1850.

AUTHORITIES.—(1) Vyav. May., p. 159, l. 3; (2*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I, Q. 1).

REMARK.—See the case of *Vijiarangam* v. *Lakshman* (*w*).

II. *e.*—THE HUSBAND'S HALF-BROTHER.

Q. 1.—When there are two relatives of a deceased woman—namely, her husband's half-brother and her husband's half-brother's son—which of these will be her heir?

A.—The husband's half-brother, being the nearest, will have the precedence.

Dharwar, 1845.

AUTHORITIES.—(1*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1); (2*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1).

II. *f.*—THE DAUGHTER-IN-LAW.

Q. 1.—A widow died, leaving a widowed daughter-in-law and also a widowed daughter-in-law's daughter, who has a son. Who succeeds to the inheritance?

A.—The daughter-in-law, being the nearest, and "Sapinda" relation of the deceased widow, will inherit the property.

Surat, July 25th, 1859.

AUTHORITIES.—(1) Manu IX. 187 (see Dig. Vyav., Chap. II., sec. 14 I. B. *b*. 1, Q. 1); (2) Nirnayasindhu, Chapter on Stridhana (*ibid.*); (3) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1).

REMARKS.—1. The contrary case, *Bandam Settah et al.* v. *Bandam Mahalakshimi* (*x*) is not supported by any reasons. In *Baee Jetta* v. *Huribhai* (*y*) the daughter-in-law was preferred to a distant cousin of the husband as the person who would be his nearest heir. Reference is made to *Bhugwandeen Doobey* v. *Myna Baee* (*z*), *Musst. Thakoor Daybee* v. *Rai Balack Ram et al.* (*a*), and *Lakshmibai* v. *Jayram et al.* (*b*). In the Viramitrodaya, Transl., p. 244, the

(*w*) 8 Bom. H. C. R. 244 O. C. J.
(*x*) 4 M. H. C. R. 180.
(*y*) S. A. No. 304 of 1871, Bom. H. C. P. J. F. for 1872, No. 38.
(*z*) 9 Cal. W. R. 23 P. C.; S. C. 11 M. I. A. 487.
(*a*) 10 Cal. W. R. 3 P. C.
(*b*) 6 Bom. H. C. R. 152.

daughter-in-law's right is denied. Balambhatta, on the other hand, as we have seen (*c*) places the daughter-in-law next to the paternal grandmother.

2. See Dig. Vyav., Chap. II., sec. 14, I. A. 2, Q. 1, Remarks, p. 469 *et seq* ; and *Lulloobhoy* v. *Cassibai*, L. R. 7 I. A. 212.

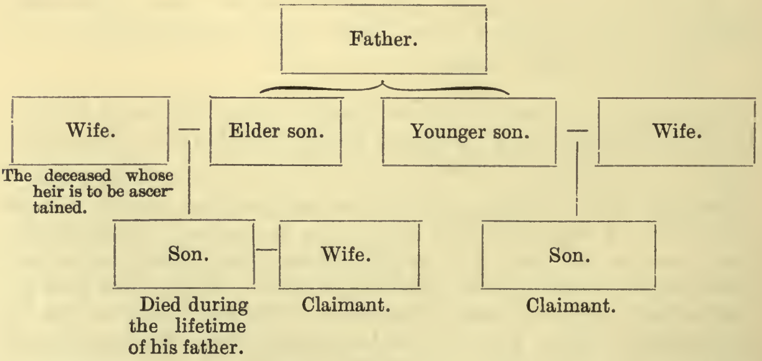
II. *g*.—THE HUSBAND'S BROTHER'S SON.

Q. 1.—There were two uterine brothers. The elder brother had a son, but he died while his father was alive. The younger brother had a son. The brothers died. The elder brother's widow also died. The widow of the elder brother's son, who died during the lifetime of his father, and the son of the younger brother, have applied to be recognised as heirs. The question is: Which of them is the heir of the widow of the elder brother?

A.—The widow of the elder brother became heir of her husband on his death. From this the brothers seem to have been separated. The right of inheritance would therefore devolve upon her daughter or other relation. She has, however, no daughter or other near relation, and as the son died during the lifetime of the father, the right of inheritance has not been through him transmitted to the daughter-in-law. It will therefore belong to the nephew.

Surat, *October* 27*th*, 1857.

The following is a genealogical table illustrative of the question:



AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2*) f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1.)

REMARK.—This is *aparibhashika* inherited from the husband. The answer would be correct according to the Mayukha, according to which the property in

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(*c*) See above, p. 119.

question, having been acquired by inheritance from the husband, would descend in the first place to the widow's husband's heirs, as being for this purpose her own heirs. See above, pp. 135, 138, 262, 316; and the Introductory Remarks to this section; Borr. 127; Stokes's H. L. B. 105.

Q. 2.—A man named Bhukhan had two sons named Manikchand and Mayarama. They effected a partition of their father's property, and wrote a deed of separation. When Mayarama died, his son Dadabhai inherited his father's property. Afterwards Dadabhai died, and was succeeded by his widow Jamna. She died without male issue. Dadabhai's sister Ganga and her two sons, named Premananda and Kalidasa, have applied for a certificate declaring them to be the heirs of Jamna. Jetta, son of Manik and cousin of Dadabhai, has also applied for a similar certificate. The question therefore is whether the former or the latter are the heirs?

A.—The two brothers mentioned in the question were separate. The Sastra declares the following rule of succession in case of the death of a separated brother. Each of the undermentioned relations succeeds in the absence of the next previously mentioned: Widow, daughter, son of a daughter, parents, the uterine brothers, nephew, stepbrother, son of a stepbrother, and members of the same kin or Gotra, and among them the first is sister. Applying this rule to the case, it appears that Ganga and her two sons are the heirs.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2) p. 140, l. 6; (3) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435); (4*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

REMARK.—The kind of property in dispute not being stated, the Sastri has treated the case as one of a succession to a male's property, and followed the Mayukha. Her heir is, according to the Mitakshara, Jetta, the son of Manik, since he is the deceased's husband's uncle's child—that is, a Gotraja-Sapinda. (See Introductory Remarks to this section, para. 4.)

II. *h.*—HUSBAND'S BROTHER'S WIDOW.

Q. 1.—A widow died. The surviving relations are a widow of her brother-in-law and a son of a sister of her husband. Which of these is the heir of the widow?

A.—The husband's sister's son is a "Sapinda," but not a "Gotraja" relation, and he is not, consequently, an heir. The

widow of the brother-in-law is both the "Sapinda" and "Gotraja" relation, and she is therefore the heir.

Ahmedabad, December 30*th*, 1853.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 58, p. 2, l. 16; (3*) f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

II. *i.*—HUSBAND'S PATERNAL UNCLE'S SON.

Q. 1.—Can a cousin of a woman's husband be her heir?

A.—Yes.

Poona, September 10*th*, 1852.

AUTHORITIES.—(1) Vyav. May., p. 159, l. 2 (Stokes's H. L. B. 105); (2*) Mit. Vyav., f. 61, p. 1, l. 14 (Col. Mit. 368; Stokes's H. L. B. 461 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

Q. 2.—A man received his share of the ancestral property and separated; afterwards he died. His widow inherited his property. She also subsequently died. There is a son of her husband's sister and a cousin of her husband. Which of these is the heir?

A.—The son of the sister of the woman's husband is the nearer relation of the two mentioned in the question, and in the order of heirs which is laid down in the Sastra a sister's son becomes heir in the absence of a sister. He should therefore be considered the heir entitled to all the movable and immovable property of the deceased, except the Vatan.

Surat, September 15*th*, 1849.

AUTHORITIES.—(1) Vyav. May., p. 138, l. 8; (2) Manu IX. 187 (see Auth. 5); (3) Daya Krama Sangraha; (4) Nirnayadipika; (5*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (6*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

REMARKS.—1. See Dig. Vyav., Chap. II., sec. 14, I. B. *b*. 2, Q. 1, p. 451; sec. 15, B. I. (1), Q. 1, p. 463.

2. The Sastri has taken this case for a question regarding the succession to a childless man's property, and decided it according to the Bengal law. See Col., Daya Bhaga, 225, note. (Stokes's H. L. B. 353.) According to the Mitakshara and the Mayukha, the husband's cousin is the heir (see Introductory Remarks to this section, and Chap. II., sec. 15 B. I. (1), p. 462.

Q. 3.—Who is entitled to inherit from a deceased woman of Kunabi caste, her husband's sister, or a cousin who was separate from her husband, or the husband of her deceased daughter?

A.—The sister and the cousin of her husband are near relations of the deceased woman, and they both appear to have equal claims to the property of the deceased. The sister, though very near to the deceased, has gone into another family by her marriage. The cousin is a "Sapinda" relation of the deceased's family. The property should therefore be equally divided between the two. There is nothing in the Sastras which is favourable to the claim of the son-in-law.

Ahmednuggur, July 27th, 1847.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2) p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (3*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

Remark.—The husband's cousin alone inherits according to the Mitakshara, as he is a Sagotra Sapinda. The Sastri regards the devolution of the property as governed by the rules applicable to the deceased husband's estate; but, admitting the sister as a gotraja, he should have preferred her to the cousin. (Vyav. May., Chap. IV., sec. 8, p. 19, Borr. 106; Stokes's H. L. B. 89.)

Q. 4.—A woman died. Her relations are her husband's cousin, another cousin's five sons, and her husband's brother's widow. The last-mentioned died. One of the five sons died, leaving a son. How will the several heirs divide the property?

A.—The property should be divided into seven equal shares, of which each of the heirs should take one, and the seventh share of the woman's husband's sister-in-law should be again equally divided among the six heirs.

Khandesh, March 22nd, 1848.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2*) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 463; (3*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

Remark.—The husband's paternal uncle's son alone inherits as the nearest Sagotra Sapinda relation of the deceased's husband. He is related to him in the fifth and the paternal uncle's grandson in the sixth degree, according to the inclusive mode of reckoning followed by the Hindus. The succession to the second brother's widow, she having survived to inherit, would be the same.

widow of the brother-in-law is both the "Sapinda" and "Gotraja" relation, and she is therefore the heir.

Ahmedabad, December 30th, 1853.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 58, p. 2, l. 16; (3*) f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

II. *i.*—HUSBAND'S PATERNAL UNCLE'S SON.

Q. 1.—Can a cousin of a woman's husband be her heir?

A.—Yes.

Poona, September 10th, 1852.

Authorities.—(1) Vyav. May., p. 159, l. 2 (Stokes's H. L. B. 105); (2*) Mit. Vyav., f. 61, p. 1, l. 14 (Col. Mit. 368; Stokes's H. L. B. 461 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

Q. 2.—A man received his share of the ancestral property and separated; afterwards he died. His widow inherited his property. She also subsequently died. There is a son of her husband's sister and a cousin of her husband. Which of these is the heir?

A.—The son of the sister of the woman's husband is the nearer relation of the two mentioned in the question, and in the order of heirs which is laid down in the Sastra a sister's son becomes heir in the absence of a sister. He should therefore be considered the heir entitled to all the movable and immovable property of the deceased, except the Vatan.

Surat, September 15th, 1849.

Authorities.—(1) Vyav. May., p. 138, l. 8; (2) Manu IX. 187 (see Auth. 5); (3) Daya Krama Sangraha; (4) Nirnayadipika; (5*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (6*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

Remarks.—1. See Dig. Vyav., Chap. II., sec. 14, I. B. *b.* 2, Q. 1, p. 451; sec. 15, B. I. (1), Q. 1, p. 463.

2. The Sastri has taken this case for a question regarding the succession to a childless man's property, and decided it according to the Bengal law. See Col., Daya Bhaga, 225, note. (Stokes's H. L. B. 353.) According to the Mitakshara and the Mayukha, the husband's cousin is the heir (see Introductory Remarks to this section, and Chap. II., sec. 15 B. I. (1), p. 462.

Q. 3.—Who is entitled to inherit from a deceased woman of Kunabi caste, her husband's sister, or a cousin who was separate from her husband, or the husband of her deceased daughter?

A.—The sister and the cousin of her husband are near relations of the deceased woman, and they both appear to have equal claims to the property of the deceased. The sister, though very near to the deceased, has gone into another family by her marriage. The cousin is a " Sapinda " relation of the deceased's family. The property should therefore be equally divided between the two. There is nothing in the Sastras which is favourable to the claim of the son-in-law.

Ahmednuggur, July 27th, 1847.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2) p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1); (3*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

REMARK.—The husband's cousin alone inherits according to the Mitakshara, as he is a Sagotra Sapinda. The Sastri regards the devolution of the property as governed by the rules applicable to the deceased husband's estate; but, admitting the sister as a gotraja, he should have preferred her to the cousin. (Vyav. May., Chap. IV., sec. 8, p. 19, Borr. 106; Stokes's H. L. B. 89.)

Q. 4.—A woman died. Her relations are her husband's cousin, another cousin's five sons, and her husband's brother's widow. The last-mentioned died. One of the five sons died, leaving a son. How will the several heirs divide the property?

A.—The property should be divided into seven equal shares, of which each of the heirs should take one, and the seventh share of the woman's husband's sister-in-law should be again equally divided among the six heirs.

Khandesh, March 22nd, 1848.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2*) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 463; (3*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

REMARK.—The husband's paternal uncle's son alone inherits as the nearest Sagotra Sapinda relation of the deceased's husband. He is related to him in the fifth and the paternal uncle's grandson in the sixth degree, according to the inclusive mode of reckoning followed by the Hindus. The succession to the second brother's widow, she having survived to inherit, would be the same.

II. *j*.—THE HUSBAND'S PATERNAL UNCLE'S GREAT-GRANDSON.

Q. 1.—The right of heirship to a deceased woman is claimed by her son-in-law and her husband's cousin's grandson. Which of these two is the legal heir?

A.—The woman's husband's cousin's grandson.

Ahmednuggur, December 13*th*, 1847.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2) p. 151, l. 7; (3) p. 83, l. 3; (4) p. 142, l .8; (5) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435); (6*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV., B., sec. 6 I., Q. 1, p. 487).

II. *k*.—THE HUSBAND'S MORE DISTANT KINSMEN.

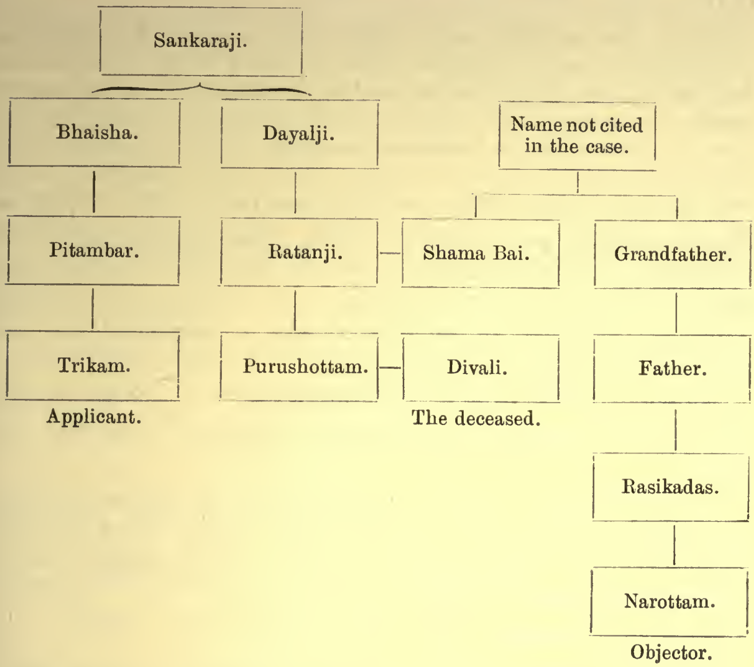
Q. 1.—A man named Sankaraji had two sons. One of them was called Bhaisha and the other Dayalji. Bhaisha's son was called Pitambar, and Dayalji's son Ratanji. Pitambar's son was called Trikam, and Ratanji's son Purushottam. The wife of Purushottam, called Divali, died without issue. Pitambar's son Trikam has applied for a certificate of heirship. One Narottam Rasikadas objects to the claim of Trikam on the ground that Shama Bai, the wife of Ratanji, was the sister of Rasikadas's grandfather, that Purushottam was her son, that Divali, the wife of Purushottam, made a will, which Rasikadas has produced, that it authorises him to take Divali's house and movable property in consideration of his having given her maintenance and promised to perform the funeral rites after her death, and that the sons of Sankaraji had separated. The questions are: Whether the said Trikam should be furnished with a certificate; and whether Divali had right to transfer her property as she had done?

A.—If there is no daughter or son of a daughter, or other near relation of Divali the applicant Trikam must be considered a relation entitled to inherit the property of the deceased. The will does not appear to have been made under the pressure of any necessity. When Divali was possessed of the whole estate of her husband she had no reason to receive maintenance from another man. The right of performing the funeral rites belongs to the

relations of her husband. A will on her part was not, therefore, necessary, and she could not have made it conformably to the law.

Surat, November 12th, 1847.

The following genealogical table will illustrate the question :



AUTHORITIES.—(1) Viram, f. 194, p. 1, l. 2; (2) Vyav. May., p. 134, l. 4; (3) Jimutavahana Dayabh. 49; (4*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

REMARK.—See above, pp. 219, 280, 284, 294; Chap. II., sec. 6 A., Q. 6, p. 374; and Book II., Chap. I., sec. 2, Q. 8, Remarks.

Q. 2.—A woman, having first inherited the property of her husband, died. The heirship to her is disputed between her husband's sister's son and some cousins three or four times removed from her husband. The question is: Which of these is the heir?

A.—As the husband of the deceased woman had separated from the other members of his family, his sister's son is the heir. The

Asura or other two forms, the heirs to the woman's property as expounded above (*e*) are thus pointed out by Brihaspati : 'The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother, are pronounced similar to mothers. If they leave no sons born in lawful wedlock, nor daughter's son, nor his son, then the sister's son and the rest shall take the property.' " (Borradaile, p. 129; Stokes's H. L. B. 106.)

Remark.—According to the Mitakshara the husband's sister inherits in every case, as his Sapinda relation.

III. *c*.—THE HUSBAND'S SISTER'S SON.

Q. 1.—A man died, and then his wife died. The man's " Bhacha," or sister's son, applied to be put in possession of his property as heir, but he subsequently died. His son has set up a claim to be his heir, and has produced a deed alleged to have been passed to his father by the first deceased, granting his land, &c., to him. There is a distant relation, seven degrees removed from the deceased. He claims to be the heir. There are also two daughters of the deceased, but they have relinquished their claim in favour of the distant relation.

A.—As it cannot be ascertained whether the distant kinsman is within seven degrees or not, he cannot be recognised as heir. The deceased sister's son applied for a certificate, but he died. His son has set up a claim, and if there is no other nearer, and Gotraja, relation, he may be considered the heir.

Ahmedabad, January 10th, 1851.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1); (3*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

Remark.—See Introductory Remarks to this section, para. 4.

Q. 2.—A deceased woman has left her brother's son and her husband's sister's son. Which of these will be the heir?

A.—Her brother's son appears to be the nearest heir. This opinion is founded upon an inference drawn from the order of relatives who are authorised to perform the funeral ceremonies

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(*e*) That is, the kindred provided for by special texts. See Vyav. May., Chap. IV., sec. 10, p. 24 (Stokes's H. L. B. 104).

of a deceased woman. This order commences with son, and continues by mentioning grandson, husband, daughter, daughter's son, husband's brother, husband's brother's son, the daughter-in-law, father, brother, and brother's son.

Dharwar, June 13th, 1853.

Authorities.—(1) Dharmasindhu III., f. 6, p. 1, l. 10 (see sec. 7, Introductory Remark, Note); (2) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1).

Remark.—According to the Mitakshara, the husband's sister's son would inherit as the deceased's husband's Sapinda (see Chap. II., sec. 15 B. I. (1), Q. 1, p. 462. According to the Vyav. May., there would be a difference according to the source of the property (see above, *b*, Q. 1).

Q. 3.—A man died, and his wife also died after him. The man's sister's son, who lived with the wife, performed the funeral rites for her. Will he or her brother be the heir?

A.—The man's sister's son will succeed to the property, provided it has been bequeathed to him. If the deceased has left no will to that effect, her brother will be her heir by law. He should take the property and perform the funeral rites. In his absence the deceased's nephew will be the heir.

Ahmednuggur, June 22nd, 1848.

Authorities.—(1) Vyav. May., p. 159, l. 3 f.; (2*) Mit. Vyav., f. 61, p. 1, l. 14 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

Remark.—See the preceding case (*f*).

B. SECTION 7.—THE WIDOW'S SAPINDAS.

Introductory Remarks.

1. The question whether, on failure of all relations on the husband's side, the widow's father's family is entitled to inherit her property if she had been married according to one of the approved rites, is still more difficult to decide than those regarding the husband's Sapindas.

The Mitakshara is silent on this point; it mentions none of the widow's Sapindas as entitled to inherit. The Mayukha names a

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(*f*) The husband's family extends to the husband's paternal aunt's son, according to *Hurreemohun Shaba* v. *Sonatum Shaba*, I. L. R. 1 Cal. 275—that is, to the furthest specified bandhu of the husband.

few (six) among the heirs who succeed to Stridhana proper on failure of the husband, *but before the husband's Sapindas* (*g*).

2. Though the leading authorities thus seem to give no encouragement to the doctrine that the widow's Sapindas inherit after those of the husband, the Sastris nevertheless declare unanimously that such is the case. They quote as authorities chiefly Mayukha, p. 140, l. 1 (a) and p. 159, l. 5 (b), where, in both passages, the verse (Manu IX. 187, quoted in full in Chap. II., sec. 14 I. B. *b*. 1, Q. 1, p. 451) " To the nearest Sapinda the inheritance next belongs," &c., is quoted (see Mit., Chap. II., sec. 3, p. 5, note.

In the Manava-dharmasastra this verse refers to the succession to a separate male's estate, and the Mayukha quotes it (p. 140, l. 1) (*h*), in this sense, in order to prove the right of the sister to inherit her brother's property. But in the Mayukha, p. 159, l. 5 (*i*), it is applied also to the succession to a woman's property, and Nilakantha uses it in order to prove that the Stridhana proper of a childless widow, who was married according to an approved rite, goes not to the husband's nearest kinsmen, as the Mitakshara states, but to *her own nearest Sapindas in the husband's family.* Hence it is evident that Nilakantha took the above-mentioned verse of Manu to be a general maxim applicable to all cases of inheritance—a proceeding perfectly in harmony with the principles of the Mimamsa, which rules the interpretation of the Smritis (*k*). The Sastris, therefore, by applying it to the case of a widow whose husband's family is extinct, have only followed the example of Nilakantha, and in no wise departed from the general rules of interpretation. The chief objection which could be raised against the correctness of their view would be that the list of heirs given in the Mit. and May. must be considered exhaustive.

3. Before touching upon this latter point it will be advisable to take into consideration some other circumstances which make it probable that the widow's own Sapindas inherit on failure of the husband's kinsmen.

(*g*) Vyav. May., Chap. IV., sec. 10, cl. 30, Borradaile; and Introductory Remarks to the preceding section, cl. 3 (see Dig. Vyav., Chap. II., sec. 15, Introductory Remarks.

(*h*) Chap. IV., sec. 8, p. 19 (Borr., p. 106; Stokes's H. L. B., p. 89).

(*i*) Chap. IV., sec. 10, p. 28 (Borr., p. 128; Stokes's H. L. B., p. 105).

(*k*) Compare the language of the Privy Council in *C. Chintamun Singh* v. *Musst. Nowlukho Konwari*, L. R. 2 I. A., at p. 272; Vyav. Mayukha, Chap. IV., sec. 8, pl. 11; and Mitakshara, Chap. I., sec. 2, pl. 4.

For though a woman by marriage loses her place in her father's family, and many of the rights and duties which her parents and her kinsmen in her father's family possess over her or have to fulfil towards her are suspended, it appears that, on extinction of the husband's family, these same rights and duties revive. Thus the right or duty of guardianship over a female is vested after marriage in the husband, his sons, and his Sapindas successively (*l*). But if the husband's family becomes extinct it reverts to her parents and their kinsmen, not to the king, who takes the place of guardian only on failure of both families (*m*).

In a similar manner the duty of performing the last rites and funeral oblations for a widow falls first on the husband's kinsmen, on failure of them on the widow's own relations, and lastly on the king (*n*). As, then, the widow's kinsmen would, but for her marriage, undoubtedly have the right to inherit her estate on account of their blood relationship, it seems not unreasonable to suppose that this right may revive on failure of the persons who barred it.

The objection which might be raised against this view, that the silence of the Mitakshara and of the Mayukha regarding the rights of the widow's blood relations is equivalent to a denial of these rights, cannot be sustained, since the lists of heirs given in the

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(*l*) See above, sec. X., On Maintenance, at pp. 225, 239 ss. Where a person claims the custody of a female minor on the ground that she is his wife, and such minor denies that she is so, Act IX. of 1861 does not apply. The plaintiff must establish his right by a suit, *Balmukund* v. *Janki*, I. L. R. 3 All. 403 (see Act XX. of 1864, sec. 31), and as to the representation of the minor in suits *Manokchand* v. *Nathu Purshotam*, Bom. H. C. P. J. for 1878, p. 204; *Jadow Mulji* v. *Chagun Raichund*, I. L. R. 5 Bom. 306.

(*m*) See Viramitrodaya, quoted in Chap. II., sec. 6A, Q. 6, and Mit. Achara, f. 12, p. 1, l. 6: For it is declared "On failure of relations on both sides (the husband's and the parents') the king becomes the supporter and master of a female." So Narada, Part II., Chap. XIII. 29.

In O. S. 894 of 1870, in the High Court, Bombay, on its original side, a widowed sister's maintenance was admitted by brothers as a charge on the ancestral estate.

(*n*) Dharmasindhu III. Uttarardha, f. 6, p. 1, l. 10:

"(The persons authorised to perform the funeral oblations) for a married female are, on failure of her son, the son of a rival wife; on failure of him, her grandsons and great-grandsons in the male line; on failure of them, the husband; on failure of him, the daughter; on failure of her, the daughter's son; on failure of him, the husband's brother; on failure of him, the husband's brother's son; on failure of him, the daughter-in-law; on failure of her, the father; on failure of the father, the brother; on failure of him, the brother's son, and the other (Sapindas) who have been mentioned before."

two law books are not exhaustive. For neither the persons connected by spiritual ties with the widow—that is, the husband's Acharya and pupil—nor the Brahmanical community in the case of a Brahman widow, nor the king in the case of other castes, are mentioned as heirs, though their eventual rights to the inheritance would not be disputed by any Hindu lawyer.

4. If, therefore, the right of the widow's own blood relations revives on failure of the husband's Sapindas, it seems natural to allow them to succeed in the same order as they would have done before her marriage, and to place the mother first, next the father, after him the brothers, and the rest of the Sapindas, according to the nearness of their relationship (*o*) (See Mitakshara, Chap. II., sec. 3, p. 5, note; Stokes's H. L. B. 443).

In conformity with this principle, and according to the maxim that Sagotras inherit before the Bhinnagotra-Sapindas (*p*), the Questions belonging to the following section have been arranged thus:

I. Sapindas in general.
II. Sagotra-Sapindas: *a*, mother; *b*, brother, &c.
III. Bhinnagotra-Sapindas.

B. SECTION 7.—I. SAPINDAS IN GENERAL.

Q. 1.—A daughter of a Paradesi Brahman and her husband lived with him. The husband subsequently ran away. The father had given some ornaments to his daughter. Afterwards both the father and his daughter died. There is neither the husband nor a son of the daughter, and the question is whether the separated relatives of her father should be considered her heirs.

A.—The husband and his relatives are the heirs to the property of a woman who has neither a son nor a daughter. In the absence of the husband and his relatives the woman's mother and father, or their relatives, are the heirs. The father's relatives mentioned in the question are therefore the heirs of the deceased woman.

Khandesh, September 9th, 1851.

AUTHORITIES.—(1) Mit. Achara, f. 12, p. 1, l. 4; (2) Mit. Vyav., f. 60, p. 2, l. 16; (3) f. 61, p. 1, l. 12; (4) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 436).

(*o*) See Chap. IV. A., pp. 469-70 ss.

(*p*) See Introductory Remarks, Chap. IV. B., sec. 6, para. 4, p. 486.

Q. 2.—When there are two "Sapinda" kinsmen (*q*) of a woman having equal relationship to her how will they inherit the property?

A.—Each of them should receive an equal share.

Dharwar, 1846.

AUTHORITY.—*Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

II.—SAGOTRA SAPINDAS.

a.—THE MOTHER.

Q. 1.—A woman died. Her parents applied for a certificate of heirship. Her four separated nephews, of whom the eldest is the guardian of the three under age, preferred a similar application. Subsequently the parents suborned the eldest nephew. He now states that he cannot prove his relationship to the deceased, and that he is a distant relation. He further admits that the deceased's father is her heir. Can this admission affect the rights of the minors under his protection?

A.—The nephews are not heirs of the deceased. Of the parents who have applied for recognition as the heirs of the deceased, the mother must be considered the first heir. The father will be the heir only in the absence of the mother. There can be no objection to the withdrawal of the claim advanced by the eldest nephew on behalf of himself and his younger brothers. He and the parents may have come to an understanding about the matter.

Ahmednuggur, April 11th, 1851.

AUTHORITIES.—(1) Vyav. May., p. 159, l. 5 (see Auth. 3); (2*) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435); (3) Mit. Vyav., f. 47, p. 2, l. 15.

[NOTE.—The kind of property in dispute is not stated.]

(*q*) This word means the relations of the same blood, and is, in the legal phraseology of the Hindus, limited to those who can trace their descent to one common ancestor so far as the seventh degree, either through males or females. (Sastri's Rem.)

II. *b*.—BROTHER.

Q. 1.—When there is no relation of a deceased woman on the side of her husband, who will be his heir, her two uterine brothers or her sister's son?

A.—The uterine brothers.

Poona, *February 29th*, 1848.

Authorities.—(1) Vyav. May., p. 159, l. 3; (2) p. 159, l. 5; (3) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1).

Remarks.—In *Hurrymohun Shaha* v. *Shonatun Shaha* (*r*) (Bengal law), there is a case in which a deceased woman's brother was declared heir in preference to her husband to property presented to her by the husband's paternal aunt's son. This would accord with Vyav. May., Chap. IV., sec. 10, p. 13, 27, but not with the Mitakshara, Chap. II., sec. 11, pp. 2, 11.

II. *c*.—HALF-BROTHER.

Q. 1.—Can the stepbrother of a deceased woman be her heir?

A.—When there is no one of the family of the husband of the deceased woman, her parents will be her heirs. If the parents are dead, anyone belonging to the family of the parents will be her heir. The half-brother, therefore, is her legal heir.

Dharwar, *September 23rd*, 1851.

Authorities.—(1) Vyav. May., p. 159, l 3; (2) p. 140, l. 7; (3*) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

Q. 2.—A woman died. Can a half-brother be her heir?

A.—According to the Mitakshara and Dharmabdhi, when there are neither children nor husband of a woman the Sapinda relations of her husband become her heirs. When there are no Sapinda relations, the woman's father and his relations become heirs. If there are no relations of the husband, her half-brother will be her heir.

Dharwar, *September 23rd*, 1851.

Authorities.—(1) Vyav. May., p. 159, l. 3 (see Auth. 3); (2) p. 134, l. 4; (3*) Mit. Vyav., f. 61, p. 1, l. 12 (see Chap. IV. B., sec. 6 I., Q. 1, p. 487).

(*r*) I. L. R. 1 Cal. 275.

II. *d*.—BROTHER'S SON.

Q. 1.—Can the sons of a full brother of a deceased woman be her heirs?

A.—Yes.

Ahmednuggur, June 7th, 1853.

Authorities.—(1) Vyav. May., p. 159, l. 3; (2) p. 159, l. 5; (3) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

Q. 2.—A man granted a piece of land to his widowed daughter for her maintenance. The daughter afterwards died. There is none of her kin, but there is a son of her uterine brother. The question is whether he is the heir?

A.—If there is none of the deceased woman's kin, her uterine brother's son is her heir.

Ahmedabad, February 15th, 1841.

Authorities.—(1) Vyav. May., p. 134, l. 4; (2) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

II. *e*.—HALF-BROTHER'S SON.

Q. 1.—A man died, and his movable as well as immovable property passed into the hands of his wife. She had no children. She had allowed her mother, half-brother, and elder sister to live with her. About four years afterwards the widow died. There was no member of the family of her husband then living. Her property fell into the possession of her sister. Afterwards her mother, stepmother, and sister died. The sister's nephew and the son of the half-brother are now alive. Which of these is the heir of the deceased woman?

A.—The nephew of the woman's sister (*s*) cannot inherit the property. The son of the half-brother is entitled to it.

Ahmedabad, May 31st, 1845.

Authorities.—(1) Mit. Vyav., f. 58, p. 2, l. 16; (2) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

(*s*) This must apparently mean a son of another sister, nephew therefore of the deceased.

II. *f*.—PATERNAL UNCLE.

Q. 1.—A widow died leaving two relatives, a Bhacha (a woman's brother's or sister's son, and a man's sister's son), and her father's brother. The question is: Which of these is the heir?

A.—Her father's brother is the heir.

Ahmedabad, February 17th, 1858.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

REMARK.—But only if the term Bhacha here means sister's son, as a brother's son is a nearer Sapinda than the father's brother.

II. *g*.—THE PATERNAL UNCLE'S SON.

Q. 1.—A woman of the Sudra caste has no other heir than a cousin. Her husband is dead. Can the cousin be her heir? If there are three cousins can one of them who has applied to be recognised as heir be considered her heir?

A.—All the three cousins have equal right to be the heirs of the woman.

Ahmednuggur, January 31st, 1854.

AUTHORITIES.—(1) Vyav. May., p. 159, l. 3; (2) p. 159, l. 5; (3) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

III.—BHINNAGOTRA SAPINDAS OF THE DECEASED'S FAMILY.

a.—THE SISTER'S SON.

Q. 1.—Can a man inherit the property from his mother's deceased sister?

A.—If there is no other heir he can.

Dharwar, January 26th, 1850.

AUTHORITIES.—(1) Vyav. May., p. 160, l. 4 (see Chap. IV. B., sec. 6, III. *b*, Q. 1); (2*) p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

REMARK.—A divided brother is preferred, notwithstanding the sister's son was acknowledged and recognised as the adopted son of the deceased brother, but without ceremonies of adoption (*t*).

(*t*) *Bhagvan* v. *Kala Shankar*, I. L. R. 1 Bom. 641.

Q. 2.—A Kunabi woman has died. Her sister's son survives. The deceased made no gift in his favour. Can he be her heir according to the Sastra?

A.—It appears that the property left by the deceased is her Stridhana, and that her sister's son is entitled to it, even though there be no will left to that effect.

Ahmednuggur, February 22nd, 1847.

AUTHORITIES.—(1) Vyav. May., p. 160, l. 4 (see Chap. IV. B., sec. 6, III. *b*, Q. 1); (2) p. 159, l. 5 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435); (3*) p. 159, l. 3.

III. *b*.—MATERNAL UNCLE'S SON.

Q. 1.—A widow died without issue. Her mother's brother's son has applied to be put in possession of her property, consisting of some land, &c. The deceased widow had obtained the property from her mother's brother, and there are no nearer relations of the deceased. Should the applicant, under these circumstances, be put in possession of the property?

A.—There is no nearer relation of the deceased; the applicant, though of a different Gotra, is a Sapinda relation. He is therefore the legal heir of the deceased.

Ahmedabad, June 30th, 1851.

AUTHORITIES.—(1) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435); (2) p. 134, l. 4; (3) p. 140, l. 6.

III. *c*.—THE SISTER'S DAUGHTER.

Q. 1.—Is a sister's daughter the heir to a deceased woman, there being being no near relative?

A.—Yes.

Dharwar, June 11th, 1853.

AUTHORITY.—Vyav. May., p. 143, l. 1.

Q. 2.—A man died, leaving two daughters. One of them died, leaving a daughter. The other also died afterwards. The question is whether the daughter of the first deceased daughter can inherit the immovable property of the deceased?

A.—The daughter who died last has left no children. Her sister's daughter cannot claim the right of inheritance. The order of heirs laid down in the Sastra does not mention a daughter of a *sister*. That order states that, when there are no near relatives to be found, the Guru and others become heirs. A Brahman's property is sacred, and the Raja or Government of any country is prohibited from taking it under any pretence whatever.

Surat, March 23rd, 1850.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1 (Col., Mit., 324; Stokes's H. L. B. 427); (2) f. 59, p. 1, l. 9; (3) f. 45, p. 2, l. 8.

Remarks.—1. The Sastri mistakes the case for one regarding the succession to a man's property.

2. For the correct answer see the preceding case.

Q. 3.—Two brothers effected a partition of their landed property; afterwards one of them died. The son of the deceased held his father's share for some time, and died. His sister succeeded him, and after having remained for some time in the possession of the share, died. The question is whether the daughter of the sister or the son of the sister-in-law of the father of the deceased is the heir?

A.—The uterine sister who inherited the property of the uterine brother died. The rights of inheritance will now descend to the daughter of the other sister.

Surat, December 7th, 1846.

Authority.—*Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

Q. 4.—Who will inherit from a deceased woman, her sister's daughter or her sister's son's widow?

A.—The sister's daughter is entitled to inherit. It is to be

remarked that when there are two heirs, a daughter and a son, to Stridhana, the daughter has the priority of claim.

Ahmednuggur, August 13th, 1847.

Authority.—Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14, I. A. 1, Q. 1, p. 435).

Remark.—The preference of daughters to sons only takes place in cases where they inherit from their mother. The right of the deceased's niece rests on her proximity.

CHAPTER V.

CASES OF INHERITANCE DECIDED BY THE CUSTOMS OF CASTES OR SECTS (*a*).

SECTION 1.—HEIRS TO A GOSAVI.

Introductory Remarks.

The Brahmanical law, Mr. Ellis points out (*b*), never obtained more than a qualified dominion in Southern India. In the Bombay Presidency the collections of Mr. Borradaile and Mr. Steele

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(*a*) An instance of the flexibility of customary law, while yet unembodied in decisions formally recorded, is to be found in the case of the Malis (Moghreliya) at Surat. When questioned by the Judge they answered that a marriage might amongst them be dissolved at the desire of either husband or wife. Either some practical inconvenience arose or the moral perceptions of the caste became more refined; a meeting of the caste was held, and it was voted unanimously that divorce should not in future be allowed except for powerful reasons recognised by the caste panchayat. This was communicated in answer to one of Mr. Borraidaile's inquiries, MSS., Book G, sheets 29, 30. A recent change of custom was recognised, though it was not necessary to base the decision upon it, in ***Musst. Radiyat*** v. ***Madhowjee Panachund***, 2 Borr. 740. According to the notion generally entertained by the Sastris that customs, where not plainly repugnant to the scriptures (Gaut., Chap. XI., para. 20; Apst., Transl., p. 15), may be regarded as resting on some lost Smriti (Apast., Transl., p. 47), the preference of conflicting Smritis may be determined by usage. See Viram., Transl., p. 127; Col. Dig., quoted in the *Utpat Case*, 11 Bom. H. C. R., at p. 267; M. Müller, H. A. Sansk. L., p. 53. Macnaghten, H. L., p. 102, says the custom of Niyoga, and consequent legitimacy of the Kshetraja son, is still preserved in Orissa. But, besides its conservative faculty, custom has had to be recognised where it plainly abolished the ancient law, as in the very case of the Niyoga just mentioned (see Mit., Chap. I., sec. 3, p. 4), and the unequal partition prescribed or allowed by the Smritis but condemned by usage (see Viram., Tr., p. 61). Mitramisra (Viram., Tr., p. 107) places the authority of custom so high that he declares what is illegal in one generation may by usage alone be made legal and even obligatory in another. Nilakantha, V.M.,

show that many caste usages have been preserved contrary to the rules of the Smritis, designed generally or chiefly for the guidance and control of the Brahmans. The tendency to adoption of the ceremonies and legal ideas of the higher castes by those of a lower order has already been noticed (*c*). But many differences still subsist which make it hazardous to apply the rules of the Sastras to the legal relations and transactions of any but the higher castes in the spheres of status and of family law, of adoption and of inheritance. But few cases of this kind appear as the subjects of questions to the Sastris, because, being regarded as matters of special custom, such questions as arose were disposed of on the evidence given in each case. A collection of such cases might have been made from the records of the Courts, but it would have been a work of considerable time; and meanwhile a process of gradual assimilation has been going on which is on the whole beneficial. The rules of the different religious orders, based generally on a real or fancied analogy to those of Brahman ascetics, have frequently been submitted to the Sastris, and a general idea of the law of inheritance prevailing amongst their members may be gathered from the cases here collected. But in litigation concerning any matha or community it must be borne in mind that it is the customary law of the particular class or institution that must govern the decision, rather than general rules deduced from the practice of other orders or societies (*d*). This is

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Chap. I., para. 13, points to many infringements of the scriptural law warranted by custom, and even goes so far as to maintain that its approval may exempt harlotry from penance. The necessities of social existence have thus forced the Commentators by degrees from the position of uninquiring submission to the letter of inspired precepts, and a sufficient authority can now be found within the Hindu law itself for a rational development of its principles in accordance with the improved moral consciousness of the castes (see *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom., at pp. 561, 567, 570). The sole choice is not between a retention of every rag of usage which the community has outgrown, and the adoption of a wholly foreign system; the course is open of a gradual amelioration of the indigenous law in harmony with its fundamental notions, and with the modified conception of these induced amongst the Hindus themselves by the exigencies and the new standpoints of each stage of social progress. The customary and case law of England has been formed under influences substantially the same as those just indicated, and a remarkable analogy may be observed between the view of custom as derived from lost Smritis and custom in England as Statute law worn out.

(*b*) 2 Str. H. L. 162.

(*c*) Above, pp. 9, 402-3.

(*d*) See the cases cited above, pp. 198-9.

the necessary qualification of the somewhat broad statement of Mr. Colebrooke at 2 Str. H. L. 181 (*e*).

According to the statements made by the Gosavis to Mr. J. Warden (see Steele's Law of Caste, App. B., p. 64 ff.), the members of his order living in Western India consider themselves as Sannyasis, following the rules of Sankaracharya, and pretend to obey the laws of Manu and other Dharmasastras (*f*). Though it would therefore seem that cases of inheritance to their property should be decided according to the rules of the Dharmasastra on the succession to the property of a hermit, and though the answers to the following Questions show this to have been also the opinion of some of the Law Officers (*g*), it nevertheless cannot be allowed that such a proceeding is in accordance with the general principles of the Hindu law. For though, on account of their retirement from the world, they are in a position analogous to that of the Sannyasis, the Gosavis cannot claim to be Sannyasis in the proper sense of the word. The order of the real Sannyasis is open, according to some authorities, to Brahmans, Kshatriyas, and Vaisyas, according to others to Brahmans only. It may be entered at any time after the completion of the ceremony of investiture with the sacred girdle (*h*). The Sannyasi is bound to keep the vow of chastity and to renounce all transaction of business. The Gosavis, on the contrary, receive among their

(*e*) See also the *Utpat Case*, 11 Bom. H. C. R. 249, and the *Naikin Case*, I. L. R. 4 Bom. 545.

(*f*) Different statements are given by H. H. Wilson, Works, Ed. Rost, Vol. I., pp. 167-169, and *passim.*

(*g*) They are considered as real Sannyasis also, *Gungapooree* v. *Musst. Jenee et al.*, 9 N. W. P. S. D. A. R. 212; *Sungram Singh* v. *Debee Dutt et al.*, 10 *ibid.* 477.

(*h*) Nirnayasindhu, Par. III. Uttarardha, f. 51, p. 2, l. 9: Angiras—" A person who knows (the Vedas) may enter the order of the Sannyasis, whether he be a Brahmachari, a Grihastha, or Vanaprastha, whether he be sick or suffering. . . Vijnanesvara (Mit., Pray., f. 25, p. 1, l. 10) and the rest say that a Brahman alone has a right to enter on this (order of the Sannyasi), on account of this inspired text of Jabala: 'Brahmans become Sannyasis,' and because Manu says: 'Having reposited the sacred fires in his mind, the Brahman should leave his house and enter the order of the Sannyasis.' And there is another verse to the same effect: 'It is said that for Brahmans four orders are ordained in the revealed texts, for Kshatriyas three, for Vaisyas two, and for Sudras one.' But the members of the three (twice-born) classes have also a right (to enter the order of Sannyasis), since it is declared in the Kurmapurana: 'A Brahman, a Kshatriya, or a Vaisya should leave his house and enter the order of the Sannyasis.'"

number Sudras (*i*) also and women, who have no right to become Sannyasis. They neglect the performance of the Samskaras or initiatory rites. Concubinage is allowed by their custom, and some marry (*k*). Lastly, many are engaged in trade and other worldly business (*l*).

It thus appears that it is impossible to consider them Sannyasis in the sense of the Hindu law, and consequently to subject them to the laws of this order. It is equally impossible to place them under the laws of the Grihasthas or householders, as some Sastris have done, since a very great number have no family ties and live in the Mathas as members of coenobitic fraternities; and others, though married, adopt pupils. Now, in all cases where a section of the Hindu community places itself by its customs or opinions in opposition to orthodox Hinduism and its law, the Hindu legislators allow disputes between its members to be judged according to its law or custom (*m*).

Thus the king is directed to uphold the customs of the castes (*n*) of the Pashandas, or heretical sects, and of the Naigama orthodox sects (*o*). The custom to be followed in the case of particular institutions is in general that of such institutions as proved by testimony. The custom in order to be recognised must apparently be one not obviously bad or injurious to the institution to which it is attributed. See below, sec. 1. On the same principle of guarding the interests of the foundation it has been held that in the case of a trusteeship held in heritable shares by several families, though a father could relinquish his right of management to his son, the son could not join in an alteration in the constitution of the trust. Nor could a majority of the trustees bind a minority by an agreement to increase the number of trustees (*p*).

Under these circumstances it would seem advisable to place the cases referring to the inheritance to Gosavis under the rules which, according to their statements to Mr. Warden, contain their law of

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(*i*) Steele, Law of Caste, App. B, clause 24.

(*k*) Steele, Law of Caste, App. B, clauses 29 and 42.

(*l*) Steele, Law of Caste, App. B, clause 14.

(*m*) See *Bhau Nanaji* v. *Sundrabhai*, 11 Bom. H. C. R. 249.

(*n*) Vyav. May., p. 7, l. 1; Borradaile 7; Stokes's H. L. B. 15.

(*o*) Vyav. May., p. 206, l. 1; Borr. 176, 177; Stokes's H. L. B. 141; Mit. Vyav., f. 73, p. 1, l. 6.

(*p*) *Kiyipattu A. Narayan Nambudri* v. *Ayikotillatu S. Nambudri*, I. L. R. 5 Mad. 165.

custom (*q*). Hence in some of the remarks on the following cases, instead of the authorities from the Law Books being quoted in full, references have been given to the paragraphs of Mr. J. Warden's Report, and to Steele's Law and Custom of the Hindoo Castes.

The following statement, however, may be quoted as describing a custom which, with slight local variations, governs the succession to Sannyasis throughout the greater part of India. "It has been laid down by the late Sudder Dewanny Adawlut that amongst the general tribe of fakirs called saniasis . . . a right of inheritance, strictly so speaking, to the property of a deceased *guru* or spiritual preceptor does not exist; but the right of succession depends upon the nomination of one amongst his disciples by the deceased *guru* in his own lifetime, which nomination is generally confirmed by the *mahants* of the neighbourhood assembled together for the purpose of performing the funeral obsequies of the deceased. Where no nomination has been made the succession is elective, the *mahants* and the principal persons of the sect in the neighbourhood choosing from amongst the disciples of the deceased *guru* the one who may appear to be the most qualified to be his successor, installing him then and there on the occasion of performing the funeral ceremonies of the late guru" (*r*).

In some instances the religious services performed by Gosavis or Vairagis in charge of temples are rendered on the voluntary principle. The temple is the property of a caste or section of a caste, whose representatives control the expenditure of the funds, pay the *guru*, and appropriate the surplus proceeds of the endowment and offerings for caste purposes. In such cases the *guru* holds his place for life and during good behaviour, but has not a property in his office or in the emoluments. His nomination of a chela as his successor has no special force, but is generally respected by the caste if he was himself held in esteem (*s*). As to the formal expression of the will of the caste or its representatives in these and other cases reference may be made to Steele, L. C.

(*q*) Compare also *Nirunjun Bharthee* v. *Padaruth Bharthee et al.*, N. W. P. Repts. of Sel. Cas., 1864, Part I., p. 512.

(*r*) *Madho Das* v. *Kamta Das*, I. L. R. 1 All., at p. 541. *Sugan Chand* v. *Gopalgir*, 4 N. W. P. R. 101, excludes a *chela* who deserts his *guru*. On the subject of sacerdotal privileges and superiority, see *Ramasawmy Aiyan et al.* v. *Venkata Achari et al.*, 9 M. I. A. 344; and *Kashi Bashi Ramlinga Swamee* v. *Chitumbernath Koomar Swamee*, 20 C. W. R. 217.

(*s*) His nomination is in other cases held binding. See Steele, L. C. 437.

124 ss. The inhabitants of a village or of a quarter of a town sometimes erect a matha or temple—a practice often commemorated in inscriptions (*t*). The position of the officiating worshipper or *guru* in such cases varies according to the terms of his institution; but he is generally removable for misconduct (*v*).

SECTION I.

I. To a Male Gosavi.

a.—THE DISCIPLE.

Q. 1.—Can a disciple succeed to the property of a deceased Gosavi?

A.—A disciple is the heir of a Gosavi, and therefore can succeed as such.

Ahmednuggur, 1845.

Authority not quoted.

Remark.—See Steele, Law of Caste, App. B., para. 20 (*w*).

Q. 2.—A Gosavi died. There is a disciple nominated by him as his successor. Can he succeed him?

A.—The Gosavis and Vairagis should be regarded as Sannyasis of the lower castes, such as Sudras and others. The person who claims to be the heir is a disciple nominated by the deceased. His claim, therefore, should be recognised.

Ahmedabad, September 15th, 1853.

(*t*) As for instance the one described in Ind. Antiq., Vol. X., p. 185 ss.

(*v*) See *Acharji Lalla Ranchor* v. *Bhagat Jetha Lalji*, Bom. H. C. P. J. 1882, p. 374.

(*w*) Succession to ascetics is based wholly on personal association, *Khuggender N. Chowdhry* v. *Sharupgir Oghorenath*, I. L. R. 4 Cal. 543. An ascetic cannot alter the succession to an endowment, *Mohunt Rumundas* v. *Mohunt Ashbul Dass*, 1 C. W. R. 160. He cannot impose restrictions on his successor contrary to the custom, such as disposing of the Mohantship by way of reversion, *Greedhari Doss* v. *Nund Kissore Doss*, 11 M. I. A. 405. The general rules of succession are given in the Smriti Chandrika, p. 122.

The trustee of a religious endowment may not alienate or encumber it except under special circumstances. See Q. 4, Rem. 2.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2) p. 141, l. 7.

REMARKS.—1. The Guru must nominate a chela as successor, and this must be confirmed by the mohants (*x*). For the succession of a chela in the Sravak sect. see *Bhutaruk Rajendra* v. *Sook Sagur et al.* (*y*). For a joint succession of two chelas, *Gopaldas* v. *Damodhar* (*z*).

2. Sudras cannot become Sannyasis in the sense in which the word is used in the Dharmasastras. See Introductory Remarks.

3. See also Steele, Law of Caste, App. B., para. 20.

Q. 3.—Is a disciple or a Gurubhau of a Gosavi his heir?

A.—If the Gurubhau is separate the disciple will be the heir. If he is united in interests he and the disciple will be the equal heirs.

Khandesh, July 3rd, 1854.

AUTHORITIES.—(1) Vyav. May., p. 131, l. 8; (2) p. 134, l. 4.

REMARK.—See Steele, Law of Caste, App. B., para. 20; *Mahdo Das* v. *Kamta Das* (*a*).

Q. 4.—A Matha of a Gosavi had always been in charge of disciples succeeding one another. Should it remain with a disciple or a relation of the Gosavi?

A.—The Sastras contain no provision regarding the matter. The custom of the sect should therefore be inquired into.

Poona, December 29th, 1847.

AUTHORITY.—Vyav. May., p. 7, l. 1 (see Chap. II., sec. 13, Q. 9, p. 434).

REMARKS.—The Matha should pass into the possession of the disciple if he was nominated by his Guru. If no nomination had taken place, and there are several disciples, they or the Dasnamah will elect a successor. See Steele, Law of Caste, App. B., paras. 18, 19, 20.

2. In *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (*b*) the Judicial Committee say : "They conceive that when, owing to the absence of documentary or other direct evidence of the nature of the foundation, and the rights, duties, and powers of the trustees, it becomes necessary to refer to usage, the custom to be proved must be one which regulates the particular institution." Reference is

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(*x*) *Atmanund* v. *Atmaram*, N. W. P. S. A. R. for 1852, p. 462.

(*y*) 1 Borr. R. 320.

(*z*) 1 Borr R. 439.

(*a*) I. L. R. 1 All. 539.

(*b*) L. R. 4 I. A., at p. 83.

made to the case above, Q. 1, and approval given to Peacock, C.J.'s *dictum* in that case, that "each case must be governed by the usage of the particular mohantee." The *Rameswara Pagoda Case* (c) also is referred to. "The important principle . . . is to ascertain . . . the special laws and usages governing the particular community."

In *Sammantha Pandara* v. *Sellappa Chetti* (d) the origin of mathas is discussed, and the duties and powers of the superior described in a way assigning to him in Madras a somewhat larger discretion than is recognised elsewhere.

3. Religious endowments are generally inalienable, but they may be temporarily pledged for repairs and other necessary purposes. See *Prosunno Kumari Debya* v. *Golab Chand Babu* (e), *Narayan* v. *Chintaman* (f), *Khusalchand* v. *Mahadevgiri* (g), *Mohunt Burm Suroop Dass* v. *Khashee Jha* (h), *Malhar Sakharam* v. *Udegir Guru* (i), and the remarks in *Gundoji Bawa* v. *Waman Bawa* (k).

Q. 5.—1. A Gosavi, having nominated two disciples, died. Both these disciples lived in the Matha of their Guru. The senior disciple nominated a disciple to succeed him. The junior disciple was afterwards confined in prison on a charge of murder. While in prison he nominated a disciple, and passed to him a deed authorising him to inherit his and his Guru's property. On the strength of this document the disciple has filed a suit against the senior disciple, and the man nominated by him as his disciple, for the recovery of the property of his Guru. Is his claim admissible?

2. What actions make a man Patita?

3. What ceremonies should be performed on the occasion of nominating a disciple?

A.—1. As the man was confined in prison for murder, he must be considered a Patita. He has forfeited his right of nominating a disciple, and a disciple nominated by such a person cannot claim any property.

2. A man becomes a Patita by the commission of the following crimes: (1) Stealing gold, (2) killing a Brahman, (3) drinking intoxicating liquors, (4) having criminal intercourse with the wife of one's teacher, one's sister, &c., (5) burning a house, (6) killing

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(c) L. R. 1 I. A., at p. 228

(d) I. L. R. 2 Mad., 175.

(e) L. R. 2 I. A., 145, 151.

(f) I. L. R. 5 Bom. 393.

(g) 12 Bom. H. C. R. 214.

(h) 20 C. W. R. 471.

(i) Bom. H. C. P. J. 1881, p. 108.

(k) *Ibid*., p. 292.

a man by administering poison to him. There are some others besides those above enumerated.

3. A person nominated a disciple must be one who is not married. The Guru gets him shaved and communicates to him certain sacred words. The followers of the sect to which the Guru belongs are informed of the intended nomination. The Sastra is silent on this subject, but the custom requires these ceremonies, and a disciple, duly nominated with the customary ceremonies, becomes entitled to a share of his Guru's property.

Ahmedabad, June 2nd, 1845.

AUTHORITIES.—(1) Mit. Vyav., f. 60, p. 1, l. 13; (2) f. 60, p. 2, l. 1; (3) Vyav. May., p. 161, l. 7.

REMARKS.—1. The acts for which a Gosavi is outcasted are : Killing a cow, a Brahman, a woman, a Guru, or a child, and sexual intercourse with other than Hindu women. See Steele, Law of Caste, App. B., para. 30.

2. Regarding the ceremonies at the initiation of a Gosavi. See also Steele, Law of Caste, para. 27.

3. Importance seems to be attached by some of the sects to a written nomination of a chela as successor to the guruship which, once delivered, they consider irrevocable except for conduct producing spiritual incapacity.

4. In *Greedharee Doss* v. *Nundkissore Doss Mohunt* (*l*), the Judicial Committee say : "This seems to be clear, from all the evidence in this case, as far as it has been brought under their Lordships' attention,—that there cannot be two existing *Mohants;* that the office cannot be held jointly; and that, therefore, if there was a double *Ticca* at all, it must have been a *Ticca* of the office in reversion after the existence of the incapacity of *Ladlee Doss* to perform the duties. But the evidence upon that point, and the law adduced upon the subject before their Lordships, fail entirely to satisfy their minds that any such species of investiture was according to the rules and customs of these *Mohants*, or that any such *Mohantship* can be given in reversion."

Q. 6.—A Gosavi had two disciples; one was born by a kept woman and the other was presented to him by another Gosavi. The Gosavi, at his death, left no directions providing for his succession, and the question is: Who should succeed him?

A.—A virtuous disciple should succeed. The son of a kept woman cannot. A virtuous disciple means a disciple who is hospitable and civil to those who visit his dwelling.

Ahmednuggur, October 20th, 1859.

(*l*) 11 M. I. A., at p. 429.

Authority.—Vyav. May., p. 142, l. 4 and 8.

Remark.—This answer would be right in the case of a real Sannyasi. According to the custom of the Gosavis, however, to whose case also the authorities above quoted refer, natural sons may become disciples, and inherit as such from their fathers. See Steele, Law of Caste, App. B., paras. 29 and 20. See also *Narayanbharti* v. *Lavingbharti et al.* (*m*), which excludes the offspring of an adulterous connection.

2. The purchase of a chela is in some cases recognised. See Col. Dig., Book V., Chap. IV., sec. 10, note. This, Colebrooke says, is not to be regarded as adoption, but as resting on the special custom of the caste. See 2 Str. H. L. 133.

Q. 7.—Two persons claim to be heirs of a Gosavi of the Maratha caste. The one is a "Gurubhau," or a disciple of the same preceptor. The other is a son of a kept woman of the deceased, but adopted by him as his disciple by the ceremony of tonsure (Mundana). Which of these is the proper heir?

A.—Both appear to be the heirs, but the one adopted as disciple seems to be the nearer of the two.

Rutnagherry, November 8th, 1845.

Authority not quoted.

Remarks.—See Steele, Law of Caste, App. B, para. 29.

2. The alleged disciple or shishya of a deceased Gosavi who sued another alleged shishya in possession of the matha and estate for a declaration of his own superior title must, it was held, pay the fee proper for a suit for possession, the real purpose of the suit being to obtain the property (*n*).

Q. 8.—A Matha of a Gosavi was held from disciple to disciple. This being the case, a disciple married and broke through the custom of the Matha. Can this breach of the custom be held a bar to his right of inheritance?

A.—A disciple who conforms himself to the custom of the Matha and no other can succeed.

Ahmednuggur, August 14th, 1854.

Authority.—Vyav. May., p. 142, l. 2.

Remarks.—The authority given by the Sastri refers only to a real Sannyasi, though the answer itself appears to be correct.

2. Both in the Dekkan and elsewhere the Gosavis in some cases marry and

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(*m*) I. L. R. 2 Bom. 140.
(*n*) *Ganpatgir* v. *Ganpatgir*, I. L. R. 3 Bom. 230.

still are eligible to mahantship in succession to deceased mahants. "The exception made (by Mr. Warden) must be extended to other places than the Dekhan also. It has been proved that the Bharti sect of Gosavis in (Ahmedabad), the locality whence this appeal comes, very generally marry . . . and there is one if not two instances of a married member of the Bharti sect being a mahant of a math."

"The plaintiff having proved his succession as mahant . . . we think that the burden of proving that the plaintiff's subsequent marriage worked a forfeiture of his office and its appendant property and rights lay upon the defendants" (*o*).

Q. 9.—If a Gosavi has got himself married, is he still to be considered a Gosavi? Can he claim the right of inheriting from his Guru? A deceased Gosavi had left two disciples; one of them is suffering from a disease, and the other died leaving a disciple nominated by him. To whom will the right of inheritance belong —to the man afflicted with the disease or to the disciple of a disciple?

A.—The question of the legality or propriety of the marriage of a Gosavi should be disposed of by the king in accordance with the usage of the sect. When a disciple is suffering from such diseases as black leprosy and others, and when he is in such a condition that he cannot be admitted into the sect, he cannot claim the right of inheritance. According to the custom of the sect, the disciple of a disciple will be the proper person to inherit the property of the deceased.

Ahmednuggur, October 26th, 1850.

AUTHORITY.—Vyav. May., p. 142, l. 2 and 8.

REMARKS.—1. Regarding the permissibility of the marriage, see the preceding case.

2. Regarding the right of the disciple's disciple to inherit from his Guru's Guru, see Steele, Law of Caste, App. B, para. 20.

I. *b*.—FEMALE DISCIPLE.

Q. 1.—A Gosavi who had no heir nominated a woman as his disciple. Can she be the heir after his death?

A.—According to the Sastras she cannot be the heir of the deceased.

Dharwar, October 2nd, 1848.

(*o*) Sir M. Westropp, C.J., in *Gosain Surajbharti* (Plaintiff in both cases) versus *Gosain Rambharti* (Defendant in R. A. No. 11 of 1880), and *Gosain Ishvarbharti* (Defendant in R. A. No. 12 of 1880), I. L. R. 5 Bom., at p. 684.

AUTHORITY.—Vyav. May., p. 142, l. 4.

REMARKS.—1. Female disciples are received by the Gosavis, and, as it would seem, they also inherit their Guru's property. See Steele, Law of Caste, App. B., paras. 21 and 20.

2. In the Reports of Selected Cases, Sudder Dewani Adawlut, North-Western Provinces, Vol. II., p. 235, it is ruled that a female disciple does not inherit, since, *according to the Hindu Law*, only males can take the property of their Guru.

I. *c*.—DISCIPLE'S DISCIPLE.

Q. 1.—A Gosavi died. There is a disciple of his disciple, and some grand-disciples of the grand-disciple of his Guru. The question is: Which of these will be the heirs of the deceased?

A.—The grand-disciple is the heir. If, however, the deceased and the other disciples were united in interests, all would be entitled to an equal share of the inheritance.

Khandesh, January 26th, 1854.

AUTHORITY.—Vyav. May., p. 134, l. 4.

REMARK.—See Steele, Law of Caste, App. B., para. 20.

Q. 2.—Should a man apply for the property belonging to his Guru's Guru, can he have it?

A.—No.

Dharwar, 1846.

Authority not quoted.

REMARK.—See the answer and remark to the preceding case.

I. *d*.—THE FELLOW-DISCIPLE.

Q. 1.—A Gosavi died. His Gurubhau is alive. Should the property of the Gosavi be considered heirless?

A.—The Gurubhau is the heir of the Gosavi.

Tanna, March 25th, 1850.

AUTHORITY.—Vyav. May., p. 142, l. 4.

REMARK.—The authority refers to a real Sannyasi.

Q. 2.—A Kanphata Gosavi had two disciples. They both died, one after the other. A disciple of the first deceased has applied to be recognised as heir of the one who died afterwards. Is he the heir?

A.—When a man in the order of "Vanaprashtha" dies, his Guru and others can inherit his property. When a man dies in the order of Sannyasis his disciples become his heirs. When a man dies in the order of Brahmachari his Dharma-Bhaus or fellow-students can inherit his property. From this it appears that a disciple nominated according to the custom of the caste by the one who died first can inherit the property of his Guru's brother who died afterwards.

Khandesh, August 23rd, 1850.

AUTHORITY.—Vyav. May., p. 142, l. 4.

REMARK.—The authority and answer apply to the case of a real Sannyasi.

Q. 3.—Can a Gurubhau of a Guru of a deceased Gosavi be his heir?

A.—No one can be the heir of a deceased Gosavi except his Guru disciple or Gurubhau.

Ahmednuggur, November 4th, 1846.

Authority not quoted.

Q. 4.—A Gosavi had two disciples. One of them nominated a disciple, the other had none. The latter died. Can his property be claimed by the disciple of the former?

A.—The Sastra does not recognise the heirship of a person situated as above mentioned. He cannot, therefore, be considered an heir of the deceased.

Poona, November 30th, 1853.

Authority not quoted.

I. *e*.—THE GURU'S FELLOW-DISCIPLE.

Q. 1.—A Gosavi has died. Will the Gurubhau of his Guru be his heir?

A.—The Sastra allows a man to acquire knowledge from a person of a lower caste than himself. By the custom of the country a Guru and a disciple stand in the same relation to each other as a father and a son, and they become heirs of each other. The Sastra permits a disciple to inherit from his Guru, and a Guru can in like manner inherit from his disciple, who dies without issue. It is nowhere mentioned in the Sastra that in the absence of a Guru his brother may succeed, but as a Guru in the caste of Gosavis takes the place of a father in a family, a Gurubhau may, in the absence of a disciple, brother, or brother's disciple, be considered an heir.

Sadr Adalat, March 5th, 1853.

Authority.—Viramit, f. 209, p. 2, l. 9.

Remarks.—1. The answer would apply to a real Sannyasi.

2. The decision of the question depends upon the custom of the caste and class.

II.—HEIRS TO A GHARBARI OR MARRIED GOSAVI.

Q. 1.—A Gosavi kept a woman. She gave birth to a son. The Gosavi then married another woman. He afterwards died. Which of these three survivors should be declared his heir, and how far would the fact of the deceased being originally a Brahman, Kshatriya, or a Vaisya before he entered the order of Gosavi affect the rights of heirs?

A.—A good disciple becomes the heir of a Gosavi as a general rule. But if he were of the Sudra caste and his wife childless, the son of his mistress would, according to the custom of the Sudras, be his heir, the wife being entitled to a maintenance only. If the deceased originally belonged to either of the other three castes—viz., Brahman, Kshatriya, or Vaisya, his good disciple should be considered his heir.

Ahmednuggur, April 14th, 1857.

Authorities.—(1) Mit. Vyav., f. 55, p. 1, l. 11; (2) f. 59, p. 1, l. 13.

Remarks.—1. The Sastri's answer applies to a Grihastha or householder only.

2. If the customs of Gharbari Gosavis are the same as those of Gosavis

proper, as would seem to be the case according to Steele, Law of Caste, App. B., para. 42, the illegitimate son will be the heir. See Steele, *ibid.*, para. 29 (*p*).

Q. 2.—A Matha of a Gosavi was held from disciple to disciple. A Gosavi who came into possession of it kept a woman, by whom he had a son. Afterwards he married and became a "Gharbari." He subsequently acquired some property and died. The question is whether the son of the kept woman or his widow is the heir?

A.—If the Gosavi belongs to the Sudra caste the son of his kept woman will be his heir. If the Gosavi belongs to either of the three superior castes—namely, Brahman, Kshatriya, and Vaisya—his widow will be his heir. The son in this case may claim maintenance, not as a matter of right, but grace.

Tanna, March 15th, 1856.

Authorities.—(1) Mit. Vyav., f. 55, p. 1, l. 11; (2) f. 55, p. 2, l. 1.

Remark.—See the preceding case.

Q. 3.—A deceased Gosavi has left a wife and a disciple. Which of these is the heir?

A.—The wife will be the heir. The disciple cannot succeed, but if the custom of the sect requires that the disciple should succeed he may be allowed to do so. The wife in that case will be entitled to maintenance only.

Khandesh, November 30th, 1859.

Remark.—Regarding the Gharbari, or married Gosavi, see Steele, Law of Caste, App. B., paras. 6 and 42 ff.

Q. 4.—A Gosavi, either of the sect of the Puri, Giri, or Bharathi, acquired a Vatan like that of a Patil or Kulkarani. Can it descend to his or his wife's disciple?

A.—Among the Gosavis of the above-mentioned sects a disciple is as good an heir as a son among other people. If a disciple was

(*p*) This case illustrates the remarks made above, pp. 80, 81.

not nominated by the male Gosavi his wife may nominate one to succeed to her estate in the same manner as a widow among other classes is allowed to adopt a son. No objection seems to exist to such a proceeding.

Khandesh, October 21st, 1848.

AUTHORITY.—Vyav. May., p. 142, l. 4.

Q. 5.—The parents (of the Kunabi caste) offered their son of the age of three months to a Gharbari Gosavi (married Gosavi). Before the child was initiated in the rites of the sect the Gosavi died. His wife, however, called the members of her sect, and presented a turban to the child, and placed him on the seat of the deceased. The nephew of the deceased taught him certain incantations and shaved his head. Is this not sufficient to entitle him to a certificate of heirship of the deceased?

A.—If the deceased Gosavi's wife and nephew have done all that was required to qualify a successor to a Gosavi according to the customs and rules of the sect, the certificate applied for may be given to him. Among the Vanaprasthas, Brahmacharis, and Sannyasis of the ten different tenets the succession takes place by disciples. The Gosavis and Vairagis follow the same tenets, and should be treated accordingly.

Ahmednuggur, March 28th, 1849.

AUTHORITY.—Vyav. May., p. 142, l. 2 and 8.

III.—HEIRS TO A GOSAVINI, OR FEMALE GOSAVI.

Q. 1.—A female Gosavi died. Which of the following will be her heir: her Guru (namely, the preceptor, or the one who initiated her into the doctrine and practices of the sect); her Guru's son, her husband's disciple, her second or "Pat" husband's disciple; her Gurubhau, or the one who belongs to the same fraternity to which her Guru belongs?

A.—According to the custom of the sect of Gosavis, a well-behaved disciple will be the heir of the deceased. If she has made a gift of her property to her Guru, he can take it. If there is

neither of these with the necessary qualifications the disciple of her second husband must be preferred to her Guru.

Ahmednuggur, February 24th, 1847.

Authorities.—(1) Mit. Vyav., f. 59, p. 1, l. 13; (2) Vyav. May., p. 142, l. 8.

Remark.—See Steele, Law of Caste, App. B., paras. 21 and 20.

Q. 2.—Can a woman of the Gosavi sect who is under the vow of celibacy nominate a disciple? And can her preceptor or Guru be her heir?

A.—A virtuous woman of the sect can nominate a disciple, and if a disciple is virtuous he can succeed as heir. The Guru may take such property as may have been duly transferred to him, but in the absence of a properly qualified disciple the property will go to the Sirkar.

Ahmednuggur, August 22nd, 1847.

Authority.—Vyav. May. p. 142, l. 4 and 8.

Remark.—See Steele, Law of Caste, App. B. paras. 21 and 38.

SECTION 2.—HEIRS TO A JANGAMA.

Introductory Remark.

The Jangamas are the priests of the Lingayata sect, who pretend to have renounced the world, like the Sannyasis. But the laws referring to the latter cannot be applied to them for the same reasons as in the case of the Gosavis. For an account of their doctrine and history, see H. H. Wilson, Works, Ed. Rost, Vol. I., pp. 218—230; and of their customs, Steele, Law of Caste, p. 105 ff.

Q. 1.—A Brahmachari Jangama, holding the hereditary office of Pattadhikari, died. The question is whether the successor to the office should be a Brahmachari (unmarried) or a married Jangama?

2. A man alleges that the office was conferred upon him by the deceased. The question is whether his eligibility to the office will be effected by the performance or omission of the ceremony called the Jangama-Diksha (*q*).

(*q*) Diksha = Initiation.

3. The head Matha is presided over by a Brahmachari Jangama, and there is an inferior Matha, which is also presided over by persons of the same class. The Brahmachari of the inferior Matha died, and has left no disciple. Can the Brahmachari of the head Matha succeed to the inferior Matha?

A.—1. A man cannot succeed to a Pattadhikariship unless he is his Dharma-brother, or fellow-student living in the same dwelling. He must further be a Brahmachari living in a college, and a Vira-Saiva, who is the most pious of the seven classes of the Saivas or the worshippers of Siva. A married man, although he is a fellow student, cannot be an heir of a Pattadhikari.

2. The answer to the second question is, that if it be proved that the man who claims to be an heir of the deceased is possessed of all the qualifications above-mentioned, and the Pattadhikari on his death-bed conferred the office upon him with the ceremony called the "Triordha-Diksha," his claim should be admitted.

3. The answer to the third question is, that if the Pattadhikari of the head Matha possesses all the qualifications, and if he has a right derived from long-established custom, he may be allowed to succeed.

Sholapoor, December 3rd, 1856.

AUTHORITY.—Mit. Vyav. f. 59, p. 1, l. 13.

REMARKS.—According to Steele, Law of Caste, p. 105, the head of the Matha (Pattadhikari) appoints his successor, or the disciples elect a new Pattadhikari with the sanction of the caste, Zamindars or Government.

In some Mathas the Jangamas are married. *Ibid.* p. 106.

There is a good account of the usual origin of a Matha in *Sammantha Pandara* v. *Sellappa Chetti* (*r*) referred to above.

SECTION 3.—HEIRS TO A JATI.

INTRODUCTORY REMARK.

The Jainas are divided into Yatis or Jatis, religious devotees, and Sravakas, lay-brethren. As the Jainas deny the authority of the Vedas, they belong to the Pashandas, heretics, and their devotees, consequently, are not subject to the laws of the Sannyasis. Regarding the history and doctrines of the Jainas, see H. H. Wilson, Works, Ed. R. Rost, Vol. I., pp. 276—369; and regarding

(*r*) I. L. R. 2 Mad. 175.

the practices of the Yatis, *ibid.* p. 317 ff. For rules and customs as to the succession to Gurus, see Steele, Law of Caste, p. 103.

Q. 1.—(1) A Jati died leaving two disciples. They may have effected a partition of the property of their Guru or left it undivided. Afterwards the senior disciple died, leaving a disciple. The questions are, whether this disciple can claim a moiety of the property of his grand-Guru? or whether it will go to the brother-disciple of the last deceased?

(2) A Jati first became a disciple of one Guru, and afterwards of another by the ceremony called "Sipuj," and assumed the name of Datta. Subsequently he called himself by a name in which his first and the second name were compounded. Is the Jati to be considered a disciple of the first Guru? and can he inherit from his Guru in preference to his brother-disciple?

A.—(1) The Sastra declares that the best disciple is the heir of his Guru. The two disciples, having effected a partition of their Guru's property, became separate. Afterwards one of them died. His disciple therefore is the legal heir. If the Guru's property had not been divided, yet the right to an equal share of it on the part of each of the two disciples is inherent, and the disciple of the deceased should be allowed to take whatever share belonged to his Guru.

(2) The Jati, who became a disciple, first of one and then of another Guru by the ceremony called "Sipuj," cannot be considered to have deserted his first Guru. He still calls himself by the name which his first Guru gave him. He cannot therefore be considered to have forfeited his right of inheritance.

Surat, September 29th, 1849.

AUTHORITY.—Mit. Vyav., f. 59, p. 1, l. 13.

Q. 2.—A Guru of the Sravaka sect has applied for a certificate declaring him to be the heir of a disciple of his Guru-Bhau. The applicant has kept a woman. Is his right to inherit from the deceased affected by this circumstance?

A.—A Guru is like a Sannyasi, and fornication on his part is contrary to the Sastra and the usages of the Jaina sect. A Guru addicted to such a vice forfeits his right of inheritance.

Surat, October 28th, 1850.

AUTHORITIES.—(1) Mit. Vyav., f. 59, p. 1, l. 13; (2) Yoga Chandrika.

SECTION 4.—HEIRS TO A NANAK SHAHI.

Q. 1.—A man of the Nanak Shahi sect died. There are his Guru-Sishyas and Guru-Bhaus. Which of these should be considered his heir?

A.—The sect founded by Nanak Shahi is not recognized by the Sastra. It has recently come into existence. The persons of that sect are Sudras, whose property cannot be inherited either by their Gurus or Sishyas, and others connected merely by the similarity of their tenets. The property should be taken possession of by the Sirkar.

Poona, July 4th, 1851.

AUTHORITY.—Vyav. May., p. 142, l. 2.

REMARKS.—1. Regarding the tenets and history of the Nanak Shahis, see H. H. Wilson, Works, Ed. R. Rost, vol. I., p. 267 ss.

2. The Sastri seems to intend that the Nanak Shahi, being Sudras, cannot be placed under the rules regarding the inheritance to a Sannyasi. But it by no means follows that for this reason the property is to be considered heirless. According to what has been said in the Introductory Remark to Chap. V., sec. 1, the case ought to be decided according to the custom of the sect.

SECTION 5.—MANBHAU.

Q. 1.—There are two sects of Manbhaus. The individuals of the one lead a life of celibacy, and the individuals of the other marry. Among the former, are preceptors and disciples the heirs of each other; and among the latter, are sons and other relations the heirs?

A.—There is no provision in the Sastra regarding the sect, and the question therefore must be decided according to the customs of the sect.

Ahmednuggur, October 27th, 1848.

Q. 2.—Can a disciple of the "Malri" caste be the heir of a Manbhavini (a woman who had embraced the tenets of Manbhau)?

A.—If the man of the Malri caste was made a disciple according to the custom of the sect, he can be the heir.

Khandesh, October 11th, 1852.

Q. 3.—A "Guru Bahina" of a man of the Manbhau sect died. He claims her property. Can it be given to him even if the Guru is said to be living in another country?

A.—There is nothing in the Sastras regarding the sect. Their customs, therefore, whatever they may be, should be respected.

Ahmednuggur, October 16*th*, 1850.

Q. 4.—A woman had two sons, named Saybowa and Sukhadeva. The woman, though originally a Sudra, adopted a Manbhau for her Guru. Her younger son Sukhadeva also chose the same Guru, so that according to the custom of the sect, the mother and the son became Gurubhau and Gurubahina (brother and sister) of each other. Saybowa had selected a different Guru. The mother, after her initiation into the sect, built a house. Subsequently she and her son Sukhadeva died. The latter has left a disciple. By the custom of the Manbhau sect a Gurubhau becomes heir. The question therefore is, whether the disciple of Sukhadeva, who was the Gurubhau of his mother, or the son of Saybowa, should inherit it?

A.—According to the Sastra, the son or the grandson is the heir to the property of his mother.

Khandesh, February 10*th*, 1851.

Authority not quoted.

SECTION 6.—HEIRS TO A VAIRAGI.

Introductory Remarks.

Regarding the history and tenets of the Vairagis, see H. H. Wilson, Works, Ed. R. Rost, vol. I., p. 184 ff.

Regarding their customs see also, Steele, Law of Caste, pp. 102, 433 ss. Vairagis so-called are sometimes found in occupation of temples, as amongst the Shenvi Brahmans in Bombay. They in some cases hold the temple property after the manner of true mahants, and appoint chelas, subject to approval by the panch or committee of the Vairagis of the other temples in the island. In other cases the property is held by trustees for the temple, and the *quasi*-mahants' appointment of a successor is little or nothing more than a recommendation of him as worshipper to the trustees in whom as representatives of the caste, owners of the temple, the right of nomination is really vested. The

practice varies as to the direct ownership of the endowment, as to its management, as to the removableness of the worshipper, and the hereditary descent of his office to chelas whether nominated or not, and has seldom acquired in any institution the consistency and permanence requisite to a custom to be recognized by Courts of law.

The Vairagis are Vaishnava mendicants, following either the doctrines of Ramananda or of Nimbaditya, Kabir, Dadu, and other teachers. They receive Sudras and women into their community, and for this reason they can neither be considered real Sannyasis, nor be subjected to the laws of the Dharmasastra. It would however seem that the married Bhat Vairagis, mentioned by Mr. Steele, form an exception, and are simply Grihasthas or householders.

SECTION 6 (1).—HEIRS TO A VAIRAGI (*s*).

Q. 1.—Who is the heir of a deceased Vairagi?

A.—If the deceased has left any property, his disciple, and if there is no disciple, one of his sect will be the heir. A Vairagi, however, can give away his property to any one he chooses.

Surat, August 1st, 1845.

Authority not quoted.

Remarks.—1. See Steele, Law of Caste, p. 109, 1st ed.; p. 103, 2nd ed.
2. A Vairagi may retain his property (*t*).

Q. 2.—Can a disciple of a Vairagi be his heir?

A. The Sastra takes cognizance of the succession by a disciple of a Sannyasi, but not of a Vairagi. The custom, therefore, should be the rule in the case of the latter sect.

Poona, December 26th, 1854.

Authority not quoted.

(*s*) A disciple who leaves his Guru without permission and goes away, manifesting an intention to be permanently absent, is not entitled to a share in the succession, *Soogun Chund et al.* v. *Gopal Gir et al.*, 4 N. W. P. R. 101. This occurs not unfrequently, as the chelas go about to seek a better settlement. They cannot again become chelas in the proper sense, but they sometimes attach themselves to mahants or *quasi*-mahants as assistants, and get nominated or elected as successors.

(*t*) *Jagannath Pal* v. *Bidyanand*, 1 Beng. L. R. A. C. 114.

Q. 3.—One Bhagvandas performed the funeral rites of the deceased Atmaram Bava Vairagi. The heads of the Vairagi sect called the " Mahants," who had come on the occasion, recognized Bhagvandas as the successor of the deceased. Should he or the sister of the deceased be considered the heir?

A.—According to the usages of the sect, Bhagvandas is the heir, by reason of his being a properly qualified disciple. The sister, though a Sapinda relation, is not the heir.

Ahmednuggar, November 1st, 1847.

Authority not quoted.

REMARK.—See *Mohunt Sheoprokash Doss* v. *Mohunt Joyram Doss* (*v*).

Q. 4.—There were two half-brothers of the Vairagi sect. One of them held a certain estate. On his death his son succeeded. On the death of the son, the other brother came into possession. On his death, his son-in-law succeeded and remained in possession for about sixteen years. He performed the funeral rites of his father-in-law. The brother who first succeeded to the estate left a daughter. She has applied for a certificate of heirship. Can her claim be admitted?

A.—According to the usages of the Vairagi and the Gosavi sects, a virtuous disciple has a better title to succeed than a " Sapinda " relation. The disciple who performed the funeral rites of the deceased will therefore inherit, if he be a virtuous man. The claim of the deceased's niece, who applies for a certificate, should be rejected as being contrary to the usages of the sect.

Ahmednuggur, August 13th, 1847.

REMARKS.—Virtuous here means not merely of good moral conduct, but of adequate capacity to profit by instruction, Viram. Tr., p. 203, though in fact the Vairagis are often grossly ignorant.

2. The adopted son of a Vairagi, who yet mingles in worldly affairs, may succeed to his property (*w*).

(*v*) 5 C. W. R. 57, Mis. A.

(*w*) *Mohount Mudhoobun Doss* v. *Hurry Kishen Bhunj*, C. S. A. R. for 1852. p. 1089.

(2).—GURU.

Q. 1.—Can the Guru of a deceased Vairagi be his heir?

A.—Yes.

Khandesh, February 5th 1857.

AUTHORITIES.—(1) Viram., f. 309, p. 2, l. 10; (2) Vyav. May., p. 142, l. 7.

REMARK.—If such is the custom of the caste, and not, as the Sastri seems to think, according to the Dharmasastra. See *Jugdanund Gosamee* v. *Kessub Nund Gosamee et al.* (*x*).

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(3).—THE FELLOW-STUDENT.

Q. 1.—Can the Gurubhau be the heir of a deceased Vairagi?

A.—Whatever property may remain after the performance of the obsequies of the deceased should be made over to the Gurubhau, if the disciples are not to be found.

Ahmednuggur, April 10*th*, 1846.

Authority not quoted.

Q. 2.—A Vairagi of the Ramavat sect died. There are his nephew and a Gurubhau. Which of these will be the heir?

A.—According to the customs and usages of the sects of the Vairagis and the Gosavis, the Gurubhau will be the heir.

Ahmednuggur, January 16*th*, 1849.

Authority not quoted.

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(4).—THE FELLOW-STUDENT'S DISCIPLE.

Q. 1.—Can a disciple of a Gurubhau be the heir of a Vairagi?

A.—No one can be the heir of a Vairagi except his immediate disciple. If none such is to be found, Government should take the property of the deceased, after defraying the expenses of his funeral.

Ahmednuggur, 1845.

Authority not quoted.

REMARK.—Contradicted by the answers to the preceding Questions.

(*x*) C. W. R. for 1864, p. 146.

Q. 2.—Can a Vairagi marry? and can his wife be his legal heir?

A.—Marriages are allowed among the Vairagis, and the wife of one of that sect is his legal heir.

Ahmednuggur, April 6th, 1846.

Authority not quoted.

CHAPTER VI.

PERSONS DISABLED TO INHERIT (*y*).

SECTION 1.—PERSONS DISEASED IN BODY OR MIND.

Q. 1.—A man has been blind of both eyes for about 16 years. He lives with his son. The son incurred some debt for the support of his family. A creditor attached the son's house, which was his ancestral property. The blind father applies for the removal of the attachment. Should it be granted?

A.—If the blindness of the father is not curable he can only claim maintenance. He has no right to the property, and consequently his application is not admissible. The debt, which was incurred on account of the family must be paid from the property of the family.

Ahmednuggur, October 9th, 1850.

AUTHORITIES.—(1) Vyav. May., p. 161, l. 5 and 7 (see Auth. (5)); (2) p. 164, l. 6; (3) p. 175, l. 8; (4) f. 19, p. 2, l. 3; (5*) Mit. Vyav., f. 60, p. 1, l. 13 : " 'An impotent person, an outcast and his issue, one lame, a mad man, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, excluding them from participation.' 'An impotent person,' one of the third gender (or neuter sex). 'An outcast,' one guilty of sacrilege or other heinous crime. 'His issue,' the offspring of an outcast. 'Lame,' deprived of the use of his feet. 'A mad man,' afflcted by any of the various sorts of insanity, proceeding from air, bile, or phlegm, from delirium or from planetary influence. 'An idiot,' a person deprived of the internal factulty, meaning one incapable of discriminating right from wrong. 'Blind,' destitute of the visual organ. 'Afflicted with an incurable disease,' affected by an irremediable distemper, such as marasmus or the like." (Chap. II. sec. 10, paras. 1, 2.) Under

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(*y*) The Smriti Chandrika, Chap. V., p. 9, teaches that the epithet "incurable" being attached only to "disease," the other qualifications, though not congenital or permanent, exclude if apparent at the time of partition (becoming possible). Loss of caste does not now deprive of heritable capacity, Act. XXI. of 1850. *Honamma* v. *Timmana Bhat*, I. L. R. 1 Bom. 559.

The Roman law, after the establishment of Christianity, deprived heretics of heritable and testamentary rights. See Cod. Lib. I. Tit V. l. IV.

the term "others" are comprehended one who has entered into an order of devotion, an enemy to his father, a sinner in an inferior degree, and a person deaf, dumb, or wanting any organ. (Colebrooke, Mit., p. 360; Stokes's H. L. B. 455.)

Remark.—In the case of *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh* (*z*), it was admitted that a woman's insanity at the time of her mother's death excluded her from the inheritance, but opened it to her sons (*a*). In *Daee* v. *Poorshotum Gopal* (*b*) it was ruled that a blind widow does not succeed to her husband's property. In the case at 2 Macn. H. L. 42, it is not specified whether a son, excluded in favor of a daughter, was insane from birth or not. In Col. Dig., Book V., T. 320, 321, 326, 331 Comm., Jagannatha seems to contemplate the defect that excludes as congenital, though it is not so stated; and so as to blindness and lameness. In the present case, the property having actually vested, the texts cited do not seem to deprive the owner. The answer to the next question appears equally applicable to this one. In *Musst. Balgovinda et al.* v. *Lal Bahadoor et al.* (*c*) it is ruled that subsequent insanity does not cause a forfeiture. See Book I., p. 150, *supra*.

Q. 2.—A blind man inherited certain property. It cannot be ascertained whether he and his brothers have separated. Are the blind man's sons and brothers entitled during his lifetime to take the management of the property into their hands?

A.—The Sastras do not provide that a blind man may be dispossessed of his property. If he is unable to take care of the property, those who are united in interests with him, as his brothers and sons, have a right to take charge of it.

Poona, January 16*th*, 1845.

Authorities.—(1*) Mitakshara, f. 60, p. 1, l. 13 (see Chap. VI., sec. 1, Q. 1); (2*) Mit. Vyav., f. 60, p. 2, l. 7 :-

"But their sons, whether legitimate or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects." (Col. Mit., p. 363; Stokes's H. L. B. 457.)

Remarks.—1. If the man was blind at the time the inheritance would have devolved upon him, that circumstance would, according to some opinions, act as a disqualification. See, however, the cases noticed under the head "Persons disqualified to inherit," in the Introduction. Only sons by birth and Kshetrajas are mentioned as taking the place of a disqualified father, not sons by adoption. His sons, if he had any, would take his share.

(*z*) 13 M. I. A. 519.

(*a*) See also *Prem Narain Singh* v. *Parasram Singh*, L. R. 4 I. A. 105.

(*b*) 1 Borr. R. 453.

(*c*) C. S. D. A. R. for 1854, p. 244.

2. In Bengal it was ruled that a son born to a deaf and dumb man after the grandfather's death could not inherit (*d*). See the case of *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh* (*e*), above, as to a woman's insanity. A blind woman may dispose by will of property to which she is absolutely entitled (*f*).

Q. 3.—Can a man claim a share of his ancestral property, if he is not completely blind?

A.—A man not completely blind does not forfeit his right to a share.

Rutnagherry, December 12*th*, 1850.

AUTHORITY.—Vyav. May., p. 161, l. 5.

REMARKS.—1. For the Sastras mention only a BLIND man as unfit to inherit. See the definition of "a blind man" in the passage of the Mitakshara quoted under Q. 1.

2. For the Bengal Law, see *Mohesh Chunder Roy et al.* v. *Chunder Mohun Roy et al.* (*g*).

Q. 4.—A man was born lame. The creditors of his brothers having obtained decrees against them attached the property of the family. The lame man has filed a suit for the removal of the attachment from a portion of the property alleged to be his share. The question is, whether a lame man can claim his share of the common property at a time when he is about to be deprived of maintenance?

A.—A sufficient means of maintenance should be reserved for the lame member of the family, and the rest sold for the satisfaction of the decrees of the creditors (*h*).

Rutnagherry, May 19*th*, 1853.

AUTHORITIES.—(1) Vyav. May., p. 161, l. 5 (see Auth. (2)); (2*) Mit. Vyav., f. 60, p. 1, l. 13 (see Chap. VI., sec. 1, Q. 1).

(*d*) *Pareshmani Dasi* v. *Dinanath Das*, 1 Beng. L. R. A. S. C. 117.

(*e*) 13 M. I. A. 519.

(*f*) *Bai Benkor* v. *Jeshankar*, Bom. H. C. P. J. for 1881, p. 271.

(*g*) 23 C. W. R. 78.

(*h*) This and other cases of maintenance are discussed in *Lakshman* v. *Satyabhamabai*, I. L. R. 2 Bom. 494 to the effect that the active members may deal with the whole property in honest transactions for the common benefit. See above, pp. 241, 254-5, 256.

Q. 5.—If a man's brother's son is afflicted with black leprosy, can he claim his share of the family property from his uncle, who is united in interests with him? If not, can his mother claim it? If neither can, will it be obligatory upon the uncle to support the mother and her son affected with the disease? If the share which they otherwise would have claimed is not sufficient to provide a suitable maintenance for them, can the uncle be obliged to make it up from his own means?

A.—A person, afflicted with black leprosy, and his mother have no right to any share. If the share which would have fallen to them is not sufficient to provide a suitable maintenance for them, the uncle must make it up from his own means.

Rutnagherry, August 1*st*, 1855 (*i*).

Authorities.—(1*) Mit. Vyav. f. 60, p. 1, l. 13 (see Chap. VI., sec. 1, Q. 1); (2) Vyav. May., p. 161, l. 3 and 8 (see Auth. 1); (3) p. 164, l. 1 :

Devala : "When the father is dead (as well as in his lifetime), an impotent man, a leper, a mad man, an idiot, a blind man, an outcast, the offspring of an outcast, and a person fraudulently wearing the token (of religious mendicity) are not competent to share the heritage." (Borradaile, p. 133; Stokes's H. L. B. 109.)

Remark.—It is only in a virulent form that leprosy disqualifies (*k*).

Q. 6.—Can a dumb or a mad man claim the property of his ancestors, or does his claim extend to a maintenance only? Should the persons so defective be married? If they die leaving widows, have their widows the same right of adoption as other widows?

A.—If a person is mad or dumb from the time of his birth, he cannot claim the property of his ancestors, though he may claim a maintenance from it. There is no objection to a person of this description being married. His widow may adopt a son.

Tanna, January, 20*th*, 1857.

Authorities.—(1) Mit. Vyav., f. 60, p. 1, l. 13 (see Chap. VI., sec. 1, Q. 1); (2*) f. 60, p. 2, l. 4 :

"For Manu says : It is fit, that a wise man should give all of them food and

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(*i*) This case illustrates what is said above, pp. 232, 241, 242.

(*k*) *Muttuvelayudu* v. *Parasakti*, M. S. R. for 1860, p. 239; *Anant* v. *Ramabai*, I. L. R. 1 Bom. 554.

A leper could not inherit in Normandy, nor could he inherit gavelkind land in England down to the reign of John. See Elton's Ten. of Kent, 96.

raiment, without stint, to the best of his power; for he who gives it not shall be deemed an outcast." (Manu IX. 202; Col., Mit., p. 363, Chap. II., sec. 10, para. 5; Stokes's H. L. B. 456.)

(3*) Mit. Vyav., f. 60, p. 2, l. 12:

"Their childless wives, conducting themselves aright, must be supported" (*l*). (Col., Mit., p. 363, Chap. II., sec. 10, p. 14; Stokes's H. L. B. 457.)

REMARKS.—See Q. 2. There is no special rule regarding adoptions to be made by the widows of men excluded from inheritance; but see Q. 2, and Mit., Chap. II., sec. 10, pl. 9, quoted under Q. 8. If the excluded person cannot adopt so as to give a heritable right, neither, it would seem, can his widow. See Q. 8.

2. A deaf and dumb man having been excluded from an inheritance which was taken by his brother, a son subsequently born to the former was held not entitled to the share of his father which he might have obtained if born before his grandfather's death (*m*).

Q. 7.—A deceased person has left a son who is insane. His nephew has applied for a certificate of heirship. Can it be granted?

A.—As the son is insane, and as the nephew and he are united in interests, there is no objection to the nephew being declared an heir.

Rutnagherry, August 20th, 1846.

AUTHORITY.—Mit. Vyav., f. 60, p. 1, l. 13 (see Chap. VI., sec. 1, Q. 1).

REMARK.—Subsequent insanity does not cause forfeiture (*n*).

Q. 8.—A son of an insane Sudra has brought an action for the recovery of certain immovable property, consisting of land held in Inam and other tenures, alleged to belong to his grandfather. The question is, whether he has a right to do so?

A.—A son of an insane person has a right to sue for the recovery of immovable property of his grandfather.

Tanna, October, 30th, 1856.

(*l*) *Gangabai* v. *Naro Moreshvar et al.*, S. A. No. 94 of 1873, Bom. H. C. P. J. F. for 1873, No. 95.

(*m*) *Bapuji* v. *Pandurang*, I. L. R. 6 Bom. 616, citing *Kalidas Das* v. *Krishan Chundra Das*, 2 B. L. R. 103 F. B. See Q. 8. The blood is in a manner attainted as under the English common law in a case of treason or felony, but only as to rights of inheritance subsequently arriving at completion.

(*n*) *Must. Balgovinda et al.* v. *Lal Bahadoor et al.*, Cal. S. R. for 1854, p. 244.

AUTHORITIES.—(1) Mit. Vyav., f. 50, p. 1, l. 7 (see Chap. II., sec. 1, Q. 1); (2*) f. 60, p. 2, l. 7:

"The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds: But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects." (Colebrooke, Mit., p. 363, Chap. II., sec. 10, para. 9; Stokes's H. L. B. 457.)

REMARKS.—It has been ruled that a man having been disqualified when the succession opened, his sons not then born or begotten are also excluded from the inheritance (*o*).

2. In the case of *Ram Soondar Roy* v. *Ram Sahaye Bhugut* (*p*), a suit was brought on behalf of a lunatic to set aside a sale of family property by his son. Had the lunatic been sane his suit would have been barred by limitation. It was held that as he was entitled only to maintenance under Mit., Chap. II., sec. 10, paras. 6 and 9, he had not a *locus standi* to sue for the property of which in a partition he would get no share. His suit was dismissed. In Bombay it is probable that if any fraud on his right could be proved his maintenance would be made a charge on the estate (*q*).

SECTION 2.—ILLEGITIMATE CHILDREN (*r*).

Q. 1.—Can an illegitimate son of a deceased Gujarathi Brahman succeed as a legal heir to his property, when there is no other heir of the deceased?

A.—An illegitimate son of a Brahman, a Kshatriya, or a Vaisya, cannot be a legal heir of his father. He and his mother, if well

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(*o*) *Pareshmani Dasi* v. *Dinanath Dass*, 1 B. L. R. 117 A. C.; *Kalidas Das et al.* v. *Krishan Chundra Das*, 2 B. L. R. 103 F. B. See Mit., Chap. II., sec. X., paras. 9-11; Datt. Chand. sec. VI., para. 1; Col. Dig., Book V., Chap. V., T. 320, 326 Comm.; Vishnu, XV., 35, 36. By custom in some castes adoption by a qualified person or by his wife on his behalf, with or without the consent of relatives or of the caste, is allowed. See Steele, L. C. 43, 182.

(*p*) I. L. R. 8 Cal. 919.

(*q*) See above, pp. 241, 256.

(*r*) In the case of *Muttuswamy Jagavera Yettappa* v. *Vencataswara Yettaya*, 12 M. I. A. 203, a maintenance, was awarded to an illegitimate son of a brother. An illegitimate son of a Khatri, one of the three regenerate castes, by a Sudra woman, cannot succeed to the inheritance of his putative father, but is entitled to maintenance out of his estate, *Chouturya Run Murdun Syn* v. *Saheb Purhulad Syn*, 7 M. I. A. 18. The child of an incestuous intercourse has no right of inheritance, *D. Parisi Nayudu* v. *D. Bangaru Nayudu*, 4 M. H. C. R. 204; nor has the child begotten in adultery, see pp. 83, 415, *supra; Rahi* v. *Govind*, I. L. R. 1 Bom. 97. But he is entitled, among the Sudras, to maintenance out of his father's estate, *Viraramuthi Udayan* v. *Singaravelu*, I. L. R. 1 Mad. 306.

behaved, can claim a maintenance only from the property of the deceased. The rest of the property should be given to the Sapinda relations. If the property belongs to a learned Brahman, it should, in the absence of relations, be given to learned Brahmans. A king has a right to take intestate property when it does not belong to a learned Brahman.

Ahmednuggur, September 23rd, 1847.

AUTHORITIES.—(1) Manu IX. 155 (see Auth. 2); (2*) Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (3*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1, p. 463).

REMARK.—At present a Brahman's property escheats to the Crown. See *Collector of Masulipatam* v. *Cavaly Venkut Narainappa* (*s*); see also Chap. II., sec. 3.

Q. 2.—A Brahman died without male issue. A "Sapinda" relation of his performed his funeral rites. The deceased has left three sons by a kept woman. They alleged that they rendered useful service to the deceased, and obtained from him the gift of his property. In support of this allegation they have no documentary evidence to adduce. Who should be considered the heirs? the sons or the "Sapinda" relations who performed the funeral rites?

A.—The son of a woman kept by a man of the Brahman, Kshatriya, or Vaisya castes, cannot be his heir. With regard to these three castes, a relation of a deceased person is his heir. If an illegitimate son of any of these castes be a useful servant, he may be allowed a suitable maintenance. He can also keep whatever property the deceased may have given him in free gift. In the case under reference, the sons could not produce any documentary evidence to prove the alleged gift, and as a gift of this kind would not be legal, the sons cannot be considered the heirs of the deceased, but if they are obedient servants, they may be supported.

Tanna, 1847.

AUTHORITIES.—(1*) Mit. Vyav., f. 55, p. 1, l. 11 (see Chap. II., sec. 3, Q. 1); (2*) Vyav. May., p. 140, l. 1 (see Chap. II., sec. 14 I. A. 1, Q. 1, p. 435).

REMARKS.—1. If it could be proved that the deceased had made a gift of

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(*s*) 8 M. I. A. 500.

his property to his illegitimate sons, the gift would be legal, since an unmarried man may do what he likes with his property.

2. A man of one of the superior castes may make a grant to an illegitimate son for his maintenance, which an after-born legitimate son cannot disturb (*t*). The rule is general as to any gift completed by possession (*v*).

SECTION 3.—PERSONS LABOURING UNDER MORAL DEFICIENCIES.

a.—The Enemy of his Father.

Q. 1.—A father says that his son is inimically disposed towards him; that he not only abuses him, but assaults him, and threatens him with death; that he once actually attempted his life and drove him out of his house, telling him to perform the Sraddha of his grandfather in a temple; that he is very ignorant and has dissipated a good deal of the ancestral property; and that if a share of property should now be given to him he would squander it also. The father therefore wishes that his son should not be allowed to claim a share of his property, but a maintenance only. Suppose the father has shown that certain of his accusations are substantially true, should the son therefore be prohibited from claiming a share, and should it be decided that he could claim nothing more than a maintenance? If, on the contrary, it appears that the father hates the son, and contrives to deprive him of the share of the property, that he abuses and assaults his son, and that what the son does is merely in self-defence, can the son then claim a share of the ancestral property from his father? What is the definition of enmity towards one's father? and is a person entertaining it to be deprived of all share in his father's property only, or in all property, whether it be his father's or that of his ancestors?

A.—A person who entertains enmity towards his father (*w*), and the one who labours under the defect of impotency, &c., are precluded from claiming shares. If the son is shown to be ill-disposed towards his father, or insane, or too ignorant to be trusted with property, he cannot claim any share, but mainten-

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(*t*) *Rajah Parichat* v. *Zalim Singh*, L. R. 4 I. A. 159.

(*v*) *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 630; see above, pp. 254-5.

(*w*) A father cannot disinherit a son properly adopted except for special reasons, *Daee* v. *Mothee Nathoo*, 1 Borr., at p. 87.

ance only. If the father hates, abuses, and assaults his son, and the son does the same for self-defence, he cannot be said to be the enemy of his father. If the father contrives to deprive him of his rights, the father must be considered the enemy of his son. If the enquiry into the matter shows that the son is not an adversary of his father, he can claim from his father a share of the property of his ancestors. The enmity towards one's father is not exemplified in the Sastras, but it is merely said that a son who hates or injures his father is his enemy (*x*).

Rutnagherry, August 24th, 1850.

AUTHORITIES.—(1*) Mit. Vyav., f. 60, p. 1, l. 13 (see Chap. VI., sec. 1, Q. 1); (2*) f. 50, p. 1, l. 7 (see Chap. II., sec. 1, Q. 1); (3) Vyav. May., p. 161, l. 8 (see Auth. 1); (4) p. 94, l. 1; (5) p. 94, l. 2 (see Auth. 2); (6) p. 84, l. 4; (7) p. 91, l. 2 :

"The father and sons are equal sharers in houses and lands derived regularly from ancestors; but sons are not worthy (in their own right) of a share in wealth acquired by the father himself, when the father is unwilling." (Borr., p. 54; Stokes's H. L. B. 48.)

REMARKS.—1. A son by birth or adoption can, for adequate reasons, be disinherited; but the course of devolution prescribed by the law cannot be altered by a private arrangement; on the son's disherison the son's son becomes his grandfather's lawful heir (*y*).

2. A son was disinherited and afterwards restored, in *Musst. Jye Koonwar* v. *Bhikaree Singh* (*z*).

3. The sons of outcasts born before their fathers' expulsion are not outcasts but take their fathers' places. Sons born after expulsion are outcasts, but Mitramisra says a daughter is not, for "she goes to another family," Viram. Tr., p. 254 (*a*). That man is in a special degree an enemy of his father who cannot or will not perform the religious ceremonies by which the father is to benefit, see Col. Dig., Book V., T. 320, Comm. Comp. Viram. Transl., p. 256.

(*x*) "*Jure etiam pro tacite exheredato habebitur qui grave crimen commiserit in patrem si nulla sunt condonatœ culpae indicia*," Grot. L. II., C. VII. 25, and the references to the Civil Law. Translation : "He is also held as tacitly disinherited by operation of law, who has been guilty of a grave offence against his father, there being no proof of subsequent condonation." The Roman law imposed no restraints on an unamiable father. At Athens it seems to have been much the same down to Solon's times. Thenceforward public notice of disinheritance had to be given. See Schoemann, Ant. Gr. 502. Zachariae His. J. Graec. Rom. Tit. II. shows the gradual modifications of the patria potestas.

(*y*) *Balkrishna* v. *Savitribai*, I. L. R. 3 Bom. 54.

(*z*) 3 Mor. Dig., p. 189, No. 27.

(*a*) With this may be compared the early English law exempting already born children from their father's outlawry which the after-born ones had to share. See Bigelow, Hist. of Proc., p. 348.

b.—Persons Addicted to Vice.

Q. 1.—A man has a son, but as he was addicted to gambling and opium-eating, the father has constituted his grandson his next heir. Can he legally do so?

A.—It is quite legal for the father to disinherit his son on the ground of his misconduct, and to appoint his grandson to be his heir.

Amhedabad, March 7th, 1856.

Authorities.—(1) Mit. Vyav., f. 45, p. 2, l. 8; (2*) Mit. Vyav., f. 60, p. 1, l. 13 (see Chap. VI., sec. 1, Q. 1); (3) Vyav. May., p. 163, l. 3:

"If there be other sons endowed with good qualities the inheritance is not to be taken by a vicious one; for says Manu—'all those brothers who are addicted to any vice lose their title to the inheritance.'" (Borr., p. 132; Stokes's H. L. B. 109.)

Remark.—This opinion has in several forms been repeated in other cases. It cannot, however, be received without a safeguard against caprice and an appeal to the Civil Court. See 1 Str. H. L. 157.

Q. 2.—A Paradesi had acquired some movable and immovable property before his death. He had a wife and two sons. One of these sons was addicted to gambling and other vices. He contracted some debts and died. The property of the Paradesi was not divided. His deceased son had acquired no property. The question is, whether the creditor of the deceased son can recover the debt from the Paradesi's property? The mother of the deceased son states that her son was a man of bad character, and therefore he was not entitled to any share of his father's property. Is her objection legal?

A.—The son was addicted to grambling and other vices. The debt contracted by him was not on account of the family. The creditor cannot therefore have his claim satisfied from the deceased's share of the common property. The objection of the mother that her son is not entitled to any of the father's property is valid.

Khandesh, August 7th, 1849.

Remark.—See the preceding case. "The father shall not pay his sons' debts; but a son shall pay his father's." Narada, Part II., Chap. III., sl. 11; so held in the case of *Udaram* v. *Ranu Panduji et al.* (*b*).

(*b*) 11 Bom. H. C. R. 76.

Q. 3.—A man had four sons. One of them was a man of bad character. The father therefore excluded him from all participation in his property, and left a direction in his will that the share due to him should be given to his son. The son protested against the validity of the will on the ground that his father was 60 years old at the time of the will, that his hand used to shake, and that the will does not bear his signature. Is it lawful in a father to assign only maintenance to his son, and to bestow his share upon his grandson?

A.—A father is at liberty to distribute the property acquired by himself among his sons in such a manner as he pleases. If one of his sons is insane, or addicted to vicious habits, or hostile, or disobedient to his father, he cannot be allowed a share of his father's property, but a maintenance only. His share would properly be given to his son. The will is not invalid merely because the father being very old could not sign it himself, but desired some other person to sign it for him.

Ahmednuggur, January 25th, 1859.

AUTHORITIES.—(1) Vyav. May., p. 163, l. 3 (see Chap. VI., sec. 3 *b*, Q. 1); (2) p. 161, l. 7 and 8; (3) f. 47, p. 1, l. 7; (4) f. 47, p. 2, l. 15; (5) f. 46, p. 2, l. 2; (6) f. 50, p. 1, l. 1; (7) f. 22, p. 1, l. 2; (8) f. 32, p. 1, l. 9; (9) f. 32, p. 2, l. 5 and 8; (10) f. 60, p. 1, l. 13 (see Chap. VI., sec. 1, Q. 1); (11) Mit. Vyav., f. 60, p. 2, l. 1:

Narada also declares: "An enemy to his father, an outcast, an impotent person, and one who is addicted to vice, take no share of the inheritance, even though they be legitimate; much less if they be sons of the wife by an appointed kinsman." Mit., Chap. II., sec. X., para. 3. (Colebrooke, Inh. p. 361.)

REMARK.—The father has no right to disinherit any one of his sons without reason, and consequently a will to this effect is void according to Hindu Law. (See Book II., Chap. I., sec. 2, Q. 4, 5, 8.) Mitramisra quotes Apastamba to the effect that an outcast is deprived of his right to inherit, and Brihaspati and Manu (see Q. 1) to show that a son incapable of offering funeral oblations is disqualified for the inheritance which is the proper remuneration for the performance of this duty. "Those," he says, "who are incapable of performing the rites enjoined by the Sruti and the Smriti, as well as those that are addicted to vice are disentitled to shares." Viram. Transl. 256. Hence degradation from caste caused an extinction of property (*c*), but without serving as a cause of retraction when the share had once been assigned and taken (*d*).

(*c*) See P C. in *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A., at p. 146.
(*d*) *Ibid.*

c.—ADULTERESSES AND INCONTINENT WIDOWS.

Q. 1.—Can a man's wife, who has been guilty of adultery, lost her caste and left her husband, be his heir?

A.—If the ceremony of Ghatasphota (divorce) has been performed, the wife cannot be the heir.

Ahmednuggur, June 17th, 1846.

AUTHORITY.—Vyav. May., p. 134, l. 6:
"The wife, faithful to her husband, takes his wealth; not if she be unfaithful; for it is declared by Katyayana: 'Let the widow succeed to her husband's wealth, provided she be chaste.'" (Borr., p. 100; Stokes's H. L. B. 84.)

REMARK.—A wife guilty of adultery cannot inherit from her husband, whether the Ghatasphota has been performed or not. But there must be positive proof or at least *very well grounded* suspicion (*e*).

Q. 2.—Can the wife of a deceased Vairagi, who forsook him without obtaining a written permission from him, and conducted herself as a prostitute for twelve years, become his heir?

A.—No.

Dharwar, March 16th, 1860.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 6; (2*) Vyav. May., p. 134, l. 6 (see Chap. VI., sec. 3 *c*, Q. 1).

Q. 3.—A widow bore a son two years after her husband's death. Can she claim the property of her husband?

A.—A widow of bad character has no right to claim the property of her husband.

Dharwar, May 10th, 1850.

AUTHORITIES.—(1) Mit. Vyav., f. 56, p. 2, l. 5; (2*) Vyav. May., p. 134, l. 6 (see Chap. VI., sec. 3 *c*, Q. 1).

REMARK.—See below, Q. 6, Remark.

(*e*) *Ramia* v. *Bhgi*, 1 Bom. H. C. R. 66.

Q. 4.—A deceased person has left distant cousins, the descendants of the fourth ancestor, and a widow, who, on account of her incontinency and pregnancy after the death of her husband, has been refused communication with the caste. Which of these will be his heir?

A.—Should the cousins and the deceased have lived together as an undivided family, the cousins will be the heirs. If they were separate, the widow of the deceased, notwithstanding her bad character, will be the heir.

Poona, August 31*st*, 1848.

AUTHORITIES.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 60, p. 2, l. 2; (3*) Vyav. May., p. 134, l. 6 (see Chap. VI., sec. 3 *c*, Q. 1).

REMARK.—The widow cannot inherit if she has been guilty of adultery before her husband's death. For the effect of her incontinence after his death, see Q. 6.

Q. 5.—Can a Brahman widow, who is guilty of adultery claim her husband's vatan?

A.—No; by her misconduct she has forfeited her right.

Ahmednuggur, 1845.

AUTHORITY.—Vyav. May., p. 134, l. 6 (see Chap. VI., sec. 3 *c*, Q. 1).

Q. 6.—A woman of the Dorik caste, having lost her husband, became the mistress of a man of (another) Sudra caste, and had a daughter by him. Can she claim to be the heir of her husband?

A.—A woman who was chaste at the death of her husband becomes his heir.

Khandesh, January 4*th*, 1851.

AUTHORITY.—Vyav. May., p. 134, l. 4; Mit. Vyav., f. 55, p. 2, l. 1 (see Chap. I., sec. 2, Q. 4).

REMARKS.—1. According to Strange, El. H. L., adultery divests the right of a widow to inherit after it has vested. See Steele, 35, 36, 176.

2. On the other hand, the Sastri's opinion seems to be supported by the Viramitrodaya, where it is said, f. 221, p. 2, l. 8: "And these persons (those disabled to inherit) receive no share only in case the fault was committed or contracted before the division of the estate. But after the division has been made, a resumption of the divided property does not take place, because there

is no authority (enjoining such a proceeding)." It is only through an extension by inference of the rule of exclusion that it is made to include females, who are therefore equally entitled to the benefit of the exception with the males specified, see Vir. Transl. 253, which allows an outcast to recover his rights by performing the proper penance. See Mitakshara, Chap. II., sec. 10, pl. 6; Stokes's H. L. B. 456. Colebrooke, quoted in 2 Strange, H. L. 272, lays down the principle that after the estate has once vested it can be forfeited only by loss of caste. A woman would in general be expelled from caste for proved incontinence, and hence Sir T. Strange (p. 164) has inferred that a widow holds "*dum casta fuerit*" only; but the authorities quoted by Colebrooke do not support the view that any forfeiture of property necessarily attends expulsion from caste. It would follow as a necessary consequence in the case of a member of an undivided family, as all the property would be appropriated by those members who remained in communion with the caste; but this would not be so in the case of a separated person (*f*).

3. The Mitakshara, while it excludes the outcast from participation, adds: "But one already separated from his coheirs is not deprived of his allotment," Mit., Chap. II., sec. 10, pl. 5, 6; Stokes's H. L. B. 456. And now by Act XXI. of 1850, expulsion from caste causes no deprivation of any right of inheritance. At the same time a widow, who remarries, forfeits her widow's estate under Act XV. of 1856. Thus subsequent unchastity does not divest her, but remarriage does (*g*). In the case at 2 Macn. Prin. and Prec. of Hindu Law, 19, the Sastri seems to have held that subsequent incontinence defeated the widow's estate, but "an estate once vested by succession or inheritance is not divested by any act which before succession or incapacity would have formed a ground for exclusion from inheritance" (*h*).

4. Subsequent unchastity does not divest an estate vesting in a mother (*i*). In the case of *Advyappa* v. *Rudrava* (*k*) it is ruled that incontinence does not affect a daughter's succession to her father's estate among Lingayats. See same case, p. 118, as to the similar rule in the case of a mother. This was followed in *Kojiyadu* v. *Lakshmi* (*l*). The disqualification of an incontinent mother to inherit from her son is expressly declared in *Ramnath* v. *Durga* (*m*). It does not prevent a widow's inheriting from her maternal grand-

(*f*) Under the English Law, Freebench, as it is called, "is generally an estate for life. In many manors it is forfeited by incontinency or a second marriage . . . If a widow is found guilty of incontinency she loses her freebench unless she comes into Court riding upon a black ram and repeats certain words," 1 Cruise's Dig. 285.

The widow takes as dower a moiety of gavelkind lands, but her estate is divested by her remarriage or incontinency. Elt. T. of Kent, 87.

(*g*) *Parvati* v. *Bhiku*, 4 Bom. H. C. R. 25 A. C. J.; *Abhiram Das* v. *Shriram Das et al.*, 3 Beng. L. R. 421 A. C.; *S. Matangini Debi* v. *S. Jaykali Debi*, 5 *ibid.* 466.

(*h*) P. C. in *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A. 115, in appeal from 13 Beng. L. R. 1. So *Bhawani* v. *Mahtab Kuar*, I. L. R. 2 All. 171; *Nehalo* v. *Kishen Lall*, I. L. R. 2 All. 150.

(*i*) *Musst. Deokee* v. *Sookhdeo*, 2 N. W. P. R. 361.

(*k*) I. L. R. 4 Bom. 104.

(*l*) I. L. R. 5 Mad. 149.

(*m*) I. L. R. 4 Cal. 550.

mother (*n*). Incontinence is held to prevent one widow getting her share from the other (*o*). Compare 2 Macn. H. L. 133, cited in the Introduction; compare also the case under the Bengal Law of two daughters inheriting jointly from their father, and on the death of one leaving a son while the other is a childless widow, the latter's inheriting, notwithstanding a state has supervened which would have originally been a disqualification (*p*). The daughter's right to inherit arises in cases of a disqualification of the widow through incontinence. Smriti Chandrika, Chap. X., sec. 2, para. 22.

5. In *Honamma* v. *Timanabhat et al.* (*q*), it is laid down that a bare maintenance awarded as such is not forfeited by subsequent incontinence. Sir T. Strange, 1 H. L. 172, thought it was doubtful. At 2 Str. H. L. 310, Colebrooke, referring to Mitakshara, Chap. II., sec. 1, p. 17, says that brethren are not bound to maintain the unchaste widow of their childless brother. Several cases to the same effect are cited in Norton, L. C. 37. The Vyavahara Mayukha, Chap. IV., sec. 8, pl. 6 and 8, and the Mitakshara, Chap. II., sec. 1, pl. 7, relying on a passage of Narada, seem to consider that unchastity, distinguishable from the mere perverseness of pl. 37, 38 of Mitakshara, Chap. II., sec. 1, causes a forfeiture of the right to maintenance. So too the Viram. Tr., p. 143, 153, 174, 219, and the Smriti Chandrika, Chap. XI., sec. 1, para. 49. Good character is insisted on as a condition of the right by the Sastri; above, p. 354, Q. 25. The distinction between the two degrees of misconduct is very clearly taken in Mitakshara, Chap. II., sec. 10, pl. 14, 15 (see also Col. Dig., Book V., T. 414, Com.), from which it appears that in the case of wives of disqualified persons, those merely perverse or headstrong, must be supported, but not those actually unchaste. The case of an adulterous wife and mother are provided for by special texts, and Mitramisra insists on the distinction, Viram. Tr., p. 153. The outcast mother is not outcast to her son, and the outcast wife is not a trespasser in her husband's house (*r*) though to be kept apart: Narada, Pt. II., Chap. XII., sl. 91; Manu, cited in 2 Macn. H. L. 144. In his answer to Chap. IV. B., sec. 1, Q. 1, the Sastri seems to have considered that a woman of abandoned character could claim no more than maintenance out of her mother's estate. A share or an allowance assigned to a widow in an undivided family by way of maintenance is resumable on her grossly misbehaving, according to the Smriti Chandrika, Chap. XI., sec. 1, paras. 47 and 48. The view here taken has very recently been confirmed by the decision in *Valu* v. *Ganga* (*s*) in which the Court declined to follow *Honamma* v. *Timanabhat*.

6. The adulteress may claim bare subsistence from her husband only, Smriti Chandrika, Chap. XI., sec. 1, para. 49, but not while she lives apart (*t*), nor can

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(*n*) *Musst. Ganga Jati* v. *Ghasita*, I. L. R. 1 All. 46.

(*o*) *Rajkoonwaree Dassee* v. *Golabee Dassee*, C. S. R. for 1858, p. 1891.

(*p*) *Vyav. Darp.* 170; *Amrit Lal Bhose* v. *Rajoneekant Mitter*, L. R. 2 I. A. 113.

(*q*) I. L. R. 1 Bom. 559.

(*r*) *The Queen* v. *Marimuttu*, I. L. R. 4 Mad. 243.

(*s*) Bom. H. C. P. J. 1882, p. 399.

(*t*) A claim for maintenance by a wife was disallowed, she not having shown sufficient reason for her desertion or absenting herself from her husband, *Narmada* v. *Ganesh Narayen Shet*, Bom. H. C. P. J. for 1881, p. 215. This

a woman, who has obtained a *Soda-chiti* (divorce) from her husband, sue him for maintenance (*v*). An unjustified withdrawal from her husband suspends her right (*w*); a severer rule applies to a wife guilty of other misbehaviour (*x*). A daughter living apart from her father for no sufficient cause cannot exact maintenance from him (*y*).

7. It is an offence punishable under the Penal Code, sec. 494 as to the woman, under sec. 497 as to the man, to marry the wife of a Hindu not divorced and without the first husband's consent, *Reg. v. Bai Rupa* (*z*). A woman thus married is entitled to maintenance (as a concubine), *Khemkor* v. *Umiashankar* (*a*); so is a concubine, *Vrandavandas* v. *Yemanabai* (*b*).

Q. 7.—A widow, who had no sons, and who was faithless to her husband, assigned her husband's immovable property as security for a debt due to his creditor. Her sister-in-law objected, on the ground of the inability of a faithless wife to mortgage her husband's property. What are the rules of the Sastras on the subject?

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applies equally to any wife wrongfully withdrawing, *Kasturbai* v. *Shivajiram Devkuran*, I. L. R. 3 Bom., at p. 382.

(*v*) *Bhasker* v. *Bhagu*, S. A. No. 298 of 1876, Bom. H. C. P. J. F. for 1876, p. 273. A divorced woman is not entitled to maintenance, *Muttammal* v. *Kamakshy Ammat et al.*, 2 Mad. H. C. R. 337.

(*w*) *Mudvallappa* v. *Gursatava*, S. A. No. 307 of 1872, Bom. H. C. P. J. F. for 1872, No. 1; *Narmada* v. *Ganesh Naranyanshet*, *supra*; *Viraswami Chetti* v. *Appaswami*, *Chetti*, 1 M. H. C. R. 375; *Sidlingapa* v. *Sidava*, Bom. H. C. P. J. F. for 1878, p. 77; S. A. No. 307 of 1872; *Mudvalappa* v. *Gursatava*, Bom. H. C. P. J. F. for 1873, p. 1. According to Steele, L. C. p. 32, repudiation without maintenance is allowable only in those cases which involve complete loss of caste, such as adultery with a man of lower caste, procuring abortion, or eating forbidden food. In other cases a penance restores the erring wife to her position. Should the husband desert his wife she is entitled to maintenance to the extent of one-third of his property, *Ramabai* v. *Trimbak Ganesh Desai*, 9 Bom. H. C. R. 283, and *Gangaba* v. *Naro Moreshwar*, Bom. H. C. P. J. for 1873, No. 95. See Col. Dig., Book IV., T. 72. In the answer at 2 Str. H. L. 309, the Sastri says that a son must give his mother a bare subsistence even though she be an adulteress. Colebrooke quotes the Mit., Chap. II., sec. 1, para. 7, to show that brethren are not bound to maintain their brother's unchaste widow. He doubts if there is an authority imposing on the son a legal obligation to support an adulterous mother; but Manu and other rishis prescribe the duty under all circumstances. See above, pp. 263, 356, and Manu II. 225, 235.

(*x*) *Shriput* v. *Radhabai*, Bom. H. C. P. J. F. 1881, p. 163; *Narmada* v. *Ganesh Narayan*, *supra*.

(*y*) *Ilata Shavatri et al.* v. *Ilata Narayanan Nambudiri*, 1 M. H. C. R. 372.

(*z*) See to the same effect *Reg.* v. *Kassan Goja*, 2 Bom. H. C. R. 117.

(*a*) 10 Bom. H. C. R. 381.

(*b*) 12 Bom. H. C. R. 229.

A.—A woman, who has no sons and is guilty of adultery, cannot have any claim to her husband's movable or immovable property, although he may have lived separate from other members of his family. Those, who are his legal heirs, entitled to take his property, should liquidate his debt.

Ahmednuggur, September 3rd, 1847.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 6 (see Chap. VI., sec. 3 *c*, Q. 1); (2) p. 135, l. 7§ (3) p. 155, l. 5; (4) p. 159, l. 5; (5) p. 181, l. 5; (6) Mit. Vyav., f. 12, p. 1, l. 10.

Q. 8.—Can a widow, who has re-married, inherit the property of her former husband? If the widow has some children by her first husband, and if they are left under the protection of her husband's brother, can the brother in his capacity of guardian claim his deceased brother's property, or should it be given to his widow who has re-married?

A.—A widow, who re-marries, cannot be considered a faithful wife. She cannot therefore claim the property of her first husband. If she has some children by her first husband, and if they are left with her husband's brother, he can claim the property of the deceased.

Sadr Adalat, July 30th, 1849.

REMARK.—The case would fall under Act XV. of 1856, and the Sastri's decision seems to agree with sec. 2 of that Act. See also Chap. II., sec. 6 B.

BOOK II.

PARTITION.

Definition.

§ 1. The Law of Partition is the aggregate of the rules, which, when a Hindu family (*a*), living in union, separates, determine the duties and rights of its several members with respect to the common property and liabilities (*b*). The basis of this law is the

(*a*) In the case of *Raj Bahadur* v. *Bishen Dayal*, I. L. R. 4 All. 343, it was recently held that the Hindu law applies of its own force only to an orthodox Hindu. This rule literally applied would exclude from the operation of the Hindu law Jains, Lingayats, and other sects of dissenters. But Hinduism is a matter of race as well as of religion, and the Hindu law, as we have seen, allows all classes of Hindus to be governed by their own customs when these differ from the general law. This is the basis of the customary law of castes (see *Mathura Naikin* v. *Naikin*, I. L. R. 4 Bom. 545), according to the Hindu view of the matter, and the indulgence extends even to the established usage of a family. In the case referred to, the High Court at Allahabad found a similar rule applicable to a Hindu family half-converted to Mahomedanism, as a law of "justice, equity and good conscience," and upheld a claim for partition according to the Hindu law, because as to inheritance the family had adhered to that law. The case of *Abraham* v. *Abraham*, 9 M. I. A. 195, is cited, but that of the Khojas and Memons, Perry, Oriental Cases, 110, is not referred to. Cutchi Memons and Khojas retain by custom some Hindu laws of Inheritance, but are otherwise governed by the Mahomedan law; *In re Haji Ismail*, I. L. R. 6 Bom. 452; *Ahmedbhoy Hubibhoy* v. *Valleebhoy Casumbhoy*, *ibid.* 703. Mere apostasy does not free from the Hindu marriage-law. See *Government of Bombay* v. *Ganga*, I. L. R. 4 Bom. 330; Act. XXI. of 1866. In Madras a view has been taken which would enable an association for almost any purpose to give itself rules analogous to those of the ordinary Hindu law. See below the case of the dancing women.

(*b*) By the Civil Law, partition is regarded as a kind of exchange. Hence an hypothecation of any share, validly created, subsists on all the shares after partition. "The doctrine of the old French law was, on the other hand, that a partition had no relation either to the contract of exchange, or to the contract of sale; that it was not in the nature of a purchase-deed (*titre d' acquisition*), but only had the effect of determining and limiting to certain subjects the indefinite share which, before the partition, each co-heir or other co-proprietor had, in the mass of the property, divided. According to the distinction to be

family. Property in common is regarded as an attribute or consequence of the relation of community of origin, not union of property as the source of the rights and duties of the co-sharers. A mere association in estate (*c*) will not make the subjects of it

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found in the writings of so many French Jurists and in the Code itself, the instrument of partition was '*un acte déclaratif*,' not '*un acte translatif de propriété*,'" P. C. in *Courteaux* v. *Hewetson*, L. R. 6 P. C., at p. 412; Poth. Tr. de V. Pt. VII., arts. 6, 7.

The former of these two theories somewhat resembles that of the Bengal law, as given in the Daya Bhaga, Chap. I., paras. 8, 35 (Stokes's H. L. B. 184, 193). The ownership of sons arises, according to Jimutavahana (para. 14), only on the death of their father, and there exists *per my et non per tout*, "a several though unascertained right in each coparcener" (1 Macn. H. L. 5), being as to each limited to a particular share, which is merely distinguished individually from the others by the act of partition, see Jagannatha in Col. Dig., Book V., T. 2 Comm.; 1 Str. H. L. 201. This view is contested by the Viramitrodaya, Transl., p. 2, and by some even of the Bengal writers, as may be seen from Colebrooke's notes, but on it rests the recognised right of an undivided co-parcener to deal with his own share by way of sale or mortgage. The Mitakshara on the other hand assigns to the sons a common ownership with their father by birth (Mit., Chap. I., sec. 1, para. 23; Stokes's H. L. B. 374), which extends, in the case of each co-sharer, to the whole, so as to prevent any one singly from dealing even with a part (para. 30; 1 Macn. H. L. 5), and then partition is the mutually exclusive concentration on particular portions of the individual ownerships previously extending in mutual concurrence over the whole property (para. 4). Compare the Smriti Chandrika, Chap. XII., para. 9, and the Viramitrodaya, Transl., pp. 3, 19, 42. On the death of a parcener "without male issue, his share becomes extinct, because no partition has taken place in the family, and there has consequently been no ascertainment of the share of each parcener." See *Udaram Sitaram* v. *Ranu Pandoji*, 11 Bom. H. C. R. 76; *Narsinhbhat* v. *Chenapa Ningapa*, S. A. No. 205 of 1877, Bom. H. C. P. J. F. for 1877, p. 329.

(*c*) The mutual relations of members of a united family are sharply distinguished from those of mere partners, *Samalbhai* v. *Someshwar et al.*, I. L. R. 5 Bom. 40; and the Viram. quoted below, though the association of the latter is recognized as much more intimate than under the European laws. Partnership, however, must now be governed by the Indian Contract IX., of 1872. On the division of a caste the Courts have sometimes declined jurisdiction in a quarrel concerning a partition of the caste property, as being a caste question excluded from cognizance by Reg. 2 of 1827, sec. 21, see *Girdhar* v. *Kalya*, I. L. R. 5 Bom. 83. As to the last point see Act XIV. of 1882, sec. 11, and *Vasudeo* v. *Vamnaji*, I. L. R. 5 Bom. 80. Without such a provision the decisions of the castes would be subject to revision by the King's Courts according to the Hindu law, see 2 Str. H. L. 267, and it is not infrequently a question whether a caste decision, so called, has been properly arrived at; *Murari* v. *Suba*, I. L. R. 6 Bom. 725. As to the incidental cognizance of a religious question, by a Civil Court, reference may be made to *Krishnasami* v. *Krishnama*, I. L. R. 5 Mad. 313, and to *Brown* v. *Cure of Montreal*, L. R. 6 P. C., p. 157; as also to *Dhurrum Singh* v. *Kissen Singh*, I. L. R. 7 Cal. 767.

members of a joint family, but their being members of a joint family makes their estate and their acquisitions, except in special cases, common property (*d*). The dissolution of the union makes joint property in this sense impossible except after a re-union. Separate rights of the members take the place of the undiscriminated common right, and the shares are determined according to the branches and sub-branches proceeding *inter se* from the common stem (*e*).

The Mitakshara (Chap. I., sec. I., para. 13), explaining the familiar text as to the sources of ownership, says that Inheritance "relates to unobstructed and Partition to obstructed inheritance." The exposition in the Viramitrodaya is that "unobstructed" relates to a right of ownership actually subsisting in the lifetime of one from relationship to whom it arises, and "obstructed" to one only ready to come into existence on the death of the obstructing owner, or a partition by several such owners. Thus inheritance would apply to the sons taking collectively the aggregate patrimony, partition to collaterals taking the same estate, not previously vested in them, according to their shares, or a mother taking on a partition by sons (*f*).

The intimate connexion of the laws relating to the two subjects has frequently been recognized. "Inheritance," in the sense of a right coming into active existence only at a preceding owner's death, does not apply to the most frequent and important cases of inheritance under the Hindu law as conceived by the Mitakshara and its followers. The growth of a family is regarded as like the growth of a banyan tree, each new male offshoot of which immediately becomes a part of the whole, capable, when the parent stem perishes, of continuing the existence of the aggregate of which it then becomes the most important, perhaps the sole remaining, element. The Hindu lawyers of the Western School accordingly treat of Partition under the title of Dayavibhaga, regarding the contents of which see Book I., pp. 51 ss.

Vijnanesvara's definition of the word "Partition" is defective (*g*), since it does not touch on the duties and liabilities of the

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(*d*) Comp. Laveleye, Prim. Prop. 181 ss.

(*e*) Comp. Maine, Early Hist. of Inst., p. 79, and *Ballabhdas* v. *Sundardas*, I. L. R. 1 All. 429. See the Viram. Transl., pp. 168, 162; Vyav. May., Chap. IV., sec. 2.

(*f*) See above, p. 63; and below, Digest of Vyavasthas, Chap. II., sec. 2. See also the Madhaviya, pp. 4 ss.

(*g*) See Mit., Chap. I., sec. 1, para. 4.

coparceners, which, as the subsequent treatment of this title shows, are apportioned in the act of Partition just as clearly as the shares of the common property.

Subdivision.

§ 2. The subjects which the law of Partition presents for consideration, therefore, are:

I. The family living in union,
II. The separation of such a family,
III. The common property to be distributed,
IV. The common liabilities to be distributed, and
V. The duties and rights arising from the separation.

The evidence of Partition, though it forms strictly no part of the law of Partition, may be included under this head for convenience sake, and in deference to the custom of the Hindu lawyers, who always treat it under this title.

I. The Family Living in Union.

§ 3. The normal state of a Hindu family is one of union (*h*).

(*h*) *Gobind Chundar Mookerjee* v. *Doorga Parsad Baboo*, 22 C. W. R. 248, and the cases there cited by Sir R. Couch, C.J.; *Rewun Persad* v. *Musst. Radha Beeby*, 4 M. I. A. 137; *Prit Koer* v. *Madho Pershad Singh*, L. R. 21 I. A. 134.

"The common abode of brethen is preferable while the parents are alive, as likewise after their death," Viram. Tr., p. 52. "But if increase of religious merit (by sacrifices) be desired, then partition should be made." *Ibid.* See *Neelkisto Deb.* v. *Beer Chunder Thakoor*, 12 M. I. A., at p. 540.

As to the case of a younger brother gradually admitted by the elder to a participation in his business, see the reply of the Sastris in *Abraham* v. *Abraham*, 9 M. I. A., at p. 235; *Vedavalli* v. *Narayana*, I. L. R. 2 Mad. 19. See Maine, Anc. Law, Chap. VIII., p. 261 ss. In *Boologam* v. *Swenam*, I. L. R. 4 Mad. 331, and some other cases it seems to be held that dancing girls living chiefly by prostitution are capable of forming a joint family. The invested earnings of two sisters were held not to be "gains of science' partible with the rest of the family, but self-acquired impartible property of the two gainers. A true joint family could not possibly spring from a prostitute mother, but the family might possibly "constitute themselves parceners after the manner of a Hindu joint family," as in the case cited above, p. 5 (*g*).

Joint tenancy under the English law arises only from some act of the parties (see Cruise, Dig. Tit. XVIII., Chap. 1): joint tenancy by inheritance is not recognised, though co-parcenership is. The joint estate of a united Hindu family differs in some respects from both. Thus, the co-sharers, unlike English coparceners, have, under the Mitakshara, an entirety of interest, and along with a limited representation (*supra*, pp. 61 ss.) there is a *jus accrescendi*. On the other hand a joint tenant can dispose of his own share,

The rule holds (*i*) as to the family of a Sudra in which illegitimate sons are members equally with those who are legitimate, though entitled on partition, which as coparceners they can enforce (*k*) to only one half of the shares taken by the latter (*l*).

The group thus constituted is in most of its civil relations to those outside it regarded as a social unit with common interests and duties as well as in typical cases common sacrifices and a common household. In such a group, membership of which may be abandoned, as unanimity cannot in all things be secured, the predominant will must be that of the greater number or of those who can exert the greater energy. Thus it was said that a majority of united brothers may deal with the estate even by way of alienation of part of it for the obvious benefit of the whole (*m*). Where four brothers sold a small part to redeem a large one, the adopted son of the fifth brother was held bound by the transaction (*n*) though he had not assented to it. This is perhaps the necessary practical solution of the question arising from a conflict of wishes amongst co-equals. The doctrine of the older jurists, however, seems to have been that a complete consent of all concerned was

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and thus sever the joint tenancy, which the Mitakshara does not allow without the assent of the other co-sharers in a united family. See for the present law pp. 166, 203, and *note*. Partition of a joint tenancy could not be enforced under the English common law prior to the Statutes of 31 and 32 Hen. VIII., but a writ of Partition was given to coparceners by the common law.

To the intimate union of the Hindu family may be traced the widely spread *benami* system under which one person, usually a near relative, purchases property in the name of another. A father not distinguishing his own interests from those of his son, invests money or establishes a business in the name of the latter as born under a favouring star. Next comes a similar purchase for the purpose of securing the investment against future chances. Finally arises a system of fictitious ownership. The Courts, looking to the facts, decline to recognise generally in a purchase by a Hindu in the name of a son an intended advancement of the son as under the English law. The presumption is in favour of a purchase for the benefit of him who supplies the price. See *Naginbhai* v. *Abdulla*, I. L. R. 6 Bom. 717; *Gopu Krist Gosain* v. *Gunpersaud Gosain*, 6 M. I. A. 53; Indian Trusts Act II., of 1882, sec. 82.

(*i*) *Raja Jogendra Bhupati* v. *Nityanund Mansingh*, L. R. 17 I. A. 128; S. C. I. L. R. 18 Cal. 151.

(*k*) *Thangam* v. *Suppa*, I. L. R. 12 Mad. 401.

(*l*) *Sadu* v. *Baiza and Genu*, I. L. R. 4 Bom. 37.

(*m*) *Balkishan* v. *Ram*, L. R. 30 I. A. 139; *Miller* v. *Ranganath*, I. L. R. 12 Cal. 389, 399; *Daulat* v. *Mehr*, I. L. R. 15 Cal. 70; *Sheo* v. *Sahib*, I. L. R. 20 Cal. 453; *Hunooman Prasad Panday's Case*, 6 M. I. A. 393.

(*n*) Ratnagiri, 5th June, 1852, M. S.

requisite (*o*) to an effectual volition touching the common property or interests except in cases expressly provided for (*p*). The need for unanimity in common acts is still so strongly felt that it is said the consent of all the co-heirs is requisite to justify expenditure from the common estate even for the funeral ceremonies of a father (*q*), and the legal identity of the several members of the joint family is so complete under the law of the Mitakshara, that a single member cannot, according to the Sastris and to Colebrook (*r*), deal directly with any part of the common property. His gift or bequest of any portion is inoperative (*s*). Visvesvara and

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(*o*) See above, p. 217, note (*p*).

(*p*) See Digest of Vyavasthas, *infra*, Chap. II., sec. 1, Q. 8; see below as to cases, and also above, p. 276, note (*m*).

(*q*) Borradaile's Collection, Lithog. p. 37.

(*r*) 2 Str. H. L. 339, 432, 449. Cf. *Rangayana* v. *Ganapa*, I. L. R. 15 Bom. 673.

(*s*) *Hurreewulubh Gungaram* v. *Keshowram Sheodass*, 2 Borr. 7; *Ichharam* v. *Prumanund*, *ibid.* 515; *Vasudev Bhat* v. *Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Gangubai* v. *Ramanna*, 3 *ibid.* 66 A. C. J. (gift to a daughter); *Rambhat* v. *Lakshman Chintaman*, I. L. R. 5 Bom. 630; Col. Dig., Book V., T. 173, Comm.; Smriti Chandrika, Chap. VIII., p. 20; *Ganga Bisheshar* v. *Pirthi Pal*, I. L. R. 2 All. 635; *Chamaili Kuar* v. *Ram Prasad*, *ibid.* 267; *Unooroop Tewary* v. *Lalla Bandhjee Suhay*, I. L. R. 6 Cal., at p. 753; *Kalu* v. *Barsu*, I. L. R. 19 Bom. 803. Sacrifices, to the completeness of which some expenditure is requisite, can be performed by any member of a united family only with the assent of the others. See the Dharmasindusara, as quoted by Goldstücker (On the Deficiencies, &c., p. 40). The Viramitrodaya, concurring in the view that it is of the essence of a sacrifice to part with property that is distinctly one's own, says that notwithstanding the joint ownership of his sons a father may do this without their permission on account of his (administrative) independence and their dependence. Mitramisra, however, seems to think that where there is a proprietary right there may be, for sacrificial purposes at any rate, an effectual relinquishment of that right by the individual, though it be attended with sin. According to this view members of joint families would be free from obstruction in dealing with their own interests. Viram. Tr., p. 14; *infra*, Chap. I., sec. 2, Q. 4, Digest of Vyavasthas. This is cited in *Lakshman. Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A., at p. 195, and the power of alienation is called "an exceptional doctrine established by modern jurisprudence." The subordinate joint ownership of the Hindu wife in her husband's estate does not interfere with his free disposal of it or confer any right of disposal on her, see Viram. Transl., p. 165; Col. Dig., Book II., Chap. IV., T. 28, Comm.; 2 Str. H. L. 7, 16, though her maintenance must be provided for. In Bengal, however, she is recognised as entitled to a share against a purchaser in execution, *Badri Roy* v. *Bhatwat N. Dobey*, I. L. R. 8 Cal. 649.

The consent of brethren is necessary to a gift at a mother's obsequies, 2 Str. H. L. 339, according to the Sastri, on whose reply, however, see the Notes

Balambhatta, in commenting on the Mitakshara, Chap. I., sec. 1, pl. 20 (Stokes's H. L. B. 373), take this as unquestioned; and the passage quoted below from Yajnavalkya (see PROPERTY NATURALLY INDIVISIBLE), shows that the author was still under the dominion, to some extent, of the notion of land being properly impartible, and of its being inalienable, at any rate, without the assent of every co-owner (*t*). The language of the Privy Council is to the same effect with regard to the incapacity of a single member (*v*). But Colebrook having said that in case of an alienation for valuable consideration, "equity would perhaps award partition" to the alienee (*w*), the Courts have allowed execution against the common

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loc. cit. Thus a joint family can act only collectively. At 2 Str. H. L. 449 the Sastri of the Recorder's Court, Bombay, says: "An undivided family having no power individually, but collectively only, no member can, without the concurrence of all, express or implied, dispose of any thing," and such is the purport of the Mit., Chap. I., sec. 1, para. 30; above, p. 446. See also *Chuckun Lall Singh* v. *Poran Chunder Singh*, 9 C. W. R. 483. "An individual cannot alien his real estate to the prejudice of his heirs," Sutherland in 2 Str. H. L. 13, 445. But an occupant under Government may, without assent of the heirs, resign his holding (*Arjuna* v. *Bhavan et al.*, 4 Bom. H. C. R. 133 A. C. J.; *Davalata et al.* v. *Beru bin Yadoji et al.*, *ibid.* 197 A. C. J.), on account of the special relations created by or constituting occupancy, *Gundo Shiddhesvar* v. *Mardan Saheb*, 10 *ibid.* 423; *Ghelabai* v. *Pranjivan*, 11 *ibid.* 222; *Tarachand* v. *Lakshman*, I. L. R. 1 Bom. 91. A member of an undivided family in Madras cannot sell even his own share save in an emergency, according to the cases quoted in the note to *Gangubai* v. *Ramanna*, 3 Bom. H. C. R., at p. 68, A. C. J. But he has this power over what may come to his share in a partition according to *Vitla Butten* v. *Yamenamma*, 8 Mad. H. C. R. 6, and the cases cited by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Prasad*, L. R. 6 I. A., at p. 101.

When one coparcener had sued a stranger for part of the patrimony and failed, and a subsequent suit is brought by one elected manager in the name of all for the same property, a question of *res judicata* arises. Its proper solution may perhaps be referred to this, that the one who sued thereby set up a separate right, and having failed, cannot sue for it again; and as he could dispose effectually of his own interest this is to be deemed transferred to the defendant even though the manager's suit should be successful. See Breton. Const. de la chose Jugee. But a simpler solution is to be found in regarding the single sharer as an essentially different "persona" from the collective one, and the latter as not affected by the act of the former. A suit for property as allotted to the plaintiff in partition does not bar a subsequent suit for partition, *Shivram* v. *Narayan*, I. L. R. 5 Bom. 27.

(*t*) See Mit., Chap. I., sec. 1, para. 30; Stokes's H. L. B. 376; and the Vivada Chintamani, p. 309. See below, sec. 5 B.

(*v*) *Musst. Cheetha* v. *B. Miheen*, 11 M. I. A. 369, quoted below. See too *Rambhat* v. *Luksman*, I. L. R. 5 Bom. 630, *sub fi*;. and the cases there quoted.

(*w*) See 2 Str. H. L. 350, 434.

property, to ascertain the undivided share and make it available to the creditor, whether expressly charged or not, and have even recognized the logical consequence (*x*) that a single coparcener may alien or incumber his own share for valuable consideration, though not gratuitously (*y*), the vendor thus acquiring a right to a partition (*z*). Whether before a partition of interests agreed to by the parties or decreed by a Court, the purchaser's right is more than an inchoate one seems doubtful. The purchaser is said to become a tenant in common (*a*), but still his right has to be worked out by partition (*b*), and it may be said that until the partition of interests is completed there is no individual interest on which the alienation can take effect (*c*), or which will not become absorbed

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(*x*) See *Ponnappa Pillai* v. *Pappuvayyangar*, I. L. R. 4 Mad., at p. 56, *et seq.*

(*y*) *Vasudeo Bhat* v. *Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Rangapa* v. *Madyapa et al.*, S. A. No. 537 of 1873, Bom. H. C. P. J. F. for 1874, p. 171. The High Court of Bengal declined to accede to this principle in *Sadabart Prasad* v. *Phoolbash Koer*, 3 Beng. L. R. 31, but as the liability of the share for its owner's debts has now been established by *Deen Dayal's Case*, L. R. 4 I. A. 247, it would seem that the same consequences must follow in Bengal as elsewhere. See the remarks of the Judicial Committee in *Suraj Bunsi Koer* v. *Sheo Prasad*, L. R. 6 I. A., at pp. 102, 104. In *Musst. Phoolbash Koonwar* v. *Lalla Jogeshwar Sahay*, their Lordships expressly refrained from deciding this question, see L. R. 4 I. A. 7, 21, 26, 27, but in *Suraj Bunsi Koer's Case* it is clearly laid down that even on a bond which could not have been enforced after the obligor's death against his co-sharers (in that case sons) an attachment and order for sale create a charge in favour of the judgment creditor on his debtor's undivided interest which is not extinguished by the debtor's subsequent death and his brother's survivorship. In Madras a decree obtained against a member of a united family does not, according to *Ravi Varma* v. *Koman*, I. L. R. 5 Mad. 223, bind the family property in the hands of the other members after his death. "The interest," it was said, "survived to the other members," and did not "enure as assets of the deceased in the hands of the appellant." In the case, however, of a father succeeded by sons the Judicial Committee have declared that the estate taken by the latter is assets for paying the debts of the former, see above pp. 166, 204, and as to attachment in execution see below, note (*e*).

(*z*) *Udaram Sitaram* v. *Ranu Panduji et al.*, 11 Bom. H. C. R. 76 *Palanivelappa Kaundan* v. *Maunaru Naikan et al.*, 2 Mad. H. C. R. 416; *Sitaram Chandrashekhar* v. *Sitaram Abaji*, S. A. No. 379 of 1874, Bom. H. C. P. J. F. for 1875, p. 140; *Mahadoo bin Jania* v. *Shridhar Babaji*, Bom. H. C. P. J. F. for 1874, p. 114; and *Vrijabhukhandas Kirparam* v. *Kirparam Govandas*, Bom. H. C. P. J. F. for 1879, p. 263.

(*a*) *Udaram Sitaram* v. *Ranu Panduji*, 11 Bom. H. C. R., at p. 81.

(*b*) *Ibid.* 72; above, p. 167. A decree for partition does not, it was said, effect a severance so long as it is under appeal, *Sakharam Mahadev* v. *Hari Krishna*, I. L. R. 6 Bom. 113.

(*c*) See *Ravi Varma* v. *Koman*, I. L. R. 5 Mad. 233, cited below.

by survivorship on the sharer's death (*d*). The view of the Judicial Committee however appears to be that an attachment in execution creates a charge (*e*). See further on this subject below. SEPARATION, BOOK II., sec. 4 C, sec. 5 A, sec. 6 A.

Where one of the members of a joint family has disappeared those who remain may deal with the common property in any way consistent with good faith (*f*).

One only of two or more united coparceners cannot enhance rent against the will of another, or oust a tenant of the family (*g*),

(*d*) See *Suraj Bunsi Koer* v. *Sheo Prashad*, L. R. 6 I. A., at p. 109, and comp. *Kotta Ramasami Chetty* v. *Bangari Sesham Naayanivaru*, I. L. R. 3 Mad., at p. 167; *B. Krishna Rau* v. *Lakshmana Shanbhogue*, I. L. R. 4 Mad., at p. 306, where it is considered that attachment for sale of a coparcener's share severs his interest so as to make it available in case of his death before satisfaction of the decree. If a distinct charge on the common estate is thus constituted it may admit of question whether that is quite consistent with the decree for ousting the purchaser in execution of a manager's share in *Maruti Narayan* v. *Lilachand*, I. L. R. 6 Bom. 564. Property sold or attached under a decree against a father stands on a peculiar footing, which is discussed below.

(*e*) *Suraj Bunsi Koer* v. *Sheo Prashad*, *supra*, and *O. Goorova Butten* v. *C. Narainsawmy*, 8 Mad. H. C. R. 13.

(*f*) *Ramchandra Sadashiv* v. *Bagaji Bachaji*, Bom. H. C. P. J. F. for 1878, p. 134; *Ganesh* v. *Jewach*, L. R. 31 I. A. 10; S. C. I. L. R. 31 Cal. 262.

(*g*) *Krishnarao Jahagirdar* v. *Govind Trimbak*, 12 Bom. H. C. R. 85; *Madharav* v. *Satyana et al.*, S. A. No. 225 of 1875, Bom. H. C. P. J. F. for 1876, p. 8; but see also *Krishna Rav et al.* v. *Manaji et al.*, 11 Bom. H. C. R. 106. Under the English Law it was held that any one of several joint landlords could by notice end a tenancy, *Doe* v. *Summerset*, 1 B. & Ad. 135, *Doe* v. *Hughes*, 7 M. & W. 139. The tenancy seems to be regarded as dependent on a continuous and complete volition, while in India the relation created by contract has usually been treated as requiring a new and complete volition to change it.

Thus one of several co-owners even after a partition of interests without a physical distribution of the estate, cannot, without the assent of the others, increase the rent of tenants or eject them. *Balaji Bhikaji Pinge* v. *Gopal bin Raghu Kuli*, I. L. R. 3 Bom. 23; *Guni Mahomed* v. *Moran*, I. L. R. 4 Cal. 96; *Raghu bin Ambu* v. *Govind Bahirao and others*, Bom. H. C. P. J. for 1879, p. 446. Notice by some co-sharers only of enchancement of rent has in Bengal been held sufficient; see *Chuni Singh* v. *Hera Mahto*, I. L. R. 7 Cal. 633. But the decision was by three Judges against two. Comp. *Gopal* v. *Macnaghten*, *ibid.* 751; *Akojee* v. *Vadelal*, Bom. H. C. P. J. 1882, p. 320.

According to the English common law a compulsion needs the concurrence of all entitled, see *Attwood* v. *Ernest*, 13 C. B. 881, compared with the cases above cited; but an acceptance or assent may be by one, *Husband* v. *Davis*, 10 C. B. 645. Comp. *Krishnarao* v. *Manajee*, 11 Bom. H. C. R. 106.

Some only of the sharers were allowed, contrary to the wish of another sharer, to eject an intruder in *Radha Prashad Wasti* v. *Esuf*, I. L. R. 7 Cal. 414. In Bombay it would perhaps be held that the outsider holding with

or recover his own estimated fractional share of the joint property from a stranger (*h*). He cannot alone sue to set aside a charge created by another (*i*), and the mere assent of other members to a suit brought by one does not supply the place of their joinder (*k*). If the suit as to the added plaintiffs is barred by limitation, it is barred altogether (*l*).

"The rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of coparceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu law imposes upon sons, and the fact that the father is in all cases naturally, and in the case of infant sons necessarily, the manager of the joint family estate (*m*).

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the assent of a sharer was in the same position as if put into possession by him. See *Mahabalaya* v. *Timaya*, 12 Bom. H. C. R. 138. In *Reasut Hossein* v. *Chorvar Singh*, I. L. R. 7 Cal. 470, it was held that some only of several joint lessors could not take advantage of a condition of re-entry. See also *Alum Manjee* v. *Ashad Ali*, 16 C. W. R. 138; *Gokool Pershad* v. *Etwari Mahto*, 20 C. W. R. 138; *Nundun Lall* v. *Lloyd*, 22 C. W. R. 74 C. R. In *Kuttusheri Pishareth Kanna Pisharody* v. *Vallotil Manakel Narayanan*, I. L. R. 3 Mad. 234, it is said that all interested in pressing the claim must be joined as plaintiffs, or if they refuse, as defendants. See Code of Civ. Proc., sec. 26, 28, 32; Indian Contract Act IX. of 1872, sec. 45; and compare *Alexander* v. *Mullins*, 2 Russ. & M. 568.

The same general principle is recognised in *Krishnamma* v. *Gangarao*, I. L. R. 5 Mad. 229, in which it was held that one of several sharers of a village could not enforce on a tenant a patta (memorandum of rent payable) for his separate share of the total rent due by the tenant for his holding. In *Kalidas Kevalda* v. *Chotalal et al.*, Bom. H. C. P. J. 1883, p. 31, it was ruled that all the members of a united family must be joined as plaintiffs in a suit for a trade debt. An express assent to a suit by a manager was held insufficient. Reference is made to *Ramsebuk* v. *Ramlal Kundoo*, I. L. R. 6 Cal. 805, and *Dularchund* v. *Balramdas*, I. L. R. 1 All. 454.

(*h*) *Nathuni Mahton* v. *Manraj Mahton*, I. L. R. 2 Cal. 149.

(*i*) See *Rajaram* v. *Luchman*, 12 C. W. R., p. 478, cited and approved in *Mussumut Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy*, L. R. 3 I. A., at p. 26; *Seshan* v. *Veera*, I. L. R. 32 Mad. 284; *Shamrathi* v. *Kishen*, I. L. R. 29 All. 311; *Jagabhai* v. *Rustamji*, I. L. R. 9 Bom. 311. The greater force of the prohibitive than of the active element in a composite will is generally recognised. Goudsmit, Pand. 75.

(*k*) *Gopal* v. *Gokaldas*, I. L. R. 12 Bom. 158.

(*l*) *Ramslebuk* v. *Ram Lal Koondoo* I. L. R. 6 Cal. 318; *Kalidas* v. *Nathu Bhagwan*, I. L. R. 7 Bom. 217.

(*m*) *Suraj Bunsi Koer* v. *Sheo Prasad Singh*, L. R. 6 I. A. 88, 100. The "obligation" arises, according to the Hindu authorities, only on the father's death. See below.

The joint family is usually represented in external transactions by a managing member or members. The managership naturally belongs to a father during his life and capacity for affairs, and then to the eldest member qualified (*n*). The elder brother may take the management unless the others intimate their dissent (*o*). A manager's right to bind the family estate by transactions or by charitable gifts rests on the consent, express or implied, of the members (*p*). The manager's transactions for the common benefit bind the several members in favour of one dealing with him in good faith (*q*), a want of which may be indicated by the unusual character of the transaction (*r*). A lessee from one member as manager

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(*n*) Steele, L. C. 153, 178; Manu IV. 184; *Bhaoo Appajee Powar* v. *Khundojee wulud Appajee Powar*, 9 Harr. 106; *Bulakhidass* v. *Ghama*, Bom. H. C. P. J. for 1880, p. 224; *Bhagirthibai* v. *Sadashivrav Venkatesh*, Bom. H. C. P. J. for 1881, p. 155; *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 6 I. A., at p. 101; *Babaji Mahadaji* v. *Krishnaji Devji*, I. L. R. 2 Bom. 666. These cases show also what is comprehended in a "family necessity." For further texts see Vyav. May., Chap. IV., sec. IV., para. 7.

(*o*) Steele, L. C. 53; 2 Str. H. L. 331.

(*p*) 2 Str. H. L. 333, 335, 339, 342. *Sheo Shankar* v. *Jaddo Kunwar*, L. R. 41 I. A. 216. On the peculiar position of the manager according to Hindu law, reference may be made to *Chuckun Lall Singh* v. *Poran Chunder Singh*, 9 C. W. R. 483; and *S. M. Rangaumani Dasi* v. *Kasinath Dutt*, 3 B. L. R. 1 O. C. J.; *Miller* v. *Ranganath*, I. L. R. 12 Cal. 389, 399; *Daulat* v. *Mehr*, I. L. R. 15 Cal. 70; *Sheo* v. *Sahib*, I. L. R. 20 Cal. 453; *Sakharam* v. *Deoji*, I. L. R. 23 Bom. 372; *Jagmohandas* v. *Duksal*, I. L. R. 19 Bom. 338; cf. *Venkatramma* v. *Venkayya*, I. L. R. 14 Mad. 377. See also below, V., sec. 7 a. A certificate to collect debts under Act XXVII., of 1860, may be refused to a Karnavam (or manager) of a Malabar Tarwad to whom the members refuse their confidence on account of his being a judgment debtor to the Tarwad, *Madhava Panikar* v. *Govind Panikar*, I. L. R. 5 Mad. 4. Comp. Steele, L. C., p. 54.

(*q*) *Aushutosday* v. *Moheschunder Dutt et al.*, 1 Fult., at p. 382; *Tandavaraya Mudaliv. Valli Ammal*, 1 Mad. H. C. R. 398; *Davlatrao Mane* v. *Narayanrao Mane*, R. A. No. 51 of 1876, Bom. H. C. P. J. F. for 1877, p. 175; *Gundo Mahadev* v. *Rambhat*, 1 Bom. H. C. R. 39; *Nahalchand et al.* v. *Magan Pitambar*, Bom. H. C. P. J. F. for 1879, p. 332; *Johurra Bibee* v. *Sree Gopal Misser*, I. L. R. 1 Cal. 470; *Narayanrao Damodar* v. *Balkrishna Mahadev Gadre*, Bom. H. C. P. J. F. for 1881, p. 293; *Chuni Singh* v. *Hera Mahto*, I. L. R. 7 Cal., at p. 642. See Col. Dig., Book II., Chap. IV., T. 54, Comm. *ad fin*; 2 Strange, H. L. 342, 343; *Kasheekishore Roy* v. *Alip Mundal*, I. L. R. 6 Cal. 149.

(*r*) *Baji Shamraj* v. *Deo bin Balaji*, Bom. H. C. P. J. F. for 1879, p. 238; 1 Str. H. L. 202; see *Hanuman Prasad Panday* v. *Babooee Munraj Koonweree*. 6 M. I. A., at p. 412, and *Kottu Ramasami Chetti* v. *Bangari Seshama*, I. L. R. 3 Mad., at p. 164 *et seq.*, and *Ponambilath Parapravan Kunhamod Hajee* v. *Ponambilath Parapravan Kuttiath Hajee*, *ibid.* 169.

is not discharged by a receipt for rent passed to him by another member (*s*), though under a lease from the members jointly he is. As to the limitations on a manager's authority, see *Gopalnarain* v. *Muddomutty* (*t*), *S. Screemutty* v. *Lukhee Narain Dutt et al* (*v*), and *Suraj Bunsi Koer's Case supra.* A widow managing for her infant son, like any other manager when minors are interested as coparceners (*w*), can deal with the property only to meet existing necessities, but the other party is protected by good faith and reasonable inquiry (*x*), and in *Trimbak* v. *Gopal Shet* (*y*) good faith

(*s*) *Dada Ravji* v. *Bhau Ganu*, S. A. No. 279 of 1875, Bom. H. C. P. J. F. for 1876, p. 11; *Poshun Ram et al.* v. *Bhowanee Deen Sookool et al.*, 24 C. W. R. 319. See *Sangappa* v. *Sahebanna*, 7 Bom. H. C. R. 141 A. C. J., and *Krishnarao Ramchandra* v. *Manaji bin Sayaji*, 11 Bom. H. C. R. 106, 110; *Akoji Gopal* v. *Hirachand*, Bom. H. C. P. J. 1882, p. 320; *Jadoo Shat* v. *Kadumbinee Dassee*, I. L. R. 7 Cal. 150; and Col. Dig., Book II., Chap. IV., T. 54 Comm. *ad fin.* For the English law see *Robinson* v. *Hoffman*, 4 Bi. 562, and *Leigh* v. *Shepherd*, 2 Br. and Bi. 465; *Doe Dem Green* v. *Baker*, 8 Taunt. 241.

Payment to one of several co-sharers frees the tenant as shown in *Krishnarao Ramchandra* v. *Manaji bin Sayaji*, 11 Bom. H. C. R. 106. A suit by one co-creditor, except on the ground of collusion of a co-creditor with the debtor, cannot in general be maintained under the English law, but he can give an effectual discharge; and under the systems derived from the Roman Law he may sue alone for the whole. See Evans's Pothier, I. 144, II. 55 ss. As to debors *in solido* one may properly represent all in paying but not in resisting payment, or in making adverse admissions or a compromise, see Evans's Poth. II. 67. All co-sharers must be served with notice of intended foreclosure, *Norender Narain* v. *Dwarka Lall*, L. R. 5 I. A. 18. Under the Indian Contract Act IX. of 1872, sec. 43, any one of several joint promisors may be compelled to perform the whole promise and may then force the others to contribute. Whether a group of successors however is in this position seems at least doubtful. The Hindu law does not seem to impose any "solidarity" of obligation on them except as members of a united family. Comp. *Doorga Parsad* v. *Kesho Persad Singh*, L. R. 9 I. A. 27, 31.

The co-sharers who have colluded with a tenant to defraud a co-sharer may on that ground be sued by him in common with the tenant for the share of the rent due to the plaintiff, *Doorga Churn Surmah* v. *Jampa Dossee*, 21 C. W. R. 46, and *Kalee Churn Singh* v. *E. Solano et al.*, 24 C. W. R. 267, and see *Akoji Gopal* v. *Hirachand*, Bom. H. C. P. J. 1882, p. 320.

(*t*) 14 B. L. R. 21, 49 (not perhaps quite assented to in Bombay).

(*v*) 22 C. W. R. 171.

(*w*) See *Saravana Tevan* v. *Muttayi Ammal*, 6 Mad. H. C. R., at p. 371. *Durgapersad* v. *Kesho Singh*, I. L. R. 8 Cal., at pp. 661-662; S. C. L. R. 9 I. A. 27. See Steele, L. C., p. 174-5.

(*x*) *Hunoomanpersaud Panday* v. *Musst. Babooee Munraj Koonweree*, 6 M. I. A. 393; *C. Colum Comara Vencatachella Reddyar* v. *R. Rungasawmy, S. J. Bahadoor*, 8 *ibid.*, at p. 323; *Dalpatsing* v. *Nanabhai et al.*, 2 Bom. H. C. R. 306; *Kashinath* v. *Dadki et al.*, 6 *ibid.* 211 A. C. J.; *Bai Kesar* v.

and reasonable inquiry seem to have been thought enough to justify and validate transactions with a member only supposed to be a manager acting for the common interest of the family (*z*). In another case (*a*) the payment to a mother as manager of a debt due on a mortgage executed to her as manager was held to bind the son who by taking no steps for several years after attaining his majority might be deemed to have ratified the transaction of which he had taken the benefit (*b*).

In the common case of an ancestral trade descending to the members of an undivided family, the manager can pledge the property for the ordinary purposes of the business. He may also enter into partnership with a stranger, but not enter into a compromise of partnership differences by a division and transfer of the partnership property, to the possible prejudice of minor members of the united family (*c*). A managing Khot has not authority to give up important rights vested in the members generally (*d*). A manager, it has been said, is not at liberty to pay out of the estate his father's debts barred by limitation (*e*). His authority to acknowledge a debt does not arise necessarily from his position but may be inferred from circumstances. Thus he cannot, without special authority, revive a claim against the family barred by limitation (*f*). The Hindu law (*g*), however, insists strongly on the

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Bai Ganga et al., 8 *ibid.* 31 A. C. J.; *Bai Amrit* v. *Bai Manik*, 12 *ibid.* 79; *Saravana Tevan* v. *Muttayi Ammal*, *supra; Ratnam* v. *Govindarajula*, I. L. R. 2 Mad. 339.

(*y*) 1 Bom. H. C. R. 27.

(*z*) See the cases in note (*x*), p. 570; *Sheo Shankar* v. *Jaddo Kunwar*, L. R. 41 I. A. 216. *Babaji Sakhoji* v. *Ramset Pandushet*, 2 Bom. H. C. R. 23; *Gane Bhive et al.* v. *Kane Bhive*, 4 *ibid.* 169 A. C. J.; *Mahabeer Persad* v. *Ramyad Singh et al.*, 12 Beng. L. R. 90; and the remarks below on Digest of Vyavasthas, Chap. I., sec. 1, Q. 5. Comp. *Doorga Persad's Case* referred to below.

(*a*) *Anant Jaganath* v. *Atmaram*, 2nd App. 301 of 1881.

(*b*) See Act IX. of 1872, sec. 197.

(*c*) *Johurra Bibee* v. *Sreegopal Misser*, I. L. R. 1 Cal. 470; *Ramlal Thakursidas* v. *Lakshmichund et al.*, 1 Bom. H. C. R. li. App.

(*d*) *The Collector of Ratnagiri* v. *Vyankatrav Narayan*, 8 Bom. H. C. R. 1 A. C. J. A father sued for a share of property as joint, and then entered into a *bona fide* compromise. His son subsequently renewing the claim was held bound by the transaction; *Pitam Singh* v. *Ujagar Singh*, I. L. R. 1 All. 651.

(*e*) *Gopalnarain Mozoomdar* v. *Muddomutty Guptee*, 14 B. L. R. 49.

(*f*) *Chimnaya Nayudu* v. *Gurunatham Chetti*, I. L. R. 5 Mad. 169.

(*g*) See Col. Dig., Book I., Chap. V., T. 185, 186; and above, Book I., p. 94.

payment of a father's debt. It is the strongest of the obligations which devolve on the sons, and the pious duty resting on them (*h*) may perhaps be held to justify the satisfaction in such a case of a claim that could not be enforced. In the case of *Tilakchand* v. *Jitamal* (*i*) it was ruled that a barred decree against a father is a valuable consideration for a new engagement by a son, and that a representative is not bound to plead limitation whenever he can do so. This was approved in *Bhala Nahana* v. *Parbhu Hari* (*k*), where a relation of a deceased husband sought to have the act of a widow set aside, by which she fulfilled his engagement made on the adoption of a son instead of setting up limitation as a ground for repudiating it. It would seem, therefore, that in Bombay at any rate a manager may discharge the religious obligation of the family out of its estate without having to make the loss good at his personal cost (*l*). A contract by a manager of a Hindu family with a stranger by which he seeks with the stranger's connivance improperly to obtain for himself an undue share, is rescindible at the suit of the party defrauded, and is not enforceable even as between the contracting parties (*m*).

The cases already referred to will have shown that there is much uncertainty as to the position of members of united families with respect to the property in relation to their co-members and the creditors of co-members and persons with whom the co-members have contracted obligations. It cannot, in many cases, be said with confidence whether the transactions of an alleged manager bind the whole family or not, or whether in a particular instance a member suing or sued is to be deemed a representative of all, and if not what are the precise relations to the family estate which arise through litigation at its several stages between him and strangers with or without liens or ostensible liens on the property. In the case of the transactions of a father and of suits against him as affecting his sons' interests, along with his own, in the family

(*h*) See *Udaram* v. *Ranu*, 11 Bom. H. C. R. 76, 84.

(*i*) 10 Bom. H. C. R. 206, 213.

(*k*) I. L. R. 2 Bom. 67, 71.

(*l*) An executor may pay a barred debt, *Lowis* v. *Rumney*, L. R. 4 Eq. 451, and set off against the share of a next-of-kin a barred debt due by him to the estate, *Re Cordwell's Estate*, L. R. 20 Eq. C. 644. So in India the representatives of heirs claiming a share in accumulations of interest on money in Court must submit to a set-off of barred debts due by them to the estate, *Lokenath Mullick* v. *Odoychurn Mullick*, I. L. R. 7 Cal. 644.

(*m*) *Ravji Janardhan* v. *Gangadharbhat*, I. L. R. 4 Bom. 29; *Balkishan* v. *Ram*, L. R. 30 I. A. 139.

property, a special source of complications has been found in the doctrine by which, in recent years, the pious duty of paying a deceased father's debt not of a disreputable kind has been translated into an authority of the father to burden the estate or dispose of it for satisfaction of such a debt, and a right on the part of creditors to enforce, during the father's life, at the cost of his sons, the moral obligation which, under the Hindu law, cannot arise for them until his death. The father is usually manager. Sometimes after borrowing money for proper purposes he colludes with his sons in trying to evade the obligation by asserting that it was obtained under such circumstances that the family estate is not answerable for it (*n*). The son may have acquiesced in his father's transactions. It does not seem possible to reduce the decisions of recent years on such questions as these to exact harmony; but the questions recur so frequently that it will be useful to collect and compare the chief conclusions arrived at by the several High Courts and by the Judicial Committee. These will be considered as they bear on the ordinary coparceners *inter se*, on the manager, on the father and son, and on strangers connected with them in these several capacities in the way of litigation or of voluntary transactions.

In the case of *Ramsebuk* v. *Ramlall Koondoo* (*o*) at Calcutta, it seems to be intimated that when a joint family carries on trade all the members must join as plaintiffs in a suit arising out of the trade. The claim was held barred because some of the members of the family had not been joined as plaintiffs until the suit as to them was barred by sec. 22 of Act XV. of 1877, though instituted by other members within the period of limitation (*p*). In several other cases the law has been held to be expressed in the less exacting proposition that where there is no manager all the members of a united family must be joined or be effectively represented in a suit brought to affect the common property (*q*); but where

(*n*) See *Oomedrai* v. *Hiralal*, quoted in *Hanooman Persad's Case*, 6 M. I. A., at p. 418.

(*o*) I. L. R. 6 Cal., at p. 826. Followed in Bombay in *Kalidas* v. *Chotalal*, H. C. P. J. 1883, p. 31. Comp. 2 Str. H. L. 331 ss.

(*p*) See further below, IV. LIABILITIES ON INHERITANCE. Compare the case of *Goodtitle dem. King* v. *Woodward*, 3 B. and Ald. 689.

(*q*) See *Rajaram v. Luckman, supra; Norender Narayan v. Dwarka Lal*, L. R. 5 I. A. 18, 27; *Reasut Hossein* v. *Chorwar Singh*, I. L. R. 7 Cal. 470; see *Radha Proshad Wasti* v. *Esuf, ibid.* 414; *Akoji and Gopal v. Hirachand*. Bom. H. C. P. J. 1882, p. 320.

there is a manager acting honestly, or where there has been an effectual representation, all may be bound, though not individually made parties (*r*). In one case infants were made liable for a share though the manager had had no right to defend the suit in their name (*s*). In *Laxman Nilkant Pusalkar* v. *Vinayak Keshav Pusalkar* (*t*) it was held that in a sale when the manager of a Hindu family alone has been made a party, his right, title and interests only passed to the purchaser unless such a manager was the father. It was decided on the authority of *Kharaginal* v. *Daim* (*v*), which had laid down that the Courts had no jurisdiction to sell the properties of persons who were not made parties to the suit, although a judicial sale was not to be disturbed because a minor was not made a party, and if the debt was justly due a minor's interest was not prejudiced. The cases of *Sakharam* v. *Deoji* (*w*) and *Hari Vithal* v. *Jairam* (*x*) adopting the view expressed in *Sheo Pershad* v. *Saheb Lal* (*y*) were referred to as not laying down good law; but the case of *Doulat Ram* v. *Mehr Chand* (*z*) was referred to as not applicable to the case.

Of this class of suits it had previously been said by the Judicial Committee (*a*) that when the members have no conflicting interests there are cases "wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit." It was held in *Mayaram Sevaram* v. *Jayvantrav Pandurang* (*b*), that a son had been sufficiently represented by his father in a suit on a

(*r*) Col. Dig., Book II., Chap. IV., T. 54; *Jogendro Deb Roy* v. *Funindro Deb Roy*, 14 M. I. A., at p. 376; *Mayaram Sevram* v. *Jayvantrav Pandurang*, Bom. H. C. P. J. F. for 1874, p. 41; *Narayan Gop Habbu* v. *Pandurang Ganu*, I. L. R. 5 Bom. 685; *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*, L. R. 6 I. A. 236; *Radha Kishen Man* v. *Bachhaman*, I. L. R. 3 All. 118. See below, SEPARATION. *Daulat* v. *Mehr*, L. R. 14 I. A. 187.

(*s*) *Doorga Persad* v. *Kesho Persad*, L. R. 9 I. A. 27; *Balkishen* v. *Ram*, L. R. 30 I. A. 139.

(*t*) I. L. R. 40 Bom. 329.

(*v*) L. R. 32 I. A. 23; S. C. I. L. R. 32 Cal. 296.

(*w*) I. L. R. 23 Bom. 372.

(*x*) I. L. R. 14 Bom. 597.

(*y*) I. L. R. 20 Cal. 453.

(*z*) L. R. 14 I. A. 187.

(*a*) *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut*, 14 M. I. A. 376.

(*b*) S. A. No. 435 of 1873; Bom. H. C. P. J. F. for 1874, p. 41.

mortgage. A father having sued for a share of property as joint and then entered into a *bonâ fide* compromise, his son subsequently renewing the claim was held bound by the transaction (*c*), and more recently that nephews had been represented by their uncle (*d*). Similarly in *Bissessur Laall Sahoo* v. *Maharajah Luchmessur Singh* (*e*) it was held that decrees which "are substantially decrees in respect of a joint debt of the family and against the representative of the family," "may be properly executed against the joint family property" (*f*). At Allahabad it has been held that where the family property hypothecated by a father for family purposes had been sold in execution of a decree against him alone the sons could not recover their shares from the purchaser (*g*). The learned Judges say that the decision of the Privy Council is an authority for holding that when a suit is brought to recover a family debt against a member of a joint Hindu family it may be assumed that the defendant is sued as a representative of the family (*h*), and also for holding "that . . . decrees . . . substantially . . . in respect of a joint debt . . . may be properly executed against the family property." In a subsequent case (*i*) it has been held that adult members presumed to know of a mortgage by a father for family purposes and not protesting (*k*), and not afterwards asking to be made parties to a suit on the mortgage against the father alone, are bound by the decree (*l*).

This seems to put the liability of sons arising from transactions of their father and from suits against him on the ground of representation through their acquiescence (*m*). The same doctrine has

(*c*) *Pitam Singh v. Ujagar Singh*, I. L. R. 1 All. 651. (It is not said whether at the time of the earlier suit the son was a minor.)

(*d*) *Narayan Gop Habbu* v. *Pandurang Gannu*, I. L. R. 5 Bom. 685.

(*e*) L. R. 6 I. A. 233, 237.

(*f*) See above, pp. 167, 168, and *Umbica Prosad Tewary* v. *Ram Sahay Lall*, I. L. R. 8 Cal. 898.

(*g*) *Ram Narain Lal* v. *Bhavani Prasad*, I. L. R. 3 All. 443.

(*h*) This doctrine was rejected at Calcutta in *Ramphul Singh* v. *Deg Narain Singh*, I. L. R. 8 Cal., at p. 523. As to a suit against a father's instead of a son's widow, see *Siva Bhagiam* v. *Palani Padiachi*, I. L. R. 4 Mad. 401.

(*i*) *Phul Chand* v. *Man Singh*, I. L. R. 4 All. 309.

(*k*) In *Upooroop Tewary* v. *Lalla Bundhjee Sahay*, I. L. R. 6 Cal. 749, the son wilfully stood by allowing the creditor to suppose he assented. See I. L. R. 8 Cal., at p. 524.

(*l*) This obligation in the case of a mortgage is denied at Madras. See below.

(*m*) In *Phul Chand* v. *Luchmi Chand*, I. L. R. 4 All. 486, the father as manager of a family firm was sued for business debts. Family property was sold in execution of the decree, and his infant son was held bound on account

been applied in Bombay where there had been a conscious and willing participation in benefits obtained (*n*). Thus the payment to a mother as manager of a debt due on a mortgage executed to her as manager was held to bind the son, who by taking no step for several years after attaining his majority might be deemed to have ratified the transaction of which he had taken the benefit (*o*), but the presumption has not been carried to the length in any ordinary case of excusing one who would impose liability on a member of a family from making him a party to the transaction or the suit. Even at Allahabad it was formerly held that the mere sale of the rights and interests of one as father of a joint Hindu family does not include the shares of his sons even though he could dispose of those shares (*p*). A suit against the father alone on a mortgage by him as manager was thought to bind the family, but a sale in execution of his interest not to bind the shares of the sons (*q*). In *Chamaili Kuar* v. *Ram Prasad* (*r*), it was held that good faith in the purchaser did not validate his purchase from a father who sold for an immoral purpose during his son's minority. The principle was adhered to that one co-sharer could not dispose of the joint estate or any part of it, and that the father could not as manager sell the estate merely for his own self-indulgence, of which information was accessible to the purchaser. Similarly at Calcutta it was said that a son could not ordinarily be affected by a suit against the father alone. But on the ground that he had acquiesced for several years in the mortgagee's possession he was not allowed to recover his share sold in execution to the mortgagee (*s*).

In the same case it is said that a father can dispose of the whole ancestral estate, or at least that it is the duty of the son to pay all his father's debts out of the estate equally during the father's life as after his death. The liability thus stated stands quite apart from acquiescence and rests on a transfer to the time of the

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of the capacity in which his father had been sued. For Bombay see *Ramlal's Case*, 1 Bom. H. C. R. App., pp. 52, 72.

(*n*) *Anant Jagannatha* v. *Atmaram*, S. A. 301 of 1881.

(*o*) See Act. IX. of 1872, sec. 197.

(*p*) *Nanhak Joti* v. *Jaimangal Chaubey*, I. L. R. 3 All. 294.

(*q*) *Deva Singh* v. *Ram Manohar*, I. L. R. 2 All. 746; *Bika Singh* v. *Lachman Singh*, *ibid*. 800. See also *Chandra Sen* v. *Ganga Ram*, *ibid*. 899.

(*r*) I. L. R. 2 All. 267.

(*s*) *Laljee Suhoy* v. *Fakeer Chand*, I. L. R. 6 Cal. 135, 139.

father's life of a duty to pay his debts which the Hindu authorities expressly impose only after his death.

These and many other cases are considered in the judgment of Field, J., in *Ramphul* v. *Deg Narain Singh* (*t*), and the conclusions he arrives at are that a "father may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral," but that where the father has not "aliened or mortgaged the family property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son as well as the father must be made a party to the suit," failing which the consequent sale of the father's interest does not affect that of the son. *Girdhari Lal's Case* is explained as one in which the father, acting as manager, mortgaged the family estate, and the debt not being an immoral one (*v*) the interest of the son as well as the father was bound by the transaction. The question of whether the son could be bound by a decree in a suit to which he was not a party "was not raised . . . and therefore nothing was decided on this point." In *Deen Dayal's Case* it is pointed out the question was raised, and the father's interest only having been sold the issue of legal necessity for the original debt was pronounced immaterial.

Badri Roy v. *Bhagwat Narain Dobey* (*w*) seems to agree with the one just referred to. In it a son, a widow and a grandmother of a defendant were allowed to recover their shares (*x*) from a judgment creditor who had purchased in execution of a money decree. But the purchaser having taken an assignment of a prior decree on a mortgage against the same defendant they were held bound by that liability, they not having shown that the debt was contracted for immoral purposes. The voluntary incumbrance and the decree obtained on it availed against the son, but not the sale in execution (*y*). In *Upooroop Tewary* v. *Lalla Bundhjee*

(*t*) I. L. R. 8 Cal. 517.

(*v*) As manager the father was bound to act in the interest of the family, and any stranger dealing with him was bound to establish a fairly reasonable belief that this duty was observed as a condition of enforcing his transaction against the family. The question of immorality could, under the Hindu law, arise for the son only when it was a question of paying the debt of a father deceased or long absent. See below.

(*w*) I. L. R. 8 Cal. 649.

(*x*) As to the "shares" of the widow and grandmother, see above, pp. 295, 321; and below, sec. 7 A. 1*a*, 1*b*.

(*y*) The Madras doctrine is the reverse of this, see below.

Sahay (*z*) on the other hand, it is laid down that though the moral duty resting on the son gives effect to a father's alienation of the estate as against the son and his share while the son is an infant, yet when the son is an adult the father cannot, even to pay off his debts, dispose of the son's share without his consent. The assent might, it was thought, be implied from quiescence coupled with knowledge of the father's dealing (*a*). In *Umbica Prosad Tewary* v. *Ram Sahay Lall* (*b*) it is said that by a decree against a father alone if he have been sued as representing the family his son's interests are generally bound. It does not seem to have been thought that the father need be sued specifically as representative, though without such specification the sons could not know for certain that their property was aimed at. The case of *Suraj Bunsee Kooer* (*c*) is relied on, but that decision saves the purchaser only if "the property was properly liable to satisfy the degree if the decree had been properly given against the father." This of course involves the question in every case of what property under the circumstances was liable under a decree against the father alone, and generally of how far without specification he can be held to have represented his sons and co-owners of the estate.

The effect of the judgment in *Girdharilal* v. *Kantoo Lall* on which all these judgments rest, must, as in other cases, be gathered from the language of the Judicial Committee in relation to the facts as they understood them. There was an ancestral estate alienated after the birth of a son to satisfy a decree against his father. The son sued on the ground that no part of the joint estate was alienable by the father. The creditor maintained that the

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(*z*) I. L. R. 6 Cal., at p. 753. See next note. This case has been distinguished in *Simbhunath* v. *Golab Singh*, L. R. 14 I. A. 77.

(*a*) It may be noted that the Mitakshara and other authorities do not, even after the father's death, impose the duty of paying his debts on his son until the son attains his majority. See below, and 2 Str. H. L. 279. A managing member and those dealing with him are bound to have regard to the interests of infant coparceners, *Saravana Tevan* v. *Muttayi Ammal*, 6 M. H. C. R., at p. 379.

The provisions of the Hindu law exempting an infant while such from responsibility for ancestral debts, and limiting liability on account of a grandfather's debts to the amount of the principal, may be compared with the 10th Article of Magna Charta. By this interest is not to run during the minority of the successor, and the king himself is to obtain satisfaction only out of the movables specifically charged. See Bracton, fol. 61*a*.

(*b*) I. L. R. 8 Cal. 898.

(*c*) L. R. 6 I. A. 88.

whole had passed to him; and this view was taken by the Judicial Committee. In *Maddan Thakur's Case* a particular part of the estate had been sold in execution of a decree against the father, and here too the son's claim was rejected. In these instances the divisible nature of the patrimony as a means of giving effect to the father's transactions was not asserted on either side (*d*), but in *Deen Dayal's Case* which followed, this divisibility of interests was made the basis of the decision (*e*). The claim was one for which the son's share would undoubtedly have been liable had the son been made a defendant; but as the father only was sued, the nature of the obligation, as in itself binding or not binding the son, was pronounced immaterial. Only the father's own share, it was said, could thus be made answerable to the creditor. There may have been a possible question as between the father and other co-sharers, but this could not affect the relations of the father and the son *inter se*, and the son's rights only were insisted and adjudicated on. It would seem therefore that, at any rate where there is no specification of a representative character ascribed to the father, a suit and a decree against him alone and a sale in execution of such a decree cannot generally be understood as binding the son's share except under special circumstances to be appreciated by the Court.

In *Suraj Bunsee Kooer's Case* (*f*) the effect of *Girdhari's Case* is stated on the highest authority as this: "It treats the obligation of a son to pay his father's debts unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son, either to impeach sales by private contract for the purpose of raising money in order to satisfy pre-existing debts, or to recover property sold in execution of decrees of Court." The same judgment imposes on a purchaser in execution, as a condition of security against a son's claim, the obligation of seeing that the property sold in execution "was property liable to satisfy the decree if the decree had been given properly against the father," and the conclusion is (*g*): First, That where joint ancestral property has passed out of a joint family, either under a conveyance

(*d*) A *dictum* in *Syed Tuffuzool Hoosein Khan* v. *Rughoonath Persad*, 14 M. I. A., at p. 50, pronounces an undivided share liable for a decree, but "not property the subject of seizure (by attachment) but rather by process direct against the owner of it."

(*e*) So in *Rai Narain Dass* v. *Nownit Lall*, I. L. R. 4 Cal. 809.

(*f*) L. R. 6 I. A. 88, 105.

(*g*) L. R. 6 I. A., at p. 106.

executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly, That the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make enquiry beyond what appears on the face of the proceedings. It will be observed that this judgment assumes that in some way the joint property does pass out of the family by the father's conveyance, or by a sale in execution on a decree against him. This must mean "*prima facie*," for otherwise there could be no ground for a reclamation of the property by the son, which was successfully made in the case, on the ground that the debt had been improperly incurred, and that the purchaser in execution had notice of the objection to the sale taken on that account. As to whether in a case in which the property has not been sold the son can be made answerable in his share for the father's debt needlessly but not viciously incurred, this judgment is silent. But where the whole estate is made liable by the father's alienation, or a decree against him, no purpose could be served by maintaining a law exempting the son and his share in the estate from direct proceedings. In these therefore as well as in suing to recover his part of the patrimony sold as his father's he must for consistency's sake now be called on to prove that the transaction sued on was an immoral one, or gave effect to an immoral one, within the knowledge of the plaintiff suing on it. Should the son, however, not be joined as a defendant with his father, it must be observed that in *Deen Dayal's Case* the property had "passed out of the family" equally as in *Girdhari's Case*, and it was on the finding liable for the debt; but still the judgment in the case says that "whatever may have been the nature of the debt the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment debtor."

In *Suraj Bunsee Kooer* v. *Sheo Prasad Singh* (*h*) it is said on this point that "it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt does acquire his share in such property with the

(*h*) L R. 6 I. A. 88, 103.

power of ascertaining and realizing it by a partition." Probably what was meant was that *even* in the case of a separate debt the sale under a decree was good as against the judgment-debtor's own share, and such was the effect of the decision of *S. Bunsee Kooer's* appeal. The other question of the father's transactions binding the son as to the son's share in the patrimony in all cases in which he cannot prove the transactions tainted with immorality, of which the purchaser had notice, was left to be governed still by *Girdhari's Case*, subject only where a father had been sued alone, and not expressly as a representative, to the ruling in *Deen Dayal* v. *Jagdeep Narayan*. In the former of these cases it was said, "The suit was brought by Kantoo Lall and Mahabeer, not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property on the ground that the sale by the father was void" (*i*). It was supposed they must recover all or none. The incapacity of a co-sharer to deal alone with his share was laid down to *Deen Dayal's Case* a received doctrine in Bengal (*k*), and the creditor's remedy could be based only on the doctrine of a complete representation of the family as to its patrimony by the father. *Deen Dayal's Case* broke down this conception by its incompatibility, and the essentially integral character of the patrimony on which both parties relied in *Girdhari's Case* being abolished, the father's share could be attacked alone, and being open to attack alone, was, subsequently to *Deen Dayal's Case*, to be held as attacked alone unless other shares were specified, and their owners made parties defendant.

In the cases enumerated in (*l*) the Judicial Committee have laid down that the sale of "right, title and interest" of the father alone in execution of a decree passed the entire family property; while in those arranged under (*m*) it was held that the father's

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(*i*) L. R. 1 I. A., at p. 329.

(*k*) See *Musst. Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy*, L. R. 3 I. A., at pp. 22, 26; *Raja Ram Narain Singh* v. *Pertum Singh*, 11 B. L. R., at p. 401.

(*l*) *Girdhari Lal* v. *Kantoo Lal*, L. R. 1 I. A. 321; *Nanomi Babuasin* v. *Modun Mohun*, L. R. 13 I. A. 1; S. C. I. L. R. 13 Cal. 21; *Bhagbat* v. *Girja*, L. R. 15 I. A. 99; S. C. I. L. R. 15 Cal. 717; *Minakshi* v. *Innudi Konaka*, L. R. 16 I. A. 1; S. C. I. L. R. 12 Mad. 142; *Mahabir* v. *Moheswar*, L. R. 17 I A. 11; S. C. I. L. R. 17 Cal. 584.

(*m*) *Deendyal* v. *Jugdeep*, L. R. 4 I. A. 247; *Suraj Bansi* v. *Sheo Persad*, L. R. 6 I. A. 88; *Hurdey* v. *Rooder*, L. R. 11 I. A. 26; S. C. I. L. R. 10 Cal. 626; *Simbhoonath* v. *Golab Singh*, L. R. 14 I. A. 77; S. C. I. L. R. 14 Cal. 572; *Pettachi* v. *Sangili*, L. R. 14 I. A. 84; S. C. I. L. R. 10 Mad. 241.

undivided interest alone passed. In *Sripat-Singh Dugar* v. *Maharajah Sir Prodyot Kumar Tagor* (*n*), decided on November 10, 1916, their Lordships had held that on the sale under a decree of " the right, title and interest " of a judgment debtor in certain property, the judgment debtor being the father the whole family estate was sold unless the debt contracted was incurred for illegal or immoral purposes. The case of *Thakur Sri Tri Radha Krishna Chanderji* v. *Ram Bahadur* (*o*) lays down that although the purchaser at an execution sale of " right, title and interest " of the judgment debtor (father) as well as the sons thought that the sale was of the entire family interest, the sons having been made parties to the execution proceedings against which they had unsuccessfully appealed to the High Court, the interest passed was the life-estate of the father. His case thus cuts at the very root of the principles laid down in the cases already set forth in the preceding pages of this book.

In Madras the same questions have been learnedly and elaborately discussed (*p*). The result is concisely stated by Kindersley, J: " The true doctrine of Hindu law appears to be that the obligation of the son to pay his father's debts does not arise until the father's death. It is the duty of the father, as long as he lives, to pay his own separate debts. But the cases of *Girdhari Lall* and *Muddun Thakoor* go further and rule that even in the undivided father's lifetime, where there has been a decree against the father for debts which were neither immoral nor illegal, and ancestral immovable property has been sold in execution of such decree or under pressure of such execution, the son cannot recover against a *bona fide* purchaser for value. The cases of *Girdhari Lall* and *Muddan Thakoor* appear to imply that a son is responsible for his father's debts even in the lifetime of the father." It is only necessary to add to this that satisfaction of this responsibility is thus far limited to the share of the son in the patrimony, and does not extend to his other property (*q*). In the Court of first instance the ruling in *Deen Dayal* v. *Jagdeep Narayan* had

(*n*) L. R. 44 I. A. 1.

(*o*) P. C. Judgment, Aug. 3, 1917.

(*p*) *Ponappa Pillai* v. *Pappuvayangar*, I. L. R. 4 Mad. 1-73.

(*q*) The Mitakshara is emphatic in declaring that the son's responsibility, where it exists, arises from sonship, though no property may have come to the son, Comm. on Slokas 47 and 50 of the Vyavaharadhyaya of Yajnavalkya (translated in the Appendix to this work). So the Vyav. May., Chap. V., sec. 4, para. 14

been applied to the case, as the decree and execution had been obtained against the father alone (*r*). Of this there is hardly any discussion in the judgments, but seeing that it introduced a modification of the law of actions as conceived in *Girdhari's Case* it was important that effect should be given to it, especially since in Madras, as in Bombay, the creditor's equity to enforce partition having long been recognized (*s*), a suit against a father alone might most reasonably have been held to have had this remedy in view. As observed by Kernan, J. (*t*), " there can be no doubt that a person not a party to a suit is not bound by the decree by way of estoppel, and it is open to him to impeach the title of the purchaser on any ground legally sufficient." It may be added that one person or his property cannot be affected by proceedings against another not his representative and whose interest is distinguishable (*v*). This was the decision as between a living father and son in *Deen Dayal's Case*, and it seems to have afforded a " ground legally sufficient " in *Ponappa's Case* for impeaching a sale under proceedings in which the son or the son's interest was not named. Such seems too to be the effect of the still more recent decision in the *Subramaniyayyanas' Case* on a suit upon a mortgage executed by an elder (managing) brother in renewal of one of the deceased father, and a decree and sale in execution against that brother alone of the family property (*w*).

One curious result of the Madras decisions seems to be that the creditor who takes from the father a mortgage as security for his claim puts himself in a worse position than one who relies on the simple obligation. The latter by suing the father alone may bind the whole family and its estate, while the former must join all the

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(*r*) See, however, *Sivasankara Mudali* v. *Parvati Anni*, I. L. R. 4 Mad. 96. *Girdhari Lall's Case* is said not to apply to a nephew coparcener; necessity must be proved, *Gangulu* v. *Ancha Bapulu*, *ibid.*, p. 73.

(*s*) *Suraj Bunsee's Case*, L. R. 6 I. A., at p. 102.

(*t*) *Ponappa Pillai* v. *Pappuvayangar*, I. L. R. 4 Mad., at p. 71.

(*v*) Thus in Ponappa's Case it was said that in a suit on the mortgage the coparceners could not be bound unless made parties so as to give them an opportunity of redeeming. See *Chockalinga* v. *Subbaraya*, I. L. R. 5 Mad., at p. 135, wherein it was ruled that a decree on a hypothecation against a father could not operate against his sons not made defendants; and *Dasaradhi* v. *Joddumoni*, *ibid.*, 193, where redemption was allowed against a sale under a decree on a mortgage against a manager.

(*w*) *Subramaniyayyan* v. *Subramaniyayyan*, I. L. R. 5 Mad. 125, by three Judges against two, who would have allowed the younger brother to recover his share only on paying his share of the mortgage debt.

sons as defendants in order to foreclose their rights by his suit on the mortgage. Yet it is not altogether obvious if a suit directed against the father alone can bind the sons as co-owners why a suit against him as mortgagor (and owner) should not bind the sons as co-mortgagors; the power of representation by the father would seem as consistent with principle in the one case as in the other. What would be the legal position of the sons where the mortgagee had sold under a power of sale in a mortgage by their father without calling on the sons to redeem is a point still to be decided. There is apparently no distinction in principle between such a sale and a sale under a decree in a suit on the mortgage. In every case of mortgage there is a personal obligation of the mortgagor (*x*) as a debtor, the mortgage being in its nature an accessory assurance (*y*); and it would seem as competent to a father to sell through the agency of the mortgagee on a condition satisfied as to sell directly for the discharge of a similar debt (*z*), which he may do in ordinary cases. But on the other hand, if the son's interests cannot be sold through the Court without an opportunity to the sons of redeeming, neither ought they to be sold without a suit or formal notice to redeem served on the sons equally as on the father. Where under a decree against a father on a debt secured by a mortgage the mortgaged family estate had been sold "as the right, title, and interest" of the father, and there was nothing to show whether the execution was in virtue of the personal remedy or of the lien on the property, the sale was upheld against the sons seeking a partition with a view to recover their shares. The learned Judges thought, apparently, that the sale had taken place to satisfy the personal obligation so far as this was in excess of what could properly be satisfied by the execution against the mortgaged property as such (*a*), and that thus the sons' interests as distinguished from the father's were effectually disposed of as

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(*x*) *Wilson* v. *Tooker*, 5. Br. Parl. cases, 193; *Goodman* v. *Grierson*, 2 B. & B. 274, 279; Com. Dig. Tr. Chancery (4 A. 3).

(*y*) See Butler's note to Co. Litt. 205*a*; *Fisher on Mortg.* lxxii., and *per* Lindley, J., in *Keith* v. *Burrows*, L. R. I. C. P. D., at p. 731.

(*z*) See *per* Sir C. Turner, C.J., in *Ponappa Pillai* v. *Pappuvayangar*, I L. R. 4 Mad. 47. According to the Sadr Court the father could not alien the patrimony except under urgent necessity, *Muthumarien* v. *Lakshmi* M. S. D. A. Dec. for 1860, p. 227.

(*a*) An attachment and sale as for an unsecured debt are not necessary in giving effect to the specific lien created by a mortgage. *Dayachand* v. *Hemchand*, I. L. R. 4 Bom. 515.

his, though in a sale expressly under the mortgage they would have been saved (*b*). In a case in which the paternal and filial relation did not subsist as a ground for a special liability, the family property having been mortgaged by one member of an undivided family and sold, in execution of a decree against that one alone, to the judgment creditor, it was held that the latter had obtained a title only to the share of his own judgment debtor; that another member could recover his share from the purchaser put into possession of the whole; and that the purchaser could not set up the defence that the debt sued on was in fact one by which all the members were bound (*c*). In another recent case it was ruled that the interest of a manager in a family estate was not assets for the satisfaction, after his death, of a decree obtained against him, but not plainly directed against other members of the united family. In the same case two sons were directed to satisfy the decree so far as it bore on their father to the extent of the assets inherited from him. But in these were not to be included his share of the joint family estate which they took by survivorship (*d*). This view, though repeated in *Karpakambal* v. *Subbayyan* (*e*), seems opposed to that expressed by the Judicial Committee in *Muttayan Chettiar's Case* (*f*), which for Madras must be conclusive. In the case of a decree against a father sought to be executed against property made over by him to his infant sons as compensation for an injury by him to their shares (*g*) it was held that such execution could not be had because the infant coparceners had not been parties to the suit, and that a suit could not be maintained against them (their father being alive) on the original cause of action, as this had been exhausted by the suit against the father (*h*).

(*b*) *Srinivasa Nayuda* v. *Yelaya Nayuda*, I. L. R. 5 Mad. 251.

(*c*) *Armugam Pillai* v. *Sabapathi Padiachi*, I. L. R. 5 Mad. 12. This agrees with *Deen Dayal's Case*, but, if the family were bound by the debt, seems hard to reconcile with *Ponappa Pillai* v. *Pappuvayangar*, I. L. R. 4 Mad. 1. See above, p. 168.

(*d*) *Ravi Varma* v. *Y. Koman*, I. L. R. 5 Mad. 223.

(*e*) I. L. R. 5 Mad. 234.

(*f*) Above, p. 168; L. R. 9 I. A., at p. 145.

(*g*) This may have made it separate property; the sons indeed could not otherwise benefit by the release in their favour of the father's interest.

(*h*) See *Gurusami Chetti* v. *Samurti Chinna Chetti*, I. L. R. 5 Mad. 37. For this Innes, J., refers to *King* v. *Hoare*, 13 Mees. & W. 494; *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547, and *Hemendro Coomar Mullick* v. *Rajendro Lall Moonshee*, I. L. R. 3 Cal. 353, as showing that a joint contract can be enforced

In Bombay, by a closer adherence to the Hindu authorities, greater consistency has been maintained. In all ordinary cases alienation of the whole estate or of part of an impartible estate by

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but once, whence *à fortiori* the same rule applies to proceedings on an obligation arising from the relation of membership of a joint family.

In the case of ex parte *Higgins* in re *Tyler*, 27 L. J. Bank. 27, a remedy in bankruptcy against the joint estate was held barred by a previous suit against one of two partners which proved infructuous. But in that case Knight Bruce, L.J., said: "I feel myself almost ashamed to find myself differing from the Commissioner" (who had admitted the claim against the joint estate). In Comyns's Dig. (K. 4), 1, 4, and (L. 9) the distinction is drawn that where damages are uncertain only one action can be maintained, but where the thing sought is certain even execution does not bar a suit against another obligor, *ex. gr.* on a bond. In *Drake* v. *Mitchell*, 3 Ea., at p. 258, Lord Ellenborough says that a judgment is but a security for the original cause of action and does not extinguish before satisfaction any collateral remedy available to the party. *Brinsmead* v. *Harrison* is discussed in ex parte *Drake*, L. R. 5 Ch. D. 866, from which it will be seen that an infructuous judgment does not extinguish the original right in a case of trover or detinue. Although, therefore, generally "where there is *res judicata* the original cause of action is gone" (*per* Lord Selborne in *Lockyer* v. *Ferryman*, L. R. 2 App. C. 519), and election to sue B. bars a suit against C. (see *Kendall* v. *Hamilton*, L. R. 3 C. P. D. 403), yet the primary right may not in all cases be converted or absorbed by a suit. Nor where the cause of action arising from non-fulfilment of the corresponding duty is one which attaches in aliquot parts to several persons or as an aggregate to any one of several, but not to more than one, does it seem that on principle one suit though infructuous should bar another seeking the same remedy in part or as a whole. The English law on this point merging a remedy against C in a judgment against B, rather imitates the earlier and ruder Roman law than its later and refined form. A "cause of action" is really a relation between persons, and the substitution of a different person as the subject of the right or of the obligation makes the cause of action different too, unless the new party stands to the former one as a representative. As a representative he should be subject to the proceedings taken against his predecessor. Thus children, if represented by their father, should be liable on a decree against him; if not, they should not be guarded against a suit on what must be a different cause of action because of the change of parties.

The Roman law, while it allowed the plea of *res judicata*, allowed also the replication *de re secundum se judicata*, or judgment against the party pleading, even between the same litigants (Di. Lib. 44, Ti. II. Lex. 9 § 1, and Voet's Comm. *ad loc*), and under the English law it seems that a judgment as between the same parties is not a bar to a fresh suit unless it has negatived the right sued on (see Com. Dig. C. L. 4) even though there may have been a verdict against the plaintiff (see *per* Bramwell, L.J., in *Poyser* v. *Minors*, L. R. 7 Q B. D., at p. 338). And under the Hindu law the rule is "one against whom a judgment had formerly been given if he bring forward the matter again, must be answered by a plea of former judgment." (Mit. Administration of Justice, sec. 5, para. 10.) This is exactly the rule of the middle and later

a single co-sharer has been held invalid as against the others (*i*). This has been so even as regards a father (*k*). His grant out of an inam village was held to require the attestation of his son to give it validity as against him (*l*), the attestation being taken as a sign of assent. A father can under ordinary circumstances alienate or mortgage the patrimony to satisfy his own personal antecedent debt not incurred for an illegal or immoral purpose, which will be enforced against the sons by a suit or by proceedings in execution to which they need not be made parties (*m*). According to some authorities the power of the father in these respects is unrestricted even for his own present debt (*n*). The interests of sons, however, in the family estate are liable to satisfy a father's debt (*o*), and a money or mortgage decree against the father alone can be executed against the sons even after the father's death as his legal representatives, when the sons can raise the question of the legality of the debt (*p*) under secs. 50, 52, and 53 of the Civil Procedure Code (Act 8) of 1908. In the case of ordinary coparceners, alienations

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Roman law, and does not help a defendant against a plaintiff who has gained a previous judgment. The law of procedure forbids a second suit on the same cause by a positive rule in order to shorten litigation, and it enables a judgment once obtained to be kept alive for twelve years, but these provisions between the same parties are rather a supersession of the general principle of jurisprudence, and cannot properly affect a suit by A. against C. on the ground of a prior suit by A. against B., except in so far as C. represents B., or else the remedy was alternative, and A. made an election by which C. was exonerated.

(*i*) Mit., Chap. I., sec. 1, para. 30. Comp. *Mohabeer Pushak* v. *Ramyad Singh*, 20 C. W. R., at p. 194.

(*k*) Mit., Chap. I., sec. 1, para. 28. Comp. *Raja Ram Narain* v. *Pertur Singh*, 20 C. W. R. 189.

(*l*) *Pandurang* v. *Naru*, Sel. Rep. 186; see Steele, L. C. 68, 237, 400.

(*m*) *Girdhari Lall* v. *Kantoo Lal*, L. R. 1 I. A. 321; *Jagabhai* v. *Jagjivandas*, I. L. R. 11 Bom. 37; *Krishnaji* v. *Renge*, I. L. R. 12 Bom. 625; *Laxman* v. *Vinayack*, I. L. R. 40 Bom. 329. Cf. *Sakharam* v. *Sitaram*, I. L. R. 11 Bom. 42; *Narayan* v. *Venkatacharya*, I. L. R. 28 Bom. 408; for alienation by grandfather.

(*n*) *Debi* v. *Jadu*, I. L. R. 24 All. 459; *Chindambra* v. *Koothapemmal*, I. L. R. 27 Mad. 326.

(*o*) *Jairam* v. *Kondia*, *ibid.*, 361; *Narayanrav* v. *Javherbahu*, I. L. R. 12 Bom. 158; *Lallu* v. *Motiram*, I. L. R. 13 Bom. 653; *Chintamanrav* v. *Kashinath*, I. L. R. 14 Bom. 320; *Appaji* v. *Keshav*, I. L. R. 15 Bom. 13; *Coverji* v. *Bhoga*, I. L. R. 17 Bom. 718; *Umed* v. *Goman*, I. L. R. 20 Bom. 385; *Bhana* v. *Chindhu*, I. L. R. 21 Bom. 616; *Joharmal* v. *Eknath*, I. L. R. 24 Bom. 343; *Durbar* v. *Harsur*, I. L. R. 32 Bom. 348; *Shivaram* v. *Sakharam*, I. L. R. 33 Bom. 39; *Dalahaya* v. *Narayan*, I. L. R. 36 Bom. 68.

(*p*) *Umed* v. *Goman*, I. L. R. 20 Bom. 385; *Amarchand* v. *Sebakchand*, I. L. R. 34 Cal. 642, F. B.

by them for valuable consideration, or sale of their interests in execution of decrees, have been held good to entitle the purchaser to claim to the extent of their shares ascertained by partition, but no farther (*q*). In this sense the purchaser becomes a tenant in common with the other parceners (*r*). For the ordinary debts of a parcener his coparceners are not answerable (*s*). His own share may be made answerable by proceedings taken and carried through to attachment during his life but not afterwards (*t*). His gift or bequest of his share is invalid as the right to a severance of it is given to the purchaser or creditor only to prevent fraud (*v*). In case of distress or to perform an indispensable duty a single coparcener may dispose of so much of the family property as is necessary for the occasion (*w*). His debts incurred for such a purpose must be paid by all the parceners to the extent of the whole estate (*x*). This applies even to the debt of a son as binding the father, though the latter is not generally responsible (*y*). If the parcener be merely sued the coparceners are not affected by that, without a decree and an attachment of the estate for the realization of his share (*z*). But this attachment enables the attaching creditor to

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(*q*) *Gundo* v. *Rambhat*, 1 Bom. H. C. R. 39; *Pandurang* v. *Bhasker*, 11 Bom. H. C. R. 72; *Udaram* v. *Ranu*, *ibid.*, 76; *Balaji Anant* v. *Ganesh Janardhan*, I. L. R. 5 Bom. 499; *Ranga* v. *Ganapa*, I. L. R. 15 Bom. 673. The same is the law in Madras—*Virasvami* v. *Ayyasvami*, 1 M. H. C. R. 471. In Bengal, Behar, and North-West Provinces no alienation of an undivided share is allowed—*Sadaburt* v. *Foolbash*, 12 W. R. 1, F. B.; *Madho* v. *Mehrban*, I. L. R. 18 Cal. 157, P. C.; S. C. L. R. 17 I. A. 194; *Balgobind* v. *Narain*, L. R. 20 I. A. 116.

(*r*) *Udaram* v. *Ranu*, 11 Bom. H. C. R., p. 81; *Krishnaji Rajvade* v. *Sitaram Jakhi*, I. L. R. 5 Bom. 496.

(*s*) *Narsinhbhat* v. *Chenappa*, I. L. R. 2 Bom. 479; St. L. C. 40, 217.

(*t*) *Udaram* v. *Ranu*, 11 Bom. H. C. R., p. 85; see above, pp. 566, 567; *Suraj Bunsi Kooer* v. *Sheo Proshad*, L. R. 6 I. A. 88, 108; *Deendeyal's Case*, L. R. 4 I. A. 247; *Rai Balkishen* v. *Sitaram*, I. L. R. 7 All. 731; *Bailur Krishna* v. *Lakshman*, I. L. R. 4 Mad. 302.

(*v*) See above, p. 76, and the cases there cited; *Suraj Bunsee Kooer's Case*, above, p. 582; *Lakshman* v. *Ramchandra*, L. R. 7 I. A. 18.

(*w*) Mit., Chap. I., sec. 1, para. 28; Steele, L. C. 54; *Daji Himab* v. *Sadram*, I. L. R. 12 Bom. 18.

(*x*) *Mahadev* v. *Narain Mahadev*, 3 Morr. 346; Vyav. May., Chap. V., sec. 5, para. 20; Col. Dig., Book V., Chap. VI., T. 373, Comm. *ad. fin.*; Book I., Chap. V., T. 181, 193, 194; Book II., Chap. IV., T. 55; Poona Sastri, August 17, 1845, MS. 685; see 1 Str. H. L. 276; Steele, L. C. 219.

(*y*) Col. Dig., Book I., T. 214, 215; Steele, L. C. 40, 178.

(*z*) *Vasudev Bhat* v. *Venkatesh Sanbhav*, 10 Bom. H. C. R. 139, 160.

proceed even though his debtor should die (*a*). Nor can a purchaser of a share be defeated by subsequent proceedings for a partition to which he is not a party (*b*).

Where the purchaser of a single coparcener's share has obtained peaceable possession, the Court, treating him as a tenant in common, has refused to oust him at the suit of the other coparceners (*c*). Being in possession, the single parcener has been supposed to be able to transfer the possession, where the transfer was not resisted, with such an accompanying right as was vested in himself (*d*). This doctrine involves a certain difficulty, seeing that the existence of any distinct right in the individual coparcener, except a right to partition and its result, admits of question; and the occupation of a distinct part of the common property by one coparcener may be conceived as merely permitted by the family, and as to outsiders held on behalf of the family, not of the individual (*e*). Such an occupation is to be regarded perhaps rather as a use of the property, occupied in virtue of the occupier's domestic relation to the aggregate family, than a true possession (*f*) implying an exclusion of others' entrance and exercise of will within the given area (*g*). The notion of a separable possession

(*a*) See *Suraj Bunsee Kooer's Case, supra; B. Krishna Rao* v. *Lakshmana Shanbhogue*, I. L. R. 4 Mad. 306.

(*b*) *Apaji Govind* v. *Naro Vital Ghate*, H. C. P. J. F. for 1882, p. 335.

(*c*) *Mahabalaya* v. *Timaya*, 12 Bom. H. C. R. 138; *Kallappa* v. *Venkatesh*, I. L. R. 2 Bom. 676.

(*d*) *Mahabalaya* v. *Timaya*, 12 Bom. H. C. R., at p. 140.

(*e*) That the possession of a single parcener is *prima facie* a derivative one ranking as the possession of all, see *Yusaf Ali Khan* v. *Chubbee Singh*, 5 N. W. P. R. 122; *Sheo Pershad Singh* v. *Leelah Singh*, 20 C. W. R. 160; *Heeralal Roy* v. *Bidyadhur Roy*, 21 C. W. R. 343. Yet it was said that possession could not be recovered from a member excluding his co-sharers, *Govind Chunder Ghose* v. *Ram Coomar Dey*, 24 C. W. R. 393. It would seem that they were entitled to co-possession. A distinct exclusion of a co-sharer is incompatible, of course, with his retaining co-possession, and limitation begins to run against him in favour of those who then hold adversely to him, *Jowala Buksh* v. *Dkarum Singh*, 10 M. I. A., at p. 535. A parcener retaining exclusive possession of a part for several years would thus expose himself to a presumption that a partition had been made allotting that part as his share to him, unless he could show his concurrent joint enjoyment of the estate at large. See below, sec. 4 D., and Book II., Chap. IV.

(*f*) See Savigny, Poss. secs. 11, 23, 25; Vin. Abr. XVI. 454; Co. Lit. 277*a*; *Page* v. *Selfly*, *Bull's* N. P. 102*b*; *Doe* v. *Brightwen*, 10 Ea. 583; *Heeralal Roy* v. *Bidyadhur Roy*, 21 C. W. R. 343, C. R.

(*g*) A separate possession on behalf of himself alone, not on behalf of all, should apparently involve a liability to account, which is not recognized. See *Konerrav* v. *Gurrav*, I. L. R. 5 Bom. 589.

corresponds, however, to that of the single coparcener's total right as separable in thought and in law, though undivided, from the others so as to be a possible object of transactions, for if the co-ownership may be thus decomposed, so it seems may the co-possession of the members of a united family (*h*). At this point the development of the idea of separable rights as combined by addition in the common right has stopped. A case in which a mortgagee of one parcener's share was put into joint possession with another parcener resisting the intrusion has not (*i*) been followed.

In the case of a manager he can bind the whole estate by transactions for its benefit (*k*) or which the other party reasonably thinks so. He is allowed a fair latitude of discretion (*l*). In *Davlatrao* v. *Narayanrao* (*m*) it was said " a reasonable degree of latitude is allowed to the members of a Hindu family in the absence of . . . fraud or . . . profligacy, and the expenditure of a managing member whose acts (*n*) are not protested against, or checked by legal proceedings, is ordinarily presumed to be on account of the family, just as his acquisitions are made for its benefit " (*o*). The extent of his general powers is well known in Hindu society. He may carry on a family business in the usual way (*p*) for the common benefit (*q*). He may mortgage the common property for the common benefit and use of the undivided family (*r*). But he is far from having unfettered power (*s*). The person to whom he mortgages, and especially to

(*h*) Compare the right arising in partition from separate occupation, below, sec. 7 A. 1 *b*.

(*i*) See *Balaji Anant Rajadiksha* v. *Ganesh Janardhan Kamati*, I. L. R. 5 Bom. 499, and the cases there referred to; also *Maruti* v. *Lilachand*, I. L. R. 6 Bom. 564, and other cases quoted below.

(*k*) *Bulakhidas* v. *Ghama*, Bom. H. C. P. J. 1880, p. 224; *Hari Vithal* v. *Jairam*, I. L. R. 14 Bom. 529; *Sakharam* v. *Deoji*, I. L. R. 23 Bom. 372; Comp. *Kombi* v. *Lakshmi*, I. L. R. 5 Mad., at p. 207.

(*l*) *Babaji* v. *Krishnaji*, I. L. R. 2 Bom. 666.

(*m*) H. C. P. J. F. for 1877, p. 175.

(*n*) *i.e.* his known acts.

(*o*) Comp. *Tandavaraya Mudali* v. *Valli Ammal*, 1 Mad. H. C. R. 398, and *Hanooman Persad Pande's Case*, 6 M. I. A. 393, as to the manager of a minor's estate.

(*p*) Comp. *Joykisto Cowar* v. *Nittyanund Nundy*, I. L. R. 3 Cal. 738.

(*q*) *Samalbhai* v. *Someshvar et al.*, I. L. R. 5 Bom. 38.

(*r*) *Gundo* v. *Rambhat*, 1 Bom. H. C. R. 39.

(*s*) *Baji Shamraj* v. *Dev bin Balaji*, H. C. P. J. F. for 1879, p. 238.

whom he sells (*t*) any part of the patrimony is bound to all reasonable care, and where the interests of minors are concerned to extreme caution (*v*). But even where the other coparceners are adults, charges incurred by a manager are binding except as against himself only when incurred for the needs of the family or with the assent, express or implied, of its members (*w*). When the manager obviously exceeds reasonable limits those who deal with him do so at their peril, and no unfairness will be tolerated. Thus a contract with a manager defrauding the family is not enforcible (*x*) and the manager is not allowed to retain a double share in what he has acquired in that position (*y*).

Although a judicial sale is not to be disturbed because some minors were not made parties to the proceedings provided their interests did not suffer, in all suits against the family or to affect its common estate all the members must, under ordinary circumstances, be made defendants (*z*), though under special circumstances the manager may *as* manager be sued so as to bind the whole family (*a*), as indeed it would seem may a member not a manager, or not sued expressly as manager, but deemed under exceptional conditions to have represented the family (*b*). Apart from such cases as these

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(*t*) *Trimbak* v. *Gopalshet*, 1 Bom. H. C. R. 27; Comp. Mit., Chap. I., sec. I., para. 32; Steele, L. C. 54, 209.

(*v*) *Ramlal* v. *Lakmichand*, 1 Bom. H. C. R., at pp. 72, 73, App.; 1 Str. H. L. 202; Comp. *Kumarsami* v. *Pala N. Chetti*, I. L. R. 1 Mad. 385; *Chetty Colum Comara Venkatachella Reddyar* v. *Raja Rungasami*, 8 M. I. A., at p. 323.

(*w*) 1 Str. H. L. 199; 2 *ibid.*, 344, 434, 457; Col. Dig., Book I., Chap. V., T. 180 ss; Book II., Chap. IV., T. 54, Comm. *sub. fin*; C. *Colum Comara Venkatachella* v. *R. Rungasawmy*, 8 M. I. A., at p. 323; *Bullakidass* v. *Ghama*, Bom. H. C. P. J. F. for 1880, p. 224; *Babaji bin Mahadji* v. *Krishnaji*, Bom. H. C. P. J. F. for 1878, p. 149.

(*x*) *Ravji Janardhan* v. *Gungadharbhat*, I. L. R. 4 Bom. 29.

(*y*) *Guruchurn Doss* v. *Goluckmoney Dossee*, 1 Fult. 165, a Bengal case, but agreeing with *Megha Sham* v. *Vithalrao*, cited below, sec. 7 A; and *Daolatrao's Case*, above, p. 590 note (*m*).

(*z*) *Annaya* v. *Hoskeri Ramappa*, H. C. P. J. F. for 1875, p. 227; *Bhimasha* v. *Ramchandarsha*, H. C. P. J. F. for 1878, p. 286; *Kharajamal* v. *Daim*, L. R. 32 I. A. 23; S. C. I. L. R. 32 Cal. 296; *Shesham* v. *Veera*, I. L. R. 32 Mad. 284; *Shamrathi* v. *Kishen*, I. L. R. 29 All. 311. As to suits by a family, see above, p. 568.

(*a*) See above, p. 573. *Hari Vithal* v. *Jairam*, I. L. R. 14 Bom. 597; *Doulat Ram* v. *Mehr Chand*, L. R. 14 I. A. 187; *Sheo* v. *Jaddo*, L. R. 41 I. A. 216.

(*b*) *Narayan Gop Habbu* v. *Pandurang Ganu*, I. L. R. 5 Bom. 685, referring to *Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut*, 14 M. I. A., at p. 376,

a suit and a decree against a manager individually affect only his own share in the common estate, even though he may have contracted the liability for the benefit of the family. That question, it is thought, cannot properly be disposed of without the several members being called before the Court (*c*), and the sale of the "right, title, and interest" of the manager gives to the purchaser no more than is expressly sold (*d*). Thus it was held that a decree obtained against the manager alone (not the father) and a sale under such a decree, did not bind the property beyond the manager's own share (*e*), and that the brother of the manager ousted by the purchaser in execution might recover possession of the whole (*f*) leaving the purchaser to work out his right by a suit for partition (*g*). This is exactly the reverse of the rule in the case of a sale in execution of a decree against the father on an ordinary debt, as recently expounded at Madras (*h*).

Subject to the foregoing observations the presumption in favour of the good faith of transactions entered into by a father (*i*) or uncle as manager of an ancestral estate is naturally somewhat stronger than in the case of more distant connexions or of women not familiar with business (*k*). But even as to the father the principle

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and *Mayaram Sevaram* v. *Jayavantrao Pandurang*, Sp. Ap. No. 435 of 1873, I. L. R. 5 Bom. 687.

(*c*) *Mahabalaya* v. *Timaya*, 12 Bom. H. C. R. 139; *Idem bis* H. C. P. J. for 1879, p. 417; *Nhanu Lukshman Golam* v. *Ramchandra Vinayak*, H. C. P. J. F. for 1882, p. 277; *Baji Shamraj Joshi* v. *Dev. bin Balaji*, H. C. P. J. F. for 1879, p. 238.

(*d*) Comp. the case of a widow's estate only passing under a decree against her for arrears as a charge, *Baijun Doobey* v. *Brij Bhookun Lal*, L. R. 2 I. A. 275; *Laxman Nilkant* v. *Vinyak Keshav*, I. L. R. 40 Bom. 329.

(*e*) This is quoted and followed in *Kisansing* v. *Moreshwar*, Bom. H. C. P. J. 1882, p. 396, referring to *Deen Dyal's Case* as conclusive that the son's interest does not pass by a sale in execution of the father's. *Lakshman* v. *Kashinath*, I. L. R. 11 Bom. 700.

(*f*) In *Gopalasami* v. *Chokalingam*, I. L. R. 4 Mad. 320, possession under a sale in execution against a *father* was held to throw on his son the burden of proving that the original debt was illegal or immoral. Compare *Gurusami's Case* quoted above.

(*g*) *Maruti Narayan* v. *Lilachand*, I. L. R. 6 Bom. 564.

(*h*) *Velliyamal* v. *Katha*, L. R. 5 Mad., at p. 68, explaining *Ponappa Pillai* v. *Pappuvayangar*, I. L. R. 4 Mad. 1.

(*i*) See *Babaji* v. *Krishnaji*, I. L. R. 2 Bom. 667.

(*k*) As to a father, see *Babaji Sakoji* v. *Ramshet Pandushet et al.*, 2 Bom. H. C. R. 23. As to an uncle see *Bhaoo Appajee* v. *Khundojee*, 9 Harr. 104, and generally *C. Colum Comara Vencatachella* v. *R. Rungaswamy*, 8 M. I. A., at p. 323; *Tandaraya Mudali* v. *Valli Ammal*, 1 M. H. C. R. 398; *Gour Chunder*

laid down in *Suraj Bunsee Kooer's Case* has always prevailed in Bombay as elsewhere. The family under the father's headship is like any other united family except that the father is manager (*l*) by nature, unless disqualified or deposed (*m*), and a manager whose transactions may be strongly presumed to be intended for the good of the family (*n*). If, however, they are not for its good but plainly

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Biswas v. *Greesh Chunder Biswas et al.*, 7 C. W. R. 121 C. R.; *Musst. Nouruthum Kooer* v. *Baboo Gouree Dutt Singh et al.*, 6 C. W. R. 193; *Heerachand* v. *Mahashunker*, S. A. No. 3918, 6th July, 1858; 2 Str. H. L. 331, 348; *Shidramapa Balapa* v. *Shesho Janardhan*, S. A. No. 178 of 1874, Bom. H. C. P. J. F. for 1875, p. 61.

The manager is not to be called to a rigorous account, nor, on the other hand, to claim credit as against the family for disbursements in excess of his proper share on account of it, *Davlatrao Ramrao* v. *Narayanrao Khanderao*, R. A. No. 51 of 1876; Bom. H. C. P. J. F. for 1877, p. 175; see for Bengal *Abhaychandra Roy* v. *Pyari Mohan Juho et al.*, 5 B. L. R. 347. An alienation by a Karta is binding on any member who consciously stands by and sees the money applied without refusing to participate, *Madhoo Dyal Singh* v. *Golpar Singh et al.*, 9 C. W. R. 511; *Ramkeshore Narain Singh* v. *Anand Misser*, 21 *ibid.* 12 C. R., and the case in Hay's Rept. 567; *Bhimasha bin Dongresha et al.* v. *Krishnabai*, Bom. H. C. P. J. F. for 1878, p. 286. The ruling in *Ramlal* v. *Lakhmichand Muniram et al.*, 1 Bom. H. C. R. li, lxxi. App., that the manager of a joint estate, the capital of a firm, has authority to deal with it for the purposes of the business, is cited and approved in *Johurra Bibee* v. *Sreegopal Misser*, I. L. R. 1 Cal., p. 475; *Samalbhai Nathubhai* v. *Someshvar Mangal and Hurkisan*, I. L. R. 5 Bom., p. 38; see Col. Dig., Book II., Chap. IV., T. 54, Comm. In *Narain* v. *Sarnam*, L. R. 44 I. A. 163, it has been held that a mortgage of the joint property by a Karta is void unless it was for family necessity. As to when a suit will lie against the Karta or manager, see *Soorjeemoney* v. *Denobandhoo*, 6 M. I. A. 540; *Krishna* v. *Subbanna*, I. L. R. 7 Mad. 564.

(*l*) Above, pp. 564, 568. In Steele, L. C. 238, it is said that the father's gift of immovable ancestral property is invalid unless attested by the heirs.

The Hindu law generally requires the attestation of the members of the family enjoying an unobstructed right of inheritance (*i.e.* a quiescent co-ownership) to a danpatra or deed of gift, to which, according to that law, a conveyance for value is assimilated. See Vyav. May, Chap. II., sec. I., para. 5; Col. Dig., Book I., T. 19; above, p. 191, note (*n*). This attestation, as the document is ordinarily read out, implies assent to its contents, as formerly in England, see Col. Dig., Book II., Chap. IV., T. 33 Comm.; *Pandurang* v. *Naru*, Sel. Rep. 186; Book I., sec. 9, p. 218 above, and the Sastri's opinion in *Doe* v. *Ganpat*, Perry's O. Cases, at p. 137.

In *Nagalutchmee Ammal* v. *Gopoo Nadaraja Chetty*, 6 M. I. A., at p. 341, the Judicial Committee observe, "These witnesses, one and all, depose to the fact of the signature of these papers, to their being written from the dictation of the testator." &c.

(*m*) Vyav. May., Chap. IV., sec. IV., para. 7.

(*n*) See above, p. 592, notes (*i*) and (*k*).

detrimental there is perhaps no case prior to *Narayanacharya* v. *Narso Krishna* (o) which makes the family estate liable because they are not otherwise immoral (p). Any transaction is forbidden which tends to reduce the family to want (q). This has not been regarded by the usage of the Hindus in Bombay as a merely pious precept, but as a law properly so called (r), and has been relied on by the Courts against improper alienations and incumbrances of the patrimony (s).

Applications for an interdiction (t) against a father could never be common amongst the Hindus; but when a father was getting rid of the patrimony the Sastri said that an interdiction might be obtained and the transaction rescinded at the suit of the son or of the united brother (v). When a Joshi proposed to give away his vatan he was restricted to a small portion of it (w). A father could for incapacity be superseded or set aside as manager in favour of his son (x).

It appears, therefore, that the father as manager stands substantially in the same position as any other manager. The care of the family, the preservation of the common estate, and the payment of debts, are more especially incumbent on him (y). In *Nagalutchmee Ammal* v. *Gopoo Nadaraja Chetty* (z) the Pandits thought a will would be invalidated by a permission to adopt acted on. They say: " The will . . . is valid . . . the testator having

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(o) I. L. R. 1 Bom. 262.

(p) See *Narayen* v. *Balkrishna*, I. L. R. 4 Bom. 529, and comp. *Sham Narain Singh* v. *Rughoobindial*, I. L. R. 3 Cal. 508.

(q) See above, pp. 204, 205; Col. Dig., Book II., Chap. IV., T. 11, 18, 19; Vyasa, cited Daya Bhaga, Chap. I. para. 45; Mit., Chap. I., sec. 1, para. 27; *Id.* Comm. on Yajn. II. 47—50 in Appendix; 2 Str. H. L. 5, 12, 16.

(r) See *Bai Gunga* v. *Dhurmdas*, Bell, R. 16; 2 Str. H. L. 449.

(s) In *Narsinha Hegde* v. *Timma*, Bom. H. C. P. J. 1882, p. 394, the District Judge was directed to inquire whether the creditor had *bonâ fide* supposed that the debt was incurred for the benefit of the family by the father.

(t) Mit., Chap. I., sec. VI., para. 9.

(v) Q. 1935, M.S.

(w) Q. 711, MS. Comp. 2 Str. H. L. 16, 12.

(x) See Steele, L. C. 178, 216; Vyav. May., Chap. IV., sec. IV., para. 7.

(y) *Ramchandra D. Naik* v. *Dada M. Naik*, 1 Bom. H. C. R. 86 App.; see Yajn., Book II., para. 46; Narada, Book II., Chap. III., paras. 11, 12, 13; Manu IV., 257; Vyav. May., Chap. V., sec. 4, para 11; Steele, L. C. 68. See H. H. Wilson, quoted below, Book II., Vyav., Chap. I., sec. 1, Q. 4, Remark.

(z) 6 M. I. A., at p. 320. Comp. the case in note (r), p. 594 above.

thereby bequeathed a portion of his estate for the maintenance of his wife and other members of his family whom he was bound to protect, and directed the remainder to be appropriated to charitable purposes in the event of his wife, who was then pregnant, not being delivered of a son." The conditions give effect to the Hindu law against disinheriting a son, and in favour of the maintenance of dependants as a duty not to be evaded by means of a disposal of the estate by its owner. In the case of an ancestral estate it does not seem that the father can really be deemed owner in a sense that does not apply equally to any of his sons. No member of an undivided family " has a certain definite share " (*a*), much less has one co-owner a right as such to dispose of the whole (*b*). The father's natural relation to his children entitles him at the same time to more than ordinary confidence. Hence it is that in such cases as *Babaji* v. *Ramshet* (*c*) the sons seeking to upset their father's alienation of family property were called on to prove that the transaction had been one not binding on their shares (*d*). The authority to alienate was not thought wider in his case than in that of another manager; only his good intentions were rather more strongly presumed.

The doctrine of the Bombay Court appears to be warranted, not only by the case of *Suraj Bunsee Kooer*, but by what is said in *Baboo Kameswar Pershad* v. *Run Bahadur Singh* (*e*). " Their Lordships have applied those principles . . . to transactions in which a father in derogation of the rights of his son under the Mitakshara has made an alienation of ancestral family estate. The principle . . . is that . . . the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can . . . that the manager is acting in the particular instance for the benefit of the estate . . . a *bonâ fide* creditor should [not] suffer when he has acted honestly and with due caution but is himself deceived." This ought apparently to be conclusive as to

(*a*) *Appovier* v. *Rama Subbayana*, 11 M. I. A., at p. 89; *Rangama* v. *Atchama*, 4 M. I. A. 103; *Girdhari Lal* v. *Kantoo Lall*, L. R. 1 I. A., at p. 329.

(*b*) Mit., Chap. I., sec. 1, para. 24; Vyav. May., Chap. IV., sec. 1, paras. 3, 5; sec. 4, para. 4.

(*c*) 2 Bom. H. C. R. 23. There is in many such cases a suspicion of fraud, as in the one referred to in *Hanooman Persad's Case*.

(*d*) It may be noted that the Mitakshara distinctly imposes on a father's creditor the burden of making his case good against sons denying his claim; Comm. on Yajn. II. 50.

(*e*) L. R. 8 I. A., at p. 11.

the nature of the father's authority when dealing or affecting to deal with the joint property of himself and his sons. It would be so but for the difficulties created by other cases which, in order to enforce the obligation resting on sons after their father's death, have apparently assigned to the father a capacity of himself discounting that liability during his life by aliening the patrimony in ways not consistent with his duty as manager. In the case of *Kastur Bhavani* v. *Appa* (*f*), sons, including two minors, sued to recover ancestral lands sold by their father to pay a debt. The debt had been originally incurred by the grandfather. It was alleged to have been contracted or increased for immoral purposes, but this was not proved, though it was proved that the father was addicted to drinking. The District Court held the sale invalid except as to the father's share, as not having been proved to be necessary, but in the High Court it was re-established on the ground that the sons had not proved, as they were on their plaint bound to prove, that it was made for an immoral purpose, they having relied on that express ground. A misapplication of a trivial sum would, it was suggested, probably make no difference (*g*). The cases of *Girdhari Lal* v. *Kantoo Lal* (*h*) and of *Muddun Gopal Lal* v. *Mussamut Gowraubutty* (*i*) are referred to, but only on the point just noticed. As a mere member of a united family the father has been held answerable in his own share on a partition for his personal debts (*k*) in the same way as any other coparcener. This is shown by the cases already referred to (*l*). A suit brought against a father alone will not in ordinary cases bind his sons as to the ancestral property. They must be made defendants if they

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(*f*) I. L. R. 5 Bom. 621.

(*g*) Before the birth or the adoption of a son an owner may deal with the property free from question by a son subsequently born or adopted, *loc. cit.* and *Rambhat* v. *Lakshman Chintaman*, I. L. R. 5 Bom. 630.

(*h*) L. R. 1 I. A. 321.

(*i*) 15 Beng. L. R. 264.

(*k*) See *Narayanrao Damodar* v. *Balkrishna*, I. L. R. 4 Bom. 529, 534.

(*l*) In the N.W. Provinces the same doctrine seems sometimes to have prevailed, see *Nanhak Joti's Case*, above, p. 576. The Pandits at 14 of the N. W. P. S. A. Report for 1857, said that two sons could recover their shares of ancestral property sold in execution of a decree against the father unless the debt was incurred for the benefit of the family. In *Ramchandra and Lakshman* v. *Raoji Sakharam*, Bom. H. C. P. J. for 1882, p. 381, the issue sent down for trial was "Was the debt secured by the mortgage of plaintiff's father . . . contracted for a legal and moral purpose?"

are to be affected by the decree (*m*). The principle extends to the case of a son born, and even to one adopted, *pendente lite* (*n*). In this respect, therefore, the father stands on the same footing as an ordinary manager. A suit against him may affect the whole family in its estate, but this is exceptional, and a sale under a decree in such a suit could not in general extend to more than the father's own share on a partition.

Sons, however, must discharge their father's debt after his death (*o*). Along with this there are precepts laying the duty on him who takes the estate and exonerating the son kept out of it (*p*). It is a reasonable inference that the estate taken by the sons is, as such, answerable in their hands (*q*) for the debts for which they are morally liable (*r*). The liability is independent of assets where there are none (*s*), and this affords an indication of the kind of debts that can properly be regarded as charges on the estate (*t*). Those only which were excusably incurred are binding (*v*). As the result is substantially the same it would seem that the father may make such debts a direct charge on the estate after his own death (*w*). But for all instruments executed by the father as by others the general rules hold good which refuse them validity if made under disturbing influences which deprive them of the character of free and intelligent expressions of volition (*x*). None of the texts, however, which establish this liability, nor any of the

(*m*) See above, p. 167.

(*n*) See *Rambhat* v. *Lakshman Chintaman Mayalay*, I. L. R. 5 Bom. 630, 635, where the owner's uncontrolled power of gift before, and his limited power after, the birth of a son are clearly defined by Sir M. Westropp, C.J.

(*o*) Vyav. May., Chap. V., sec. 4, para. 12 ss.

(*p*) Vyav. May., Chap. V., sec. 4, para. 16; Col. Dig., Book I., Chap. V., T. 171.

(*q*) See above, pp. 73, 75.

(*r*) Vyav. May., Chap. V., sec. 4, para. 13.

(*s*) *Ibid.*, Yajn., Book II., para. 51; Narada, Book II., Chap. III., para. 6, quoted Col. Dig., Book I., Chap. V., T. 188; Steele, L. C. 312; 2 Str. H. L. 274, 277; *Lallu* v. *Motiram*, I. L. R. 13 Bom. 65.

(*t*) "The obligation . . . has respect to the nature of the debt, not . . . of the estate," Judicial Committee in *Hanooman's Case*, 6 M. I. A. 421.

(*v*) Manu VIII. 166, says: "if the money was expended for the use of his family." See Steele, L. C. 217.

(*w*) This is the effect of *Hanooman Parsad's Case* (see above, p. 165), if it is generalised beyond the case of an ancestral debt made a charge by the father, which was all the Judicial Committee dealt with.

(*x*) Vyav. May., Chap. II., sec. 1, p. 10; Narada, Part I., Chap. III., para. 43; Part II., Chap. IV., paras. 8, 9; 2 Str. H. L. 14.

Commentators on them, say that a son's liability for his father's debts arises during the father's life (*y*). Nor has any response of a Sastri been found in favour of such a liability. There are many texts which imply the contrary. Vishnu says the sons or grandsons must pay when the debtor is dead or has been absent twenty years, that is when he may be presumed to be dead, not before (*z*). Manu says simply when the father is dead (*a*). Brihaspati (*b*) says the sons must pay even in the father's life but only in cases in which he is incapable of acquiring property or retaining it. The exception here is conclusive as to the rule, at least as it was understood by the school that produced this Smriti, which is sacred everywhere. The same observation occurs as to Katyayana's text (*c*) quoted in *Narayanacharya's Case* (*d*). So too as to Narada's text on the subject (*e*). The whole series quoted by Jagannatha imply a liability only after the father's natural or civil death or its equivalent, and so they have invariably been understood by native lawyers reading them with the context. The case may be stated even more strongly. There is no text imposing on sons a liability during their father's life for debts incurred even for the benefit of the family (*f*), except in cases in which the father is not capable of managing the estate and affairs of the family, and the sons are (*g*). It is impossible that of the numerous texts treating of debts contracted for the family and of the sons' liability as survivors of their father all should have omitted to mention their liability during the father's life had the liability been recognized. But the father is regarded as alone responsible, and alone having administrative control as the head of an undivided family (*h*). Debts even for its benefit cannot, it is said, be contracted against

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(*y*) See above, p. 164; and below, Book II., Vyav., Chap. I., sec. 1, Q. 5.

(*z*) 2 Str. H. L. 237; Vishnu, Transl., p. 45; Col. Dig., Book I., Chap. V., T. 168; 1 Str. H. L. 188; 2 *ibid.* 237, 316; Steele, L. C. 34

(*a*) VIII. 166.

(*b*) Col. Dig., Book I., Chap. V., T. 178.

(*c*) T. 177.

(*d*) I. L. R. 1 Bom., at p. 266.

(*e*) Part I., Chap. III., paras. 14, 15.

(*f*) See the answer to Chap. I., sec. 1, Q. 5, below.

(*g*) See Yajn., Book II., para. 45; Col. Dig., Book I., Chap. V., T. 167, 168, 177, 178; 2 Str. H. L. 81, 277, 326.

(*h*) Comp. Ellis in 2 Str. H. L. 321, 326, and above, p. 270. On his death or incapacity the eldest son succeeds unless disqualified, as in ancient times he took the *patria potestas*. See Manu IX., 106 ss., 126.

his prohibition (*i*)—a doubtful proposition—but one which shows how his position was understood by a learned native lawyer. The Vyav. Mayukha, the chief local authority in Bombay (*k*) dwells elaborately on the debtor's obligations, but says nothing about any obligation of the sons except on their father's death or prolonged absence (*l*). The Mitakshara itself, in commenting on the texts of Yajnavalkya in the untranslated portion on "Vyavahara," construes them as imposing a duty only after the father's death, his absence for twenty years, or on his imbecility. It then transfers the liability to the new head of the household if there is one (*m*), or to the sons jointly if there is not.

It seems, therefore, that the decision in *Jamiyatram's Case*, giving to the father in a united family virtually unlimited power over the whole ancestral estate, on condition only that his behaviour is not scandalous, cannot be rested on the Hindu law as the people have received it in Bombay (*n*). The acknowledged authorities do not support it, and the usage of the people has conformed to these authorities. A reference to Steele's Law of Caste establishes this (*o*), and the MS. collection of Caste Customs made by Mr. Borradaile, while it shows that the father's debts were regarded as a burden on the estate in partition, does not assert any liability of the sons during his life. It appears indeed that in the great majority of castes the father's debt and the family debt are not distinguished. Partition against the father's will during his life is not allowed (*p*). He is manager while capable, and all his debts are *primâ facie* incumbent on him alone (*q*), passing to his

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(*i*) Col. Dig., Book I., Chap. V., T. 194. The Vyav. May., Chap. V., sec. 4, para. 20, and the Mit., chapter on Vyavahara, prescribe the duty of payment without any qualification. See, too, Col. Oblig., p. 24; Vishnu, Tr. pp. 45, 46.

(*k*) *Sakharam* v. *Sitabai*, I. L. R. 3 Bom., at p. 367.

(*l*) Vyav. Mayukha, Chap. V., sec. 4.

(*m*) Comp. 2 Str. H. L. 252, 326.

(*n*) *Comp. Lallubhai* v. *Mankuvarbhai*, I. L. R. 2 Bom., at pp. 418, 448; as to the force of this reception S. C. L. R. 7 I. A. 212, 237.

(*o*) *i.e.*, by treating the liability for debts as one arising on the father's death in all places where the point occurs. Alienations without the assent of heirs are pronounced invalid, *ibid.* 68, 238; or at most good only for the grantor's share and during his life, *ibid.* 237.

(*p*) See below.

(*q*) The absence of rules for a partition enforced by the sons in the father's life is an evidence of the comparatively late introduction of this doctrine. The same inference arises from the want of a rule for the partition of debts

sons only on his death subject to exceptions on the usual grounds (*r*).

The decision in *Jamiyatram's Case* conforms to that in *Girdharilal* v. *Kantoolal*, but the question remains of whether the latter expresses the Hindu law of Bombay. The father's share may be made separately available, as in Bengal it could not when *Girdharilal's Case* was decided. The son's right is a co-ownership entitled to protection against a careless or designing creditor of the father; and there is no hardship in controlling the father's right to sell what he did not buy. When it is said that *Hanooman Pershad's Case* "is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him," the remark occurs that their Lordships in the earlier case did not decide as to debts in general, only as to an ancestral debt made a charge by the father. Secondly it may with deference be pointed out that the Mitakshara itself in dealing expressly with the subject in a chapter which was not before their Lordships on either occasion, treats of the payment of debts in such a way as to make it clear that no liability of a son for his living father's debt is recognized. The estate may be answerable, and the son's share in it, but simply through the father's authority as manager. This enables him to create burdens for purposes necessary and beneficial to the family, but not for other purposes though these should not be "immoral" (*s*). The point in *Hanooman Pershad's Case* was that as an ancestral debt descended to the father he was *primâ facie* bound to pay it (*t*), and hence justified in applying the ancestral estate to that purpose (*v*), and therefore the manager for

in a partition between the father and sons, which in the case of a partition amongst the sons only is always provided for. It seems that the three stages of development were (1) a moral claim of the sons and a still stronger moral duty of the father to preserve the patrimony; (2) an advance of the son's right to co-ownership, the father being still ex-officio manager; (3) the son's acquisition in virtue of co-ownership of a right to partition of the patrimony, comp. p. 206 above, and the Daya Bhaga, Chap. II., Stokes's H. L. B., pp. 200 ss., and the Dayakrama Sangraha, Chap. VI., *ibid.*, p. 511.

(*r*) The exceptions are not explicitly stated, no question having been put on that point. See Steele, L. C. 40, 178, 217.

(*s*) See above, p. 165; Steele, L. C., pp. 40, 265.

(*t*) Amongst the Marathas this obligation extends to all debts incurred during the son's infancy, and to those incurred after his majority for Samsar, or the discharge of moral and ceremonial duties. Steele, L. C. 40.

(*v*) See Katyayana in Vyav. May., Chap. V., sec. 4, para. 14.

his infant son might properly recognize the charge as binding on him. The conversion of such an obligation inherited by a son into a liability to have all his property aliened by his father while they are both alive (*w*) in order to furnish means for the father's needless expenditure is a process which, so far as can be discovered, the " usage of the country " or the " laws and usages of the Gentoos," have not performed in Bombay.

The English connotation of the word " heir," as denoting one succeeding his ancestor but only succeeding, not participating with an equal right, is misleading in the case of a son's relation to his father as regards the Hindu " heir " so called (*x*). The birth of a

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(*w*) The duty arises from " sonship " and must be discharged out of a son's own property. It rests, therefore, on a separated son. If, then, the " pious duty " towards a father deceased is convertible into a legal obligation to a father alive, with a corresponding right in the father, it would seem that the separated son's property equally with that of the son unseparated, may be disposed of by a father or sold in execution of a decree against him for a debt not " immoral."

(*x*) See above, pp. 62, 232. This participation is not in theory limited to the ancestral estate : it extends to all immovable property, with some special exceptions.

A father cannot, according to the doctrine of the Mitakshara, Chap. I., sec. 1, para. 27, dispose of his immovable property, even though acquired by himself, without the assent of his sons, except in a case of urgent need, Steele, L. C., pp. 39, 54. The reason given is the duty of providing for the family, and this must limit the administrative independence assigned to him over his acquisitions by Chap. V., sec. 10, supposing the latter extends to immovable property. Colebrooke seems to recognise this at 2 Str. H. L. 436. At p. 439 he states the same doctrine as undoubtedly that of the Smriti Chandrika, and at p. 441 as that of the Madhaviya. At p. 444 Sutherland says no part of the Daya Bhaga (of Jimuta Vahana) is so unsatisfactory as that which maintains the right to dispose of self-acquired immovables, and at p. 445 that according to the Mithila and the Benares (Mitakshara) Schools a man is free to give away only his movable property. The Sastri of the Recorder's Court at Bombay says, p. 449, that alienation of immovable property is forbidden, and of movable property also, except as to the surplus beyond the needs of the family. Such, he says, is the usage of the country, and this is confirmed by Steele, L. C., pp. 68, 211, though some castes maintain the power of the acquirer over his own acquisitions, *ibid.* 237; and the authority of the manager is by some castes extended beyond the warrant of the sacred writings, *ibid.*, 53, 54, 209.

Though the power of a Hindu to deal as he pleases with his acquired property cannot now be questioned, Steele, L. C. 54, 211; above, pp. 193, 206, 209; it does not seem reconcilable with the principles of the Hindu law, as thus stated by high authorities, that a father should be at liberty to cast off his obligations to his family, or that he should be able not only to burden

son necessarily causes a diminution of his father's estate, by the introduction of an owner in common with the father (*y*), and thenceforward the father's acts are those of a manager. His death throws a new burden on the son, as the son's birth partly divested the father's estate, but the death equally with the birth is a necessary condition of the jural change (*z*).

It may be added that nowhere amongst the provisions of the Hindu law for enforcing payment of debts (*a*) is such a process as the attachment and sale of the lands of a family mentioned. Jagannatha's discussion of the subject (*b*) makes it plain that the connexion between an owner and his land was conceived by the Hindu lawyers as by the earlier Romans (*c*) as separable only by his own volition, however that might be influenced. Attachment and sale in execution therefore are entirely the creatures of British legislation. They belong wholly to the province of procedure; and the title sold cannot, it would seem, be enlarged beyond that vested by the substantive law in the party sued, and whose "right,

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his sons with his debts after his death, but also to alienate even the ancestral estate in their despite during his life. The duty of the son to pay his father's debts is regarded by the Hindu law as a "pious obligation," and as such limited by the equally pious obligation of maintaining the family where the two duties come into competition, see above, p. 207; below, Appendix; and Dayakrama Sangraha, Chap. VI., para. 5; Stokes's H. L. B., p. 510; Vyav. May., Chap. IX., para. 5, *ibid.*, p. 134; though the son must make any merely personal sacrifice.

(*y*) See *Rambhat* v. *Lakshman Chintaman Mayalay*, I. L. R. 5 Bom., at p. 635, *per* Sir M. Westropp, C.J., and the authorities there cited.

(*z*) See *per* White, J., in *Bhecknarain Singh* v. *Januk Singh*, I. L. R. 2 Cal. 438, 443. The son, if a minor at his father's death, becomes responsible only on attaining his majority, according to the Mit. and Vyav. May., *loc. cit.* See also 2 Str. H. L. 76, 80, 279. This indicates a personal obligation to be satisfied no doubt out of the estate if there is one, but not in the proper sense a charge on it as in the case of a specific lien legally created.

(*a*) For the process employed amongst the Marathas, see Vyav. May., Chap. IV., sec. 4, para. 7; Wilson's Glossary *Asedha*; Steele, L. C., pp. 74, 267. For the sacredness of the debtor's obligation for a debt incurred to celebrate one of the necessary ceremonies, *ibid.*, p. 60. By the ancient common law of England execution could not be had for debt or damages against the land or the person of the debtor, only against his chattels and corn, Coke, 2 Inst. 394; Co. Rep., Part III., 11*b*.; Vin. Abr. Execution (M).

(*b*) Col. Dig., Book II., Chap. II., T. 24, Comm. *ad. fin.*; T. 27, 28, Comm.

(*c*) See Mommsen, Hist. Rom., vol. I., pp. 169, 311; Maynz, Dr. Rom., secs. 243, 380. How very gradually the English law admitted the charging of the estate with debts may be seen in *Blackstone's Comm.*, Book II., Chap. XIX.

title, and interest" as a Hindu father of a family is put up to auction to satisfy his creditor (*d*).

Amongst the male members of an ordinary Hindu undivided family, a suit by one member against another for maintenance is not sustainable. The right arises only (in such a case) through disability to inherit (*e*), but it lies by a son against his father holding impartible property (*f*). In such property is included a pension allowed as commutation for a resumed Saranjam (*g*). The father's maintenance is the first consideration. That being once provided for, the indigent sons have, according to the Hindu Law, a claim on the surplus, so far as it extends, for their maintenance (*h*). In answer to Q. 1884 MS., the Dharwar Sastri (6th October, 1854) says, "It is not right for a son, however young, to claim support from his father. But a father should afford a maintenance to a child, and, if there be hereditary property, to the extent of the son's share." The Sastri seems to have relied on Manu, as cited in Col. Dig., Book V., T. 379, Comm., and 2 Macn. H. L. 114, to the effect that aged parents, a wife, and an *infant* son must under all circumstances be maintained; the last words of which being ambiguous (Col., Note *loc. cit.*) are differently taken in the Mitakshara (*i*). In the case of *Ramchandra Dada Naik* v. *Dada Mahadev Naik* (*k*), Sausse, J., after holding that a partition of the hereditary estate could not be enforced by a banker's son against his father, says: "I do not think that the

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(*d*) The great practical importance of this subject may be pleaded as a justification for dealing with it at such length. The authority said to be vested in the father to waste the patrimony so long as he avoids spending it on the acts included in "immorality," makes the position of every Hindu son in a state of union with his father unsafe. *Suraj Bunsee Kooer's Case*, L. R. 6 I. A., at p. 100, says the son may claim a partition at will. Thus a motive and a means are held forth which tend at least to a complete break-up of the Hindu family system, and may lead to very serious consequences unless the whole subject is comprehensively dealt with by the Legislature. *Kharajamal* v. *Daim*, L. R. 32 I. A. 23; S. C. I. L. R. 32 Cal. 296.

(*e*) *Himmatsing* v. *Ganputsing*, 12 Bom. H. C. R. 96; *Agursangji* v. *Gagji Khodabhai*, *ibid.*, 96 Note (*a*).

(*f*) *Himmatsing* v. *Ganputsing*, *ibid.* 94.

(*g*) *Ramchandra Sakharam* v. *Sakharam Gopal*, I. L. R. 2 Bom. 346.

(*h*) See Col. Dig., Book V., T. 23, Comm.; 2 Str. H. L. 321; Steele, L. C. 40; Mit., on Yajn. II., 175, translated in Appendix.

(*i*) See Book I., Vyav., Chap. II., sec. 1, Q. 2; 1 Str. H. L. 67; Smriti Chandrika, Chap. II., sec. 1, paras. 31, 32.

(*k*) 1 Bom. H. C. R., App., at p. lxxxiv.

abstract question of the right of a son to enforce maintenance (in a Hindu sense) from his father arises here. If I thought it did I would overrule the demurrer, for there is no clearer duty imposed upon a Hindu father than that of giving 'food, raiment, and shelter' not only to a son, but to any member of his family" (*l*).

§ 3A. A family living in union may be either (A) undivided (*avibhakta*) or (B) *reunited* (*samsrishta*).

(A.) An undivided family consists—

1. Of an ancestor and his descendants (*m*).
2. The descendants of a common ancestor.

The descendants must be legitimate descendants of the body, or else legally adopted sons or their descendants (*n*), except in the case of Sudras, where illegitimate sons have a capacity to form a united family *inter se*, probably also with their legitimate half brothers (*o*), and at any rate have rights analogous to those of legitimate sons (*p*). The right of descendants extends only to the third degree from an ancestor, living undivided and being the head of a family or of a particular branch (*q*). Thus:

(1). If A, A^1, A^2, A^3, and A^4 live together, and A^1, A^2, and A^3

(*l*) See *Suraj Bunsee Kooer's Case*, *supra*, and the remark in *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A., at p. 193.

(*m*) Two widows, it has been said, succeed jointly to the estate of their deceased husband. But they do not form an undivided family in the proper sense, and they are perhaps regarded by the Hindu Law rather as holding several, though undiscriminated, shares in the property. See above Book I., Vyav., Chap. II., sec. 6 A, Q. 6, p. 374; 2 Str. H. L. 90.

(*n*) See 2 Str. H. L. 312.

(*o*) See p. 362—4, Q. 10 and 12, Remarks.

(*p*) As to the *paunarbhava*, or son by a twice-married woman, see Sutherland's note, 2 Str. H. L. 208. The *Paunarbhu* is there classed in three divisions, differing, in description, from those given by Narada, Pt. II., Chap. XII., paras. 56 ss. As to the svairini or disloyal wife, see Narada, *loc. cit.*, paras. 50 ss. The heritable right and consequent right to shares in a partition of sons of paunarbhus depends, Sutherland says, on local custom. See above Book I., Vyav., Chap. II., sec. 3, p. 367.

(*q*) See 2 Str. H. L. 327; Vyav. May., Chap. IV., sec. 4, paras. 21, 22; Manu IX. 185; Col. Dig., Book V., T. 81, 394, 396, Comm. Visvesvara, in the Subodhini on Mit., Chap. I., sec. 1, p. 3 seems to admit that the doctrine of representation may be carried down even beyond the great-grandson, but the latter is generally admitted only after the near relatives, specifically enumerated as heirs.

predecease A, then A^4 will have no immediate claim to a share of A's property, see No. 1 in (*r*).

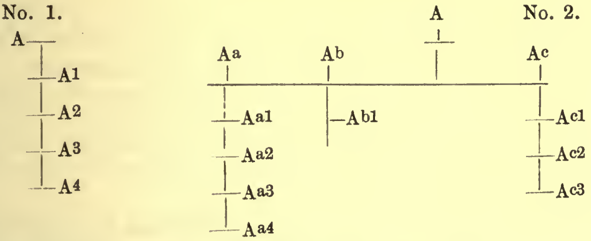
(2). If A^a, with his four descendants, A^b and A^c with their one and three descendants respectively, live together, and A^a's first, second and third descendants predecease A^a, and if A^a die afterwards, then A^{a4} will have no claim to a share of the family property, see No. 2 in (*r*).

The principle operating here is the same as that applying to the Law of Inheritance in an undivided family (*s*). In the case at 2 Macn. H. L. 150, the maternal grandfather having given property to four brothers, the son of one of them, they having been united, was allowed to obtain a partition from his uncle, the survivor of the four (*t*).

Males only can be the subjects of the full rights of coparceners. But women, *ex. gr.* wives, mothers, grandmothers, and daughters, possess latent or inchoate rights of participation, which become effective when separation takes place (*v*). If a widow has been placed in possession of a part of the common estate in order to provide her with subsistence, she can be ousted only through a

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(*r*) No. 1. No. 2.



(*s*) See Book I., p. 70.

(*t*) This case might perhaps be more properly referred to the principle stated below, sec. 5 A, that a gift to united brethren without discrimination constitutes joint property; but it illustrates the right of the co-members to enforce partition, even of recent acquisitions, ranking as joint estate. Had the gift been made in separate shares, the son of one donee would have had to claim by inheritance, not by partition.

(*v*) "The mother's right to a specific allotment arising only when a partition is made," Col. at 2 Str. H. L. 290. See *Ramappa Naiken* v. *Sithammal*, I. L. R. 2 Mad., at p. 186; *Sibbosoondery Dabia* v. *Bussoomutty Dabia*, I. L. R. 7 Cal. 191; *Narbadabai* v. *Mahadeo Narayan*, I. L. R. 5 Bom. 99 (stepmother). According to the usage of some of the lower castes in Gujerath the mother must take part in a partition by her sons : it cannot proceed without her co-operation or at least her consent. Many instances of this occur in Borradaile's Collection. See below "RIGHTS AND DUTIES ARISING ON PARTITION."

suit for a general partition (*w*), in which she is entitled to the allotment of a son's share (*x*).

The principle, limiting the participation of descendants from a common ancestor who live in union, is most explicitly stated in the Viramitrodaya, f. 177, p. 1, l. 6 sqq. (*y*):

Katyayana :—" Should one's own [brother] die before partition, his share shall be allotted to his son, provided he had received no livelihood from his grandfather. But that [grandson] shall receive his father's share from his uncle or from his [uncle's] son; but an equal share shall be allotted to each of the brothers according to law. Or his [the grandson's] son shall receive the share [in case his father be predeceased], beyond him [succession] stops."

One's own (*i.e.*) brother. His son (*i.e.*) the brother's son. A livelihood (*i.e.*) a share. As it is necessary to know what kind of share he shall receive, (Katyayana) says, " His father's share." His son (*i.e.*) the great grandson of the person whose estate is being divided, because the grandson has (already) been mentioned. Afterwards (*i.e.*) beyond the great-grandson, shall occur a stoppage; (*i.e.*) a stoppage of the succession. *The meaning is that the great-grandson's son does not receive a share.*

Hence Devala also says :—" Amongst members of a family who reside together, being undivided or after having been divided, (on a first or) second (partition), shares of the common property shall be given (even) to the fourth (in descent). That is certain " (*z*).

(*w*) *Anpoornabai* v. *Mahadevrao Balwunt*, R. A. No. 13 of 1872, Bom. H. C. P. J. F. for 1872, No. 192. See *Rajbai* v. *Sadu*, 8 Bom. H. C. R. 98 A. C. J., wherein a widow in possession was awarded maintenance before being evicted at the suit of an heir to her deceased husband. See also *Vrandavandas* v. *Yamunabai*, 12 Bom. H. C. R. 229, wherein a concubine in possession was awarded maintenance under similar circumstances. See below " PARTITION BETWEEN BROTHERS," and Dayakrama-Sangraha, Chap. VII., paras. 7-9; Stokes's H. L. B. 514.

(*x*) The Smriti Chandrika, admitting that the widow has an interest in the property, but denying to her a share of it as daya, says that, when sons make a partition, the mother becomes entitled for her maintenance to so much only as, with her other property, will equal a share. Devanda Bhatta, however, admits that, according to the Mitakshara, the widow's share *is* heritage (daya), though there be sons. See the Smriti Chandrika, Chap. IV., para. 8 ff. As to daughters, *ibid.*, para. 18 ff and Chap. IX., sec. 3, para. 11; and as to the widow's lien on property given to her for maintenance, *ibid.*, Chap. XI., sec. 1, para. 44 ff. Succession of the widow and of the daughter, in the absence of sons, is recognised by this author as inheritance. See Chap. XI., sec. 1, paras. 15, 22; sec. 2, paras. 3, 7, 9; sec. 4, para. 19. The widow of a re-united coparcener has an equal right with that enjoyed by her deceased husband, *ibid.*, Chap. XII., para. 34.

(*y*) Transl. p. 72.

(*z*) See Col. Dig., Book V. Text 81; Manu IX. 210; Smriti Chandrika, Chap. VIII., paras. 15, 16.

"The meaning is, a distribution of shares shall take place down to the fourth (descendant) from the common ancestor."

"From the words 'residing together,' it follows that this rule holds good even for persons who have made a partition, and afterwards live together upon reunion or the like."

With this doctrine the Madanaratna agrees; but the Mayukha (*a*) contends, that the passages of Katyayana and Devala, quoted above, refer to reunited coparceners only. The Mayukha's opinion is, however, based on a forced explanation of the term "avibhaktavibhakta" in Devala's passage. Nilakantha takes it as a Karmadharya compound, "those who were first undivided and became afterwards divided." The correct way to dissolve the compound is to take it as a "Dvandva" or copulative compound. The correctness of the rule given above may be inferred also from the fact, that the great-great-grandson in the male line of a divided person inherits only as a Gotraja-relation, after the wife, daughters, &c. (*b*).

The distinction between the rights of male coparceners and of the female members of the family rests on this, that the right of the former are immediate, arising on the birth of each, while those of the latter are contingent or dependent, having their source in the necessity for a provision for a marriage portion or maintenance (*c*).

§ 3B. A REUNITED FAMILY.—A reunited family may, according to the Mitakshara, Chap. II., sec. 9, para. 3 (*d*), consist (1) of a father and his sons, (2) of brothers, and (3) of nephews and paternal uncles, who, having once separated, have agreed to combine their interests again. According to the Mayukha, Chap. IV., sec. 9, para. 1 (*e*), all persons, who once formed a united family, may reunite. This difference of opinion depends on a variance in the interpretation of a passage of Brihaspati, quoted Mit., *loc. cit.*, para. 3. Vijnanesvara takes it as an exhaustive enumeration of the persons capable of reunion, whilst Nilakantha views it as a *dikpradarsana*, that is, an indication of principle, extending to analogous cases (*f*).

(*a*) Borradaile, Chap. IV., sec. 4, paras. 22 and 23; Stokes's H. L. B. 53-54.

(*b*) Vyav. May., Chap. IV., sec. 4, p. 22; Borradaile 59; Stokes's H. L. B. 53.

(*c*) On this point, see the beginning of Book II., and below, § 7 A 1 *b*.

(*d*) Stokes's H. L. B. 452. (*e*) Stokes's H. L. B. 91.

(*f*) As to the effects of reunion see *Prankishen Paul Chowdry* v. *Mothooramohun Paul Chowdry*, 10 M. I. A. 403; *Rampershad Tewarry* v. *Sheochurn Doss et al.*, *ibid.*, 506.

It has been held by the Judicial Committee that the reunion must be made by the parties, or some of them, who once lived in union (*g*). See to the same effect Jagannatha, in Col. Dig., Book V., T. 430.

II. Separation.

§ 4A.—*Definition.*—Separation is the dissolution of the state of union or reunion, the continuance of which is based on the will or acquiescence of the united coparceners (*h*).

§ 4B.—*Separation, how effected.*—The separation of a family united or reunited may be effected:

1. *By the will of all the members.*
2. *At the desire of one or more members only.*

[3. *By the Judgment Creditor of a member or the purchaser at an execution sale of his interest.*]

An agreement between co-parceners never to partition has been held invalid by the Bombay High Court (*i*) as being contrary to the Hindu law, and although the Calcutta High Court had laid down such an agreement binding upon the parties (*k*) themselves as distinguished from the heirs and the purchasers from the former, in a recent case (*l*) it has doubted the validity of such an arrangement unless it be for a sufficient consideration, and for a limited period. An agreement at a partition that one of the coparceners shall get one-fourth of the net income of a certain value from the eldest brother was held not binding upon the coparcener in question in claiming the partition of his

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(*g*) *Balabux* v. *Rukhmabai*, L. R. 30 I. A. 130; *Vishvanath* v. *Krishnaji Ganesh et al.*, 3 Bom. H. C. R. 69 A. C. J.; cf. *Akhay* v. *Hari*, I. L. R. 35 Cal. 721.

(*h*) According to the Malabar law descent is traced through females, and the joint property of the tarwad is impartible. The interest of an individual member endures only for his life and is not available for payment of his personal debts or taken in inheritance by his offspring. The group of common maternal origin take the acquisitions of such members collectively. See *Ponambilath* v. *Ponambilath*, I. L. R. 3 Mad. 169.

(*i*) *Rambuja* v. *Virupakshi*, I. L. R. 7 Bom. 538.

(*k*) *Ram* v. *Anund*, 2 Hyde, 97; *Anath* v. *Mackintosh*, 8 Beng. L. R. 60; *Rajender* v. *Sham Chand*, I. L. R. 6 Cal. 107; *Krishnendra* v. *Debendra*, 12 Cal. W. N. 793.

(*l*) *Srimohan* v. *McGregor*, I. L. R. 28 Cal. 769, 786.

quarter share (*m*). Nor is such a condition of any validity in case of a property given away or divided (*n*) by will.

Times of Separation.—1. Separation by the will of all the members, whether undivided or reunited, may take place at any time, provided there be no pregnant widow of a deceased coparcener. In that case it must be deferred until the delivery of the widow (*o*). It cannot be prevented by third parties, however interested they may be in the estate, *e.g.*, by creditors or mortgagees, since their equitable rights and remedies are not impaired. (*See* below, §7 B. 1.)

2. As regards separation at the desire of one or several coparceners only, the head of a family, whether a father, grandfather, or great-grandfather, may separate from his descendants at any time (*p*).

A son living in union with his father, who is head of the family, may demand a separation and a division of the ancestral property (movable and immovable) at any time (*q*), both according to

(*m*) *Subba* v. *Raja*, I. L. R. 25 Mad. 585.

(*n*) *Makoondo* v. *Ganesh*, I. L. R. 1 Cal. 104; *Jeeban* v. *Ramnath*, 23 Suth. W. R. 297; Transfer of Property Act (IV.) of 1882, secs. 10 and 11.

(*o*) May., Chap. IV., sec. 4, para. 37, and compare para. 35; Stokes's H. L. B. 56-7. *Shivajirao* v. *Vasantrao*, I. L. R. 33 Bom. 267.

(*p*) Mit., Chap. I., sec. 2, paras. 2 and 7; Stokes's H. L. B. 377-8. See also May., Chap. IV., sec. 4, para. 8; Stokes's H. L. B. 49-50.

(*q*) Mit., Chap. I., sec. 5, paras. 5-8; Stokes's H. L. B. 392-3; May., Chap. IV., sec. 4, para. 4; Stokes's H. L. B. 48; Smriti Chandrika, Chap. VIII., p. 20; *Naglinga Mudali* v. *Subbiramniya Mudali et al.*, 1 M. H. C. R. 77; *Kali Pershad* v. *Ram Charan*, I. L. R. 1 All. 159; *Phulchand* v. *Man Singh*, I. L. R. 4 All., at p. 312. The late Supreme Court held that a son could not enforce a partition of ancestral movable property, *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, 1 Bom. H. C. R. 76 App., I. L. R. 1 Bom. 563. See, however, Mit., Chap. I., sec. 5, pl. 3; Stokes's H. L. B. 391; and Col. Dig., Book V., T. 92, whence it appears that according to the law books the ancestral wealth (*dravya*) generally is subject to partition at the will of the son, though particular parts of it, as jewels, may be excepted. See also Col. Dig., Book V. T. 26, Comm.; *Raja Ram Tewary et al.* v. *Luchmun Pershad et al.*, 8 C. W. R. 15 C. R. 731 F. B.; *Laljeet Singh* v. *Rajcoomar Singh*, 12 B. L. R. 373; *Suraj Bunsee Kooer* v. *Sheo Proshad Singh*, L. R. 6 I. A., at p. 100, and the cases therein cited; above, p. 172, sec. 8, on the LIMITATIONS OF PROPERTY. Mr. Ellis, at 2 Str. H. L. 321, adopting the Bengal law that the father is not bound to divide, adds that he must maintain his son. At 2 Str. H. L. 323, Mr. Sutherland has overlooked Mit., Chap. I., sec. 5, p. 8. (Stokes's H. L. B. 393.) *Balkishen* v. *Ram*, L. R. 30 I. A. 139.

the Mitakshara and the Mayukha (*r*); of the self acquired property, under certain conditions only (*s*), viz.:

a. If the father be indifferent to wealth, his wife past child-bearing, and the daughters married (*t*).

b. If the father be incapacitated by bodily ailments, extreme age, insanity, or by addiction to vice (*v*), or the loss of caste. The last of these conditions would, however, now perhaps be inoperative, as loss of caste, according to Act XXI. of 1850, does not affect a man's civil rights (*w*). A grandson, living in union with his grandfather, or a great-grandson with his great-grandfather, may similarly demand a partition, provided his own father, or his father and grandfather, be dead. Till then he cannot demand a partition notwithstanding his right in the property, because the intervening heir obstructs his complete title (*x*), that is, intervenes between him and the full acquisition of it.

In *Suraj Bunsi Koer* v. *Sheopershad* (*y*) the Judicial Committee said then: "it seems now to be settled law in the Courts of the three Presidencies that a son can compel his father to

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(*r*) *Jugmohundas* v. *Nathubhoy*, I. L. R. 10 Bom. 528.

(*s*) 2 Str. H. L. 320. In Bengal a father in the distribution of his self-acquired property is not subject to any restriction. In *Rao Balwant Singh* v. *Rani Kishori*, L. R. 25 I. A. 54, the Judicial Committee have held that a father of an undivided Hindu family subject to the Mitakshara law has full power of disposition over his self-acquired immovable property.

(*t*) The doctrine, given here, is that of the Mitakshara as explained by the Subodhini (Col. Dig., Mit., Chap. I., sec. 2, note to para. 7; Stokes's H. L. B. 378). The Viramitrodaya differs from this view by rejecting the division *a*, while the Mayukha, Chap. IV., sec. 4, para. 3, Stokes's H. L. B. 48, divides *a* into two sub-divisions. Narada, Part. II., Chap. XIII., sl. 2 ss., gives the following times, (1) after father's death, (2) when the father being old desires, (3) when the mother is past child-bearing, and the sisters married, (4) when the father's capacity or desire has ceased.

(*v*) The Mitakshara says, "if he is addicted to vice." The Viramitrodaya explains this to mean "loss of caste." But it is probable that the Mit. means to include, besides loss of caste, the case of a notorious spendthrift and evil liver, as "interdiction" is otherwise known to the Hindu law. See above, pp. 192, 594; Mit., Vyav., Chap. I., sec. 5, pl. 9; Stokes's H. L. B. 393. If a father has become incapacitated, or retired from worldly affairs, a son may become the representative of the family, 2 Str. H. L. 326; Steele, L. C. 178.

(*w*) *Tagore* v. *Tagore*, L. R. Suppl. I., App., p. 56.

(*x*) Mit., Chap. I., sec. 2, paras. 1 and 7; Stokes's H. L. B. 377-8; sec. 5, para. 3, note, *ibid.* 391; May., Chap. IV., sec. 4, paras. 1—3, *ibid.* 47-48; *Rai Bishen Chand* v. *Asmaida Koer*, L. R. 11 I. A. 164, *per Curiam.*

(*y*) L. R. 6 I. A. 88, 100; S. C. I. L. R. 4 Cal. 226.

make a partition of ancestral immovable property." The High Courts of Calcutta, Madras, the N.W. Provinces and Bombay have laid down that in a family governed by the Mitakshara (and in Bombay by the Mayukha also) a son and a grandson can compel partition against a father of both movable and immovable ancestral property (z). In the case of *Apaji* v. *Ramchandra* (a) the Bombay High Court has held that in the Satara District of the Province a son cannot compel partition as against his father's assent living jointly with the uncle. As a general proposition interpreting the Mitakshara this restriction upon the right of a son to claim partition has been dissented from by the Calcutta High Court in *Rameswar* v. *Lachmi* (b) and the Madras High Court in *Suba Ayes* v. *Ganesa* (c). In *Pranjvidas* v. *Ichharam* (d) the Bombay High Court has confirmed the view it had taken in *Apaji* v. *Ramchandra* (a). That a male coparcener can effect a partition by mere expression of his intention to become separate in estate has been laid down by the Privy Council (e). That a purchaser of a coparcener's share at an execution sale (f) and an ordinary purchaser of a share for value from a coparcener in Bombay and Madras (g) can enforce a partition in the right of that member has now been fully established.

A son, a grandson, or a great-grandson may voluntarily separate without receiving a full share, at any time (h).

The law of the Mitakshara as stated should be regarded as binding generally in Bombay as in the other provinces in which the authority of that work prevails. But it is subject to many

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(z) *Laljeet* v. *Rajcoomar*, 12 Beng. L. R. 372; *Suba Aiyer* v. *Ganesa*, I. L. R. 18 Mad. 179; *Jogul Kishore* v. *Shib Sahai*, I. L. R. 5 All. 430; *Jugmohundas* v. *Mangaldas*, I. L. R. 10 Bom. 529, 578.

(a) I. L. R. 16 Bom. 29, F. B.

(b) I. L. R. 31 Cal. 111.

(c) I. L. R. 18 Mad. 179.

(d) I. L. R. 39 Bom. 734.

(e) *Appovier* v. *Rama*, 11 M I. A. 75; *Balkishen* v. *Ram*, L. R. 30 I. A. 139; *Parbati* v. *Naunihal Singh*, L. R. 36 I. A. 71; *Kewal* v. *Parbhu*, L. R. 44 I. A. 159.

(f) *Deendyal* v. *Jugdeep*, L. R. 4 I. A. 247; *Per Curiam*, *Soorjeemoney Dossee* v. *Denobundoo*, 6 M. I. A. 539; *Suraj Bunsi Koer's Case*, L. R. 6 I. A. 88.

(g) *Gurlingapa* v. *Nandapa*, I. L. R. 21 Bom. 797; *Aiyyagari* v. *Ramayya*, I. L. R. 25 Mad. 690; *Lakshman* v. *Ramchandra*, L. R. 7 I. A. 18; *Rangayana* v. *Ganpa*, I. L. R. 15 Bom. 673.

(h) Mit., Chap. I., sec. 2, paras. 11 and 12, *ibid.* 380; May., Chap. IV., sec. 4, para. 16, *ibid.* 51.

exceptions according to the caste law of the parties. Thus amongst 82 of the 101 castes, from whom information was obtained by Mr. Steele at Poona, it was found that partition could not be enforced by a son against his father unless the father had acted improperly as manager (*i*). It would seem, therefore, that in the usage of a large minority, at least of the people of the Dekhan, the rule of Baudhayana (*k*) is still received as law. "While the father lives the division of the estate takes place (only) with his permission." In Gujarath the castes, almost without exception or qualification, answered Mr. Borradaile's enquiries by denying the right to partition of a son against the wish of his father. Although the Sastris, therefore, as in Chap. I., sec. 1, Q. 3, 6, below, generally follow the Mitakshara in recognizing a son's right to enforce partition, there is room for reasonable doubt as to whether it can be considered as finally established except amongst those castes or classes whose rights and duties in this particular have become the subject of judicial decision. Uniformity of the law is so desirable that the Courts will naturally desire to abide by the Mitakshara and the Mayukha (*l*), whose doctrine has been adopted by the Judicial Committee (*m*), but it is only fair to point out that custom does not appear to have more than partially accepted these authorities on the point now in question. On the one side are the Sastris whose opinions are entitled to respect; but on the other are the answers given by the representatives of the castes themselves. Even amongst the Brahmans the son's right does not seem to be fully admitted by any of the classes whose answers are preserved in Mr. Borradaile's collection; while amongst the lower castes the answers, without exception, so far as has been discovered, were either that the son could not enforce partition at all, or else that the father could retain so much as he wished of the ancestral property (*n*). This would of course reduce the son's right to nothing (*o*). In several cases the surviving mother's assent is

(*i*) Steele, L. C. 216; see *ibid.*, pp. 405, 407.

(*k*) Transl. p. 224.

(*l*) See Book II., Vyav., Chap. I., sec. 1, Q. 1.

(*m*) See *Suraj Bunsi Koer's Case*, L. R. 6 I. A., at p. 100.

(*n*) So in Steele, L. C. 405, 407 ss.

(*o*) Amongst the Oudich Brahmans of Broach and the neighbourhood it was said that there was no instance of sons having made a partition during their father's life. The father dividing the property might retain as much as he wished for himself during his life, subject to the rights of his sons at his death; Borr. Lith., p. 59.

said to be necessary to validate a partition after the father's death, and in nearly all it is set forth as a condition that she is to be provided for (*p*).

(*p*) This is in accordance with a tendency in many castes to favour the mother in the matter of succession. See above, pp. 91, 152, and Book I., Vyav., Chap. II., sec. 6*a*, Q. 19, 21, 23, 24, 26.

The (Bhargova Visa) Brahmans of Surat said : " So long as the father lives his sons are not competent, without his consent, to divide the father's or grandfather's property." (Borr. Lith., p. 85.) So also those of Broach. (*Ibid.*, p. 127.) A similar rule was stated by the Srimali Brahmans of Surat and of the neighbourhood of Broach. (*Ibid.*, pp. 151, 182.) The Mewara Chowraisi Brahmans recognised a partition at the father's option during his life; but no instance has occurred of one against his will (*ibid.*, p. 211) at Surat. At Broach no partition is allowed without his consent (*ibid.*, p. 227). The Mewara Bhuttee Tulubda Brahmans of Surat allow no partition without the father's assent in his life either of his property or of the grandfather's. (*Ibid.*, p. 244.) He may divide and then the sons during his life take what he has assigned to each. So amongst the Sachoura, and Waira, and Oonewal Brahmans of Surat. (*Ibid.*, pp. 298, 319, 342.) The Brahmans (Motola, Desaee Tur) of Oolpar stated a similar rule (*ibid.*, p. 267) as prevailing amongst them. At Broach amongst the Oonewal Brahmans should a son separate himself the father sets apart a share for him. (*Ibid.*, p. 363.) Amongst the castes below the Brahmans, the assent of the father is set forth as indispensable amongst the following :

Borr. Coll. MS.

Book G,	p. 29	Bhaosar Cheepa Sooruti	Surat.
	76	Bhaosar Shravak (Tuppa Sect.)	Surat.
	135	Sootar Punchallee Sooruti	Surat.
	200	Sootar Goojar Tulubda Sooruti	Surat.
	252	Sootar Purdaisee Khatee	Surat.
	296	Lohar	Ahmedabad.
	335–6	Sootar Lohar Sooruthiya	Surat.
	362	Khatree Vunkur Sooruti	Surat.
	410	Durjee Meeraee Sooruti	Surat.
	445	Malee Sonathiya Sooruti	Surat.
	475	Malee Moghreliya Sooruti	Surat.
	510	Kudiya Sooruti	Surat.
	541	Pukhalee Sooruti	Surat.
	568	Vansphora Sooruti	Surat.
	591	Vansphora Dukhani Sooruti	Surat.
	609	Koombhar Goojurathi Sooruti	Surat.
	636	Dhobee Rawatiya Sooruti	Surat.
	699	Waghrees	Surat.
	719	Duphgur Rajpoot	—
	745	Khalpa Puttuni	Surat.
	773	Khalpa Khumbarti Sooruti	Surat.
Book C D E,	p. 16	Bruhm Kshatrees, &c.	Broach.
	39	Kayusthus Valnik	Surat.
	57	Kayusthus Mathur	Surat.

A member cannot enforce a partial division (*q*), though it can be effected by arrangement (*r*). As to this, however, Sir R. Couch, C.J., in *Shib Suhaye Singh et al.* v. *Nursing Lall et al.* (*s*) says, "I did not intend to decide any such general question." But this is the recognised law in Bombay (*t*), and in the North-West Provinces (*v*), Madras (*w*), and Bengal (*x*). The same rule holds good in respect to one or more members of a family, consisting of brothers or collaterals only (*y*), the whole property being brought

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Book C D E, p.	73	Sonee Dumuniya	Surat.
	89	Sonee Tragun Javeeya	Surat.
	110	Lohar Bhownugguriya	Surat.
	128	Bharboonja Kayustha	Surat.
	144	Rajpoot Jadhowvanshi	Sabulgaon.
	157	Purdesee Aliya	Surat.
	174	Salvee Sreemalee Veesa	Surat.
	192	Koombhar Lar Sooruti	Surat.
	210	Sulat Sompoora Sooruti	Surat.
	229	Mochee Kudiya Khumbarti	Surat.
	245	Bhurwar	Surat.
Book F, p.	28	Hujjam Mehsooriya	Surat.
	59	Soothar Vaisya	Surat.
	120	Hujjam Kalmooniya	Surat.
	165	Khutree Phurusrami	Broach.
	201	Dher Tulubda...	Surat.
	229	Soothar Puncholee	Broach.
	259	Brahmans Kherwa Hoomunero	Gour.

In no instance is there an admission of an unqualified right on the part of a son to enforce a partition and obtain a share.

The instances above tabulated are all drawn from the districts of Surat and Broach. The collection for Ahmedabad was not completed, or it has been lost.

(*q*) *Nanabhai* v. *Nathobhai*, 7 Bom. H. C. R. 47, A. C. J. For the Bengal law, see the note of Sir W. Jones at 2 Str. H. L. 251. He thinks that the text of Manu IX. 104, "After the death of the parents, &c.," prevents a partition, even after the father's death, except with the mother's assent. See above, sec. 3 A, and the case of *Lakshman* v. *Satyabhamabai*, I. L. R. 2 Bom. 494; *Shivmurtappa* v. *Virappa*, I. L. R. 24 Bom. 128; *Kristayya* v. *Narasimha*, I. L. R. 23 Mad. 608; *Jogendra* v. *Jugobundhu*, I. L. R. 14 Cal. 122.

(*r*) *Gavri Shankar* v. *Rajaram*, I. L. R. 18 Bom. 611; *Muthsami* v. *Nallakulantha*, I. L. R. 18 Mad. 418; *Radha Churn* v. *Kripa*, I. L. R. 5 Cal. 474.

(*s*) 22 C. W. R. 354.

(*t*) *Trimbak Dixit* v. *Narayan Dixit*, 11 Bom. H. C. R. 69; *Venkatesh et al.* v. *Ganapaya*, R. A. Nos. 30 and 31 of 1875, Bom. H. C. P. J. F. for 1876, p. 110; *Shivmurtappa* v. *Virappa*, I. L. R. 24 Bom. 128.

(*v*) *Mithoo Lall* v. *Golam Nuseer-ood-deen et al.*, 4 Agra Rep. 276.

(*w*) *Kristayya* v. *Narasimha*, I. L. R. 23 Mad. 608.

(*x*) *Jogendra* v. *Jugobundhu*, I. L. R. 14 Cal. 122.

(*y*) Mit., Chap. I., sec. 3, para. 1; *Musst. Deowanti Koonwar* v. *Dwarkanath*, 8 B. L. R., at p. 363, note; 2 Str. H. L. 358.

into account (*z*), so far as it is common (*a*), but one coparcener may separate himself while the rest remain joint as before (*b*). The right to claim a partition is not lost by its non-exercise during six or seven generations (*c*). A decree for partition produces an immediate severance of interests (*d*), subject, however, to the result of an appeal should one be made. An appeal, according to the view held by the Bombay High Court, seems to suspend or postpone the division until it is decided, according to the cases quoted below, sec. 4 D (*e*).

3. *Partition in Execution of Decrees.*—The creditor of an undivided coparcener may obtain execution of his decree against the share of his judgment debtor by enforcing a partition (*f*). This is

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(*z*) *Lakshman D. Naik* v. *Ramchandra D. Naik*, I. L. R. 1 Bom. 561. See below, sec. 7.

(*a*) *Moti Mulji* v. *Jamnadas Mulji*, S. A. No. 77 of 1877, Bom. H. C. P. J. F. for 1877, p. 123; *Ballal Krishna* v. *Govinda et al.*, S. A. No. 25 of 1877; *ibid.*, p. 124.

(*b*) *Anandibai* v. *Hari*, I. L. R. 35 Bom. 293; *Gavrishankar* v. *Rajaram*, I. L. R. 18 Bom. 611.

(*c*) *Thakur Durriao Singh* v. *Thakur Davi Singh*, L. R. 1 I. A. 1; *Moro Vishvanath* v. *Ganesh*, 10 Bom. H. C. R. 444. As to limitation, see above, p. 589, and below, sec. 4 D.

(*d*) *Joy Narain Giri* v. *Grish Chandra*, L. R. 5 I. A. 228; *Parbati* v. *Naunihal Singh*, L. R. 36 I. A. 71; *Kewal* v. *Parbhu*, L. R. 44 I. A. 159; *Lakshman* v. *Narayan*, I. L. R. 24 Bom. 152; *Ram Pershad* v. *Lakhpati*, I. L. R. 30 Cal. 231, P. C.

(*e*) The right acquired by a decree may be abandoned by non-execution, *Prankissen Mitter* v. *Sreemutty Ramsoondry Dossee*, 1 Fult. 110. This might be regarded as a case of reunion as soon as limitation barred execution of the degree. *Sakharam* v. *Hari*, I. L. R. 6 Bom. 113, *contra Thandayuthapani* v. *Raghunath*, I. L. R. 35 Mad. 239. As to when a decree becomes complete, see *Jotindra* v. *Bejoy*, I. L. R. 32 Cal. 483.

(*f*) The whole property of two co-sharers may be attached for the debt of one, though only the undivided moiety can be sold, *Goma Mahadev.* v. *Gokaldas Khimji*, I. L. R. 3 Bom. 74. By proceedings in execution against a single parcener (even the father) alone, his interest only, not that of his sons, can be affected according to *Deendyal Lal* v. *Jugdeep Narain Singh*, L. R. 4 I. A. 247. (See on this subject above, pp. 621 ss.). Separation may be enforced in order to give effect out of his own share to a sale made by a single member of a joint family, 2 Str. H. L. 349, or to a sale of such share in execution, *Bai Suraj* v. *Desai Harlochandas*, Bom. H. C. P. J. F. for 1881, p. 123, and *Gopal Narayan* v. *Atmaram Ganesh*, Bom. H. C. P. J. F. for 1879, p. 489. Such a transaction, however, Ellis says, Str. H. L. *loc. cit.*, is presumably collusive on the part of the purchaser. See below, sec. 4 F.; *Suraj Bunsi Koer* v. *Sheo Purshad Singh*, L. R. 6 I. A., at p. 109; 4 Comyn's Dig. 233.

A judgment debtor and his sons having joint possession of family property,

closely connected with the law now recognized in Bombay and Madras, that a parcener may dispose effectually of his own undivided share for value, though not by way of gift or devise, except for pious purposes (*g*). It is improper to put a purchaser of land in execution of a decree against one member of an undivided family into possession of the property (*h*). Where he has been actually placed in possession, the other co-sharers will be awarded joint possession and the parties will be left to work out their several rights should they desire it by a suit for partition (*i*). The alienation is thus subject to claims of the other sharers on the common property (*k*). What is sold for the necessary discharge of a common liability is deducted from the common estate (*l*).

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the latter can sue for a declaration of their title to two-thirds of the property, whilst under attachment under decree of a creditor as against the former, without asking for consequential relief, *Narayan Damodar* v. *Balkrishna Mahadev*, I. L. R. 4 Bom. 529.

(*g*) See the elaborate judgment of Sir M. Westropp, C. J., in *Vasudev Bhat* v. *Venkatesh Sanbhav*, 10 Bom. H. C. R. 139; *Udaram Sitaram* v. *Ranu Panduji et al.*, 11 *ibid.* 76; *Mahabalaya* v. *Timaya*, 12 *ibid.* 138, &c., referred to below; *Tukaram* v. *Ramchandra*, 6 *ibid.* 247, A. C. J.; *Suraj Bunsi Kooer* v. *Sheo Prashad Singh*, L. R. 6 I. A. 88, 101; *Anant Balaji* v. *Ganesh Janardhan*, I. L. R. 5 Bom. 499, which discusses *Pandurung Aanandrav v. Bhasker Sadashev*, 11 Bom. R. 72, 76; *Mahabalaya* v. *Timaya*, 12 Bom. R. 138; *Dugappu Sheti* v. *Venkatramnaya*, I. L. R. 5 Bom. 493, 496; *Kalappa* v. *Venktesh* I. L. R. 2 Bom. 676, citing *Nowla Oooma* v. *Bala Dhurmaji*, *ibid.* 95; *Gopal Narayan* v. *Atmaram Ganesh*, H. C. Bom. P. J. F. for 1879, p. 489; see above, pp. 565 ss.

The share of a widow arising on partition cannot be defeated either by execution proceedings or by a voluntary partition, *Bilass* v. *Dinanath*, I. L. R. 3 All. p. 88. At Allahabad the mother is entitled to a share as against the purchaser under a decree of the share of the sons. In Bengal it has been ruled that after the institution of a suit for partition, the purchaser of a son's share takes it subject to its contribution to the mother's share claimable on partition, though a previous purchaser is not subject to such a deduction, *Jogendra* v. *Fulkumari*, I. L. R. 27 Cal. 77, and *Barabi Debi* v. *Debkamini*, I. L. R. 20 Cal. 682. Comp. *Parwati* v. *Kisansing*, I. L. R. 6 Bom. 567.

(*h*) *Deendyal Lal* v. *Jugdeep Narain Singh*, L. R. 4 I. A., at pp. 251, 252, 255; *Anant Balaji* v. *Ganesh Janardhan*, I. L. R. 5 Bom. 499, which discusses the previous cases, and pp. 567, 578, *supra*.

(*i*) *Mahabalaya* v. *Timaya*, 12 Bom. H. C. R. 138; above, p. 589.

(*k*) *Muccandas* v. *Ganpatrao*, Perry's O. Ca. 143; *Jogendra* v. *Fulkumari*, I. L. R. 27 Cal. 77.

(*l*) *Narayan Vinayak* v. *Balkrishna Narayan*, Mis. S. A. No. 21 of 1872, Bom. H. C. P. J. F. for 1872, No. 190; *Sakharam* v. *Deoji*, I. L. R. 23 Bom. 372; *Bhana* v. *Chindhu*, I. L. R. 21 Bom. 616.

§ 4 c. *Right to partition limited to demandant and his share.*

1. It must be considered a fundamental principle, that each coparcener has power only to effect his own separation from the family, and not to enforce a separation amongst the other coparceners against their will (*m*). In the Mitakshara Chap. I., sec. 2, para. 1 (*n*) it is stated, that "When a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two, or more sons," and the comment on this by Balambhatta, as translated in the note, is, that he may "make them distinct and several by giving to them shares of the inheritance." From this it would at first sight appear, that a father has a right not only to sever himself in interest from his sons, but also to effect a separation amongst the sons, independently of their desire or assent (*o*). This, however, would not be a correct inference; the entire comment of Balambhatta runs thus:

"(If) he make them distinct by giving to them shares of the inheritance. As the limit of this (separation) is desired to be known, he (Vijnanesvara) adds: 'From himself.'"

"The purport is, that the (author) does not stop to consider, whether they (the sons) remain afterwards united or separate."

This is evidently not conclusive either of separation or of union in such a case.

It is, no doubt, competent to a father to distribute, to a certain extent, his self-acquired property at his own pleasure amongst his sons (*p*). But it does not follow, that by such a distribution, a separation amongst them individually and independently of their own desire will be effected. There appear to be no texts which lay down such a rule, and Jagannatha, in Colbrooke's Digest, Book V., Chap. VIII. Text 430, explicitly recognizes the doctrine of a continuance of union in a family, notwithstanding the separation of individual members and the allocation to them of their share in the estate (*q*). He makes separation or non-

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(*m*) *Anandibai* v. *Hari*, I. L. R. 35 Bom. 293; *Bata* v. *Chintamoni*, I. L. R. 12 Cal. 262; *Radha Churn* v. *Kripa*, I. L. R. 5 Cal. 474, F. B.

(*n*) Stokes's H. L. B. 377.

(*o*) This would be the most natural inference from Narada also. See Narada, Part II., Chap. XIII., sl. 4.

(*p*) Below, sec. 7 A, 1a (2), and Chap. I., sec. 1, Q. 4, Rem.; Steele, L. C. 58, 216, 330. *Rao Balwant Singh* v. *Rani Kishori*, L. R. 25 I. A. 84.

(*q*) So Steele, L. C., p. 214.

separation depend on the free consent of the coparceners, resting, in the absence of explicit texts, on the reason of the law—a principle recognized in the Hindu as well as in the English jurisprudence (*r*). So too the Privy Council (*s*) say, "It is, however, clear upon the evidence that the two other brothers continued joint after the separation of Shama Doss" (*t*).

This principle has been questioned in Madras, where the right to sever the sons *inter se* seems to have been regarded as a part of the *patria potestas* still recognized by the Hindu law (*v*), and in *Lakshmibai* v. *Ganpat Moroba* (*w*) it was laid down, that a grandfather could, by a will distributing a share of ancestral property received by him on a partition in equal portions among his grandsons, effect a separation amongst the latter (*x*). The reason-

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(*r*) Col. Dig., Book II., Chap. IV., Text 17. The defendants in a suit for partition in England need not submit to it *inter se*. The partition may be limited to the share of the plaintiff. *Hobson* v. *Sherwood*, 4 Bea. 184, and a conveyance by a single joint tenant severs only his share, Co. Lit. 394.

(*s*) In *Musst. Cheetha* v. *Baboo Miheen Lall*, at 11 M. I. A. 380.

(*t*) See also *Rewan Persad* v. *Musst. Radha Beeby*, 4 *ibid.* 137.

(*v*) *Kandasami* v. *Doraisami Ayyar*, I. L. R. 2 Mad. 317. The learned judgment sounds almost like an echo from an earlier world, one in which the equal rights of sons with the father had not yet been developed. (See Narada, XIII., 15; Apast. II., VI., 14.) The power ascribed is special to the father, and would be exercised in vain against the will of sons who, being severed by the father's will, might forthwith reunite by their own. The cases of infants and absentees are distinct. See below. In the Punjab the division made by a father may be revised at his death, see Panj. Cust. Law, II., p. 169, 180, 206, 257. A similar case in the Dekhan, Steele, L. C., p. 219.

(*w*) 5 Bom. H. C. R. O. C. J. 128.

(*x*) As to Wills, see above, pp. 209 ss.

A daughter (childless) may dispose by will of property inherited from her father as against his heirs or her own, *Haribhat* v. *Damodharbhat*, I. L. R. 3 Bom. 171, quoting *Narotum* v. *Narsandas*, the note at 5 Bom. R. 136, O. C. J., and *Bhika* v. *Bhava*, 9 Harr. R. 449.

Mr. Ellis thought that a Hindu could not make a will at all, 2 Str. H. L. 419. It is obviously opposed to the Brahmanical family system and to the interest of the ancestral manes in the estate out of which sacrifices to them are to be provided. A general opinion unfavourable to the testamentary power was expressed by native judicial officers consulted in Bombay in 1864. But the principle obtained early recognition, though but a qualified one, that what could be given away during life could be bequeathed by will. See *Doe dem Munnoo Lall* v. *Goper Dutt* (A.D. 1786), Mort. R. 81; *M. V. Vardiah* v. *M. Lutchumia* (A.D. 1824), M. S. D. A. Dec. 438. In Madras, wills of Hindus have long been recognized by statute if made in conformity with Hindu Law, Reg. III. of 1802, sec. 16, and Reg. V. of 1829, sec. 4, but this condition left

ing of the learned Judge in that case was not, however, concurred

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the whole question of testamentary competence open, as may be seen by a reference to the Madras decisions.

In Bombay separate and self-acquired property may be thus dealt with, *Nana Narain Rao* v. *Haree Punt Bhao et al.*, 9 M. I. A. 96, 98; *Baboo Beer Pertab Sahee* v. *M. Majender Pertab Sahee*, 12 M. I. A., at p. 38; *Adjoodhia Gir et al.* v. *Kashi Gir et al.*, 4. N. W. P. H. C. R. 31; *Bhagvan Dullabh* v. *Kalla Shankar*, I. L. R. 1 Bom. 641. The extent of the testamentary power must be regulated by the Hindu law, *Sonatun Bysack* v. *S. Juggutsoondree Dossee*, 8 M. I. A., at p. 85 (which furnishes no analogy but that of gifts); Colebrooke at 2 Str. H. L. 428, 431, 435; *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore*, S. I. A. 47 S. C., 9 Beng. L. R., at p. 398. But see also *S. Soorjeemoney Dossee* v. *Denobundoo Mullick et al.*, 9 M. I. A. 123. Thus a will cannot be made of ancestral property in which sons have an interest, though effect may be given to it as a family arrangement, *Lakshmibai* v. *Gunpat Moroba et al.*, 5 Bom. H. C. R. 135, O. C. J.; 2 Str. H. L. 436. The castes reject the wills of testators having issue, Borr. Coll. *passim*.

That a Hindu's will is to be construed according to Hindu law, see *S. Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 M. I. A., at p. 550; *Musst. Kollaney Kooer* v. *Luchmee Pershad*, 24 C. W. R. 395; *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore*, S. I. A. 47; S. C., 9 Beng. L. R. 395; *Molvi Mahomed Shumsool Rooder et al.* v. *Shewukram*, 14 Beng. L. R. 227, 230, S. C., L. R. 2 I. A. 7; *Musst. Bhagbutti Daee* v. *Chowdry Bholanath Thakoor et al.*, L. R. 2 I. A. 256, 261; *Ramguttee Acharjee* v. *Kristo Soonduree Debia*, 20 C. W. R. 473, C. R. As to the form, a nuncupative will is effectual, *Bhagvan Dullabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641; and so is a parol revocation, *Maharaj Pertab Narain Sing* v. *Maharanee Soobha Kooer et al.*, L. R. 4 I. A. 228.

In East's cases No. 75 is a case of an adoption by a prostitute of a girl. It was said after adoption the son's share could not be devised, see Mor. Dig. 133.

The following cases and observations on the law of wills may be added to the brief discussion of the subject in Book I., sec. 4, sub-sec. 6, and in the note above. An attempt to create a perpetuity will not be supported, *Muccondas* v. *Ganputrao* in Perry's Or. cases; above, pp. 179, 193, 194. See *Abdul Ganee Kasam* v. *Hasan Meya Rahimtulla*, 10 Bom. H. C. R., at p. 10.

A charge on property for worship will not give effect to an attempt to create a perpetuity in the surplus proceeds, *Ashutosh Dutt* v. *Doorga Churn Chatterjee*, L. R. 6 I. A. 182; above, pp. 179, 182, 184; *Promotho Dossee* v. *Radika Persaud Dutt*, 14 Beng. L. R. 175.

A bequest for the erection of a bathing ghat and temples at the discretion of the executor, who renounced, was declared void for uncertainty, *Surbo Mungola Dabee* v. *Mohendronath*, I. L. R. 4 Cal. 508. It may perhaps be doubted whether effect should not have been given to this bequest according to the Hindu law; see above, pp. 223, 224; Steele, L. C. 214, 404, 405.

Section 234 of the Indian Succession Act, X. of 1865, applies to Hindus, and an application may be made under it to revoke the probate of a Hindu's will. In re *Pitamber Girdhar*, I. L. R. 5 Bom. 638.

By the Hindu Wills Act, XXI. of 1870, the forms prescribed by sec. 50 of

in by the Court on appeal, and the ultimate decision was based on

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the Succession Act, X. of 1865, must be followed by Hindu testators where the Act is in force, *i.e.*, Lower Bengal and the towns of Madras and Bombay. The Hindu Wills Act was not intended to introduce changes in the substantive Hindu law. The introduction of secs. 98, 99, 101 of the Succession Act is subject to all the provisos in sec. 3 of the Hindu Wills Act, which was not intended to enlarge a testator's power, only to regulate its exercise, *Alangmanjari Dabee* v. *Sonamonee Dabee*, I. L. R. 8 Cal. 637.

A person claiming under a will in the Mofussil is not generally obliged to obtain probate. See above, p. 221. Act V. of 1881, however, by sec. 4, makes the executor or administrator of the deceased his legal representative, and vests the property in him. By sec. 2 of the same Act, Chaps. II. to XIII. thereof apply in the case of "every Hindu, Buddhist and person exempted under sec. 332 of the Indian Succession Act, 1865, lying before, on, or after 1st April, 1881." Again, it is provided "that except in cases to which the Hindu Wills Act, XXI. of 1870, applies, no Court in any local area (in the Mofussil) . . . shall receive applications for probate or letters of administration until the local Government has, with the previous sanction of the Governor-General in Council, by a notification in the Official Gazette authorized it so to do." The High Courts are, as to such areas, similarly restricted. Now Act XXI. of 1870 in a sense applies to all wills made by Hindus, &c., in the towns of Bombay and Madras, but it does not apply to those made in the Mofussil, except so far as they relate to immovable property within the presidency towns. The result seems to be that until the issue of the requisite notifications the law in the Mofussil remains what it was, while in the Presidency towns the new legislation applies to the estates of all classes of natives. When the Notification has been issued in Bengal the whole Act will operate generally there along with Act XXI. of 1870, but in Bombay and Madras the Act of 1870 is limited to the Presidency towns. In those towns, therefore, the provisions of the two Acts will operate alone from April 1, 1881, conditionally on the notification required by sec. 2 having been made. The provisions of sec. 52 of Act V. of 1881 are repeated *verbatim* in Act VI. of 1881, sec. 2, as an addition (sec. 235 A) to Act X. of 1865, and other provisions are made with regard to "District Delegates." The tangle, here, of exemptions, exceptions, provisos, and conditions is such as will afford a useful exercise to the perspicacity of students of the law. As to testators, the words of H. H. Wilson (Works, V. 58) may be quoted : "If the Hindus are to be authorized to make wills, they should be instructed how to make them and not be suffered to . . . make the arrangements which they contemplate subject to improbable or impracticable conditions."

As to the construction of Hindus' wills, see above, pp. 184, 219, 223, 618. Such words as "putra paotradi krame" and "naslan bad naslan," though primarily importing the male sex, yet included females as heirs to either males or females, *Ram Lal Mookerjee* v. *Secretary of State for India*, L. R. 8 I. A. 46.

The usual notions and wishes of Hindus with regard to the devolution of property may properly be taken into consideration, *Moulvie Mahomed* v. *Shevukram*, L. R. 2 I. A. 7. Compare *Maniklal Atmaram* v. *Manchershi Dinsha*, I. L. R. 1 Bom. 269; see above, pp. 183, 184, 202.

A bequest to a class not completely ascertained and existing at the testator's

different grounds (*y*). The views above stated are conformable to those set forth by Sir T. Strange, H. L., 193 and 204, the authority quoted by whom, however, is not applicable. In a Bengal case effect was refused to a father's deed of partition which had not been carried out by actual distribution in his life (*z*). Conversely when a testator had bequeathed his business to his sons, but had directed that there should be no partition for twenty years, the latter direction was held repugnant, and the sons entitled to immediate partition (*a*). In *Ramkishore Kedarnath* v.

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death fails as to those even who do exist, according to *Soudaminey Dossee* v. *Jogesh Chunder Dutt*, I. L. R. 2 Cal. 262; *Kherodemoney Dossee* v. *Dhoorgamoney Dossee*, I. L. R. 4 Cal. 455. The provisions of secs. 102 and 103 of the Indian Succession Act, X. of 1865, do not apply to the Mofussil, but do apply to the town of Bombay under Act XXI. of 1870. The references to the Hindu law in the latter of the two cases just cited seem to show that those qualified at the testator's death might take, but the decisions point the other way. Comp. pp. 183 ss.

According to the English Statute, 3 & 4 Wm. IV. c. 106, an heir who is also a devisee takes in the latter character.

The present freedom of devise in England is of quite recent origin. Before the Conquest a man might dispose as he pleased of his own acquisitions, though his devise of book-land was usually precatory on account of the temporary character of his interest as strictly viewed. After the Conquest "till modern times a man could only dispose of one-third of his movables from his wife and children, and in general no will was permitted of lands till the reign of Henry the Eighth, and then only for a certain portion; for it was not till after the Restoration that the power of devising real property became so universal as at present," Kerr's Blackstone, II. p. 11. The Latin nations adopted the Roman Law system of testaments much more readily; the older German Law, as reported by Tacitus, was simply *Heredes successoresque sui cuique liberi et nullum testamentum*. The customary equal partition of lands under the law of gavelkind seems to have been limited to the undivided estate, and over this by the old Common Law a father had not a power of free devise, which indeed is manifestly opposed to rights of equal partition. See for the Saxon Law, Elton, Tenures of Kent, 74; and comp. *infra*, Book II., Vyav., Chap. I., sec. 2, Q. 4. The custom of the City of London down to 1725 allowed a freeman to deal by way of devise with only the half or one-third equal to the half or one-third which it gave to his widow and to his children even of his personal property, Vin. Abt. Customs of London. Thus the notions of the Hindus were substantially those of the English until a comparatively recent time.

(*y*) See *Lakshmibai* v. *Ganpat Moroba*, 5 Bom. H. C. R. 128 O. C. J.

(*z*) *Bhowannychurn* v. *Heirs of Ramkaunt*, 2 C. S. D. A. R. 202. This case may be referred to another principle, see below, sec. 4 D, but it shows that the mere volition of the father was not held by itself to create the desired jural relations.

(*a*) *Mokoondo Lall* v. *Gonesh Chunder*, I. L. R. 1 Cal. 104. His inculcation of joint enjoyment is no bar to a suit for partition, *Raja Sooranany Venkata-*

Jainarayan (*b*) the Privy Council have held that a partition made by a father may be impeached by the minor son if a share was given to an absolute stranger without any consideration or by way of a *bona fide* compromise of a claim in dispute.

§ 4 c. 2. *Great-grandson.*—Devala says, "Partition among undivided parceners and among reunited parceners extends to the fourth in descent from a common ancestor." According to the Mithila law "the partition of heritage shall extend from the original owner of the estate to his descendants in the fourth degree." (*c*) The case of a great-grandson is not otherwise expressly dealt with in the Hindu law books except in a rather obscure passage of Katyayana quoted by the Viramitrodaya (*d*), but it rests on the same principle as that of the grandson, viz., on the doctrine of representation (*e*).

§ 4 c. 3. *Minors.*—In the case of minor coparceners, it would certainly tend to convenience if the doctrine, apparently upheld by the Madras and Bombay High Courts (*f*), that a minor copar-

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pettyrao v. *R. S. Ramchandra*, 1 M. S. D. A. Dec. 495. So Macn., Cons. on H. L. 323; see above, pp. 179, 182, 193.

The Madras High Court allows a gift but not a bequest by an undivided coparcener, *Vitla Buttel* v. *Yamenamma*, 8 Mad. H. C. R. 6. The latter it thinks prevented by the survivorship. This principle was recognized by the Privy Council in *Suraj Bunsi Koer* v. *Shivparsad Singh*, L. R. 6 I. A. 88. In Bombay the gift of undivided property by a joint coparcener is illegal, see Privy Council in *Lakshman Dada Naik* v. *Ramchunder*, L. R. 7 I. A. 181. A father in an undivided family cannot dispose by will of his undivided share without the consent of his co-sharers, *ibid.* The alienation by gift where, as in Madras, that is admitted, is founded on a parcener's right to partition and dies with him, the title of the other co-sharers vesting by survivorship at the moment of his death. The Sastris denied any power of disposal before partition in *Bajee Sudshet* v. *Pandoorung*, 2 Morr. 93. According to these cases the father's declaration of will would be inoperative, except after partition or to effect it in his own case.

A joint tenant under the English Law was not a devisable interest, Co. Lit. 185 *b*.

(*b*) L. R. 40 I. A. 213; S. C. I. L. R. 40 Cal. 966.

(*c*) Vivada Chintamani, p. 283.

(*d*) Transl. p. 72.

(*e*) "The great-grandson's son is not entitled to any share." Viram. *loc. cit.*

(*f*) *Nallappa Reddi* v. *Balammal et al.*, 2 Mad. H. C. R. 182, quoted in *Lakshmibai* v. *Ganpat Moroba et al.*, 5 Bom. H. C. R. O. C. J., p. 128. Every minor is to be guarded by the King, Col. Dig., Book V. T. 449; 2 Str. H. L. 72.

cener is to be represented in partition by his guardian, could be based on any explicit texts. All, however, that can be deduced from the original authorities appears to be that the interests of the minor shall be duly regarded, and shall, if necessary, be protected by the sovereign power. His position is, in fact, declared to be analogous to that of absentees, and the rules proceed on the assumption that his assent or that of a guardian for him is not essential (*g*). The minor must not be injured by any unconscientious dealing. Mr. Colebrook, in an opinion quoted at 2 Str. H. L. 360, says, that "the sovereign or his representative, as *guardian of the minor*, is competent to authorize a partition," and for this opinion he refers to a text of Katyayana, Col. Dig., Book V., Chap. VIII., T. 453. But this text points to the necessity of protecting the minor's interest, if, contrary to the ethical

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Krishnabai v. *Khangowda*, I. L. R. 18 Bom. 197; *Chowdhry Ganesh* v. *Jewach*, L. R. 31 I. A. 10; S. C. I. L. R. 31 Cal. 262.

Minority now ceases at 18 years of age, Act IX. of 1875.

A guardian may sell a portion of a minor's property to maintain a suit beneficial to the minor, *Ganga Prasad et al.* v. *Phool Singh et al.*, 10 C. W. R. 106. Compare the cases of *Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh*, 10 M. I. A. 454, and *Dharmaji Vaman et al.* v. *Gurrav Shrinivas et al.*, 10 Bom. H. C. R. 311; *Taikom Devji* v. *Aba*, Beng. H. C. P. J. 1878, p. 126. The minor is bound by a compromise made in good faith, *Baboo Lekraj* v. *Baboo Mahtab Chand*, 14 M. I. A. 393.

When an administrator has not been appointed under Act XX. of 1864 a guardian *ad litem* of a minor may be appointed under section 443 of the Code of Civil Procedure, Act XIV. of 1882, *Jadow Mulji* v. *Chhagan Raichand*, I. L. R. 5 Bom. 306. The office of administrator or of guardian *ad litem* cannot be imposed on a person unwilling to accept it, *Babaji bin Kusaji* v. *Maruti*, 11 Bom. H. C. R. 182 S. C., I. L. R. 5 Bom. 310. An officer of the Court may be appointed guardian, and being appointed remains subject to the jurisdiction, see Act XV. of 1880, sec. 3, cl. (*b*).

The Minors Act for the Bombay Presidency is Act XX. of 1864. But this, it has been held, does not enable the Civil Court under ordinary circumstances to take charge of an infant's share in undivided property, *Shivji Hasam et al.* v. *Datu Mavji*, 12 Bom. H. C. R. 281. So under Act XL. of 1858, *Sheo Nundun Singh* v. *Musst Ghunsam Kooeree*, 21 C. W. R. 144. A different view, however, seems to have been taken by the Judicial Committee in *Doorga Persad* v. *Baboo Keshav Persad*, I. L. R. 8 Cal. 656. See below, p. 625, note (*r*).

The natural father is not the proper guardian of an adopted infant so long as either of his adoptive parents lives, *Lakshmibai* v. *Shridhar Vasuleo Takle*, I. L. R. 3 Bom. 1. The Bombay Minors Act XX. of 1864 is not superseded by the provisions of the Code of Civil Procedure, Act V. of 1908, *Murlidhar* v. *Supda*, I. L. R. 3 Bom. 149.

(*g*) Viramitrodaya, quoted below, Book II., Vyav., Chap. I., sec. 1, Q. 7; 2 Str. H. L. 341, 348.

obligation to remain undivided during the minority (*h*), a partition should actually be made by the adult coparceners, rather than to any necessity for an assent expressed on behalf of the minor (*i*). This text, indeed, and the one preceding it, with their accompanying commentaries, imply a valid partition by the will of the adults alone (*k*). *In Balkishan* v. *Ram Narain* (*l*) the Judicial Committee has laid down that a partition is binding upon a minor unless his interest was prejudiced by non-representation. Again, in the case of *Kharajamal* v. *Daim* (*m*), it has been held that a judicial sale was not to be disturbed for want of a minor's representation if no prejudice is shown to him by his absence, and on the same ground a partition by the mother was held binding upon the minor by the Bombay High Court in *Chanvirapa* v. *Danava* (*n*).

A partition demanded on behalf of a minor by his guardian or friends, cannot usually be enforced against the will of the adult coparceners. But such a demand may be enforced, when it is necessary to prevent malversation or jeopardy to the minor's interests (*o*). This opinion has been expressed by Mr. Colebrooke also in the passage quoted above; but it rests on the reason of the law, not on any express texts. In the case of *Govind Ramchandra* v. *Moro Raghunath* (*o*), reference is made to *Sheo Nundun Singh* v. *Musst Ghunsam Kooer* (*p*), and to *Shivji Hasam et al.* v. *Datu Mavji Khoja* (*q*), and the rule is repeated that " when the joint

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(*h*) But only during the minority, as generally " a partition is favourably viewed by the Hindu religion and law"; The Judicial Committee in *Juggut Mohinee Dossee* v. *Musst. Sokheemoney Dossee*, 14 M. I. A., at p. 303.

(*i*) To the guardianship the paternal male kindred have the preference, 2 Str. H. L. 74. Any one may come forward as a next friend for an infant, *ibid.* 79. A relative is to be preferred, *ibid.* 80.

(*k*) *Kandasami* v. *Doraisami Ayyar*, I. L. R. 2 Mad., at p. 323, referring to 2 M. H. C. R. and to *Appovier's Case*, 11 M. I. A. 75.

(*l*) L. R. 30 I. A. 139.

(*m*) L. R. 32 I. A. 23; S. C. I. L. R. 32 Cal. 296.

(*n*) I. L. R. 19 Bom. 593.

(*o*) App. No. 1 of 1875 (under Act XX. of 1864), Bom. H. C. P. J. F. for 1875, p. 261; *Svamiyar Pillai* v. *Chokkalingam Pillai*, 1 Mad. H. C. R. 105; *Alimel Ammal* v. *Arunachellam Pillai et al.*, 3 *ibid.* 69; and *Kamakshi Ammal* v. *Chidambara Reddi et al.*, 3 *ibid.* 94; 2 Str. H. L. 310, 362; *Madhavram* v. *Lakshman*, I. L. R. 19 Bom. 99; *Bholanath* v. *Ghasi Ram*, I. L. R. 29 All. 373; *Damodar* v. *Senabutty*, I. L. R. 8 Cal. 537.

(*p*) 21 C. W. R., p. 143 C. R.

(*q*) 12 Bom. H. C. R., p. 281 (S. A. No. 316 of 1872).

property of an undivided family governed by the Mitakshara law is enjoyed in its entirety by the whole family, and not in shares by the members, some of whom are adults, one member has not such an interest therein as is capable of being taken charge of, and separately managed, under the provisions of the Minors Act (XX. of 1864)" (r). In the same case the District Judge was directed to report whether on inquiry it seemed probable that the minor would benefit by a suit for partition brought against his uncles, against whom no "special instance of malversation," it was said, had been alleged. In *Meghasham Bhavanrao* v. *Vithalrao Bhavanrao* (s), it had been said, "No doubt the claim for partition advanced on behalf of a minor is one that must in every case be closely scrutinized. . . . Its result must in each instance depend on the view that the Court below takes of the evidence as rendering a partition necessary or not for the

(r) See also *Bhagirthibai* v. *Sadashiv*, Bom. H. C. P. J. F. 1881, p. 155, and *Samatsang* v. *Shivasangji and Ramasangji*, Bom. H. C. P. J. F. 1882, p. 404. But in *Doorga Parsad* v. *Baboo Keshav Parsad*, I. L. R. 8 Cal. 656, the Judicial Committee say: "It is clear that the manager of an estate, although he may have the power to manage the estate, is not the guardian of infant co-proprietors of that estate for the purpose of binding them by a bond as Hur Nandan did, or for the purpose of defending suits against them in respect of money advanced with reference to the estate. Act XL. of 1858 . . . shows that Sheo Nundan Persad, though he was a co-proprietor and manager of the estate, was not the guardian of the infants who, according to the Act, were subject to the jurisdiction of the Civil Court. . . . No certificate was obtained by Sheo Nundan Persad; and although it is stated that he was guardian to the infants he clearly was not the legal guardian, and had no right to defend that suit in their names." Hence it would seem a manager, to enable him to act for his infant co-sharers, must take out a certificate of guardianship, though the Court cannot on an application under the Minors Act, XX. of 1864, remove the adult managing member from the control of the estate and business in which he and all the members of the family are interested. See *Babaji Shriniwas* v. *Sheshgir Bhimaji*, I. L. R. 6 Bom. 593. The view of the High Courts has been that jurisdiction expressly given to the Civil Courts did not necessarily affect the ordinary relations of a Hindu family, and that before a partition there is no distinct property of the minor of which the manager has charge. All possess together, the manager administers. See *Appovier's Case*, 11 M. I. A. 75; *Ramchundra Dutt* v. *Chundar Coomar Mundal*, 13 M. I. A., at p. 198. *Girdhari Lal's Case*, L. R. 1 I. A., at p. 229 *ad fin.* As to the representation of minors in suits, see further Act XV. of 1880, sec. 3, cl. (b); Act XIV. of 1882, sec. 440 ss; *Jadow Mulji* v. *Chhagan Raichand*, I. L. R. 5 Bom. 306; *Babaji* v. *Maruti*, *ibid.* 310; S. C. 11 Bom. H. C. R. 182.

(s) S. A. No. 148 of 1871, decided on the 14th of September 1871 (Bom. H. C. P. J. F. for 1871).

protection of the minor's interests" (*t*). A minor who has been used unfairly in a partition may repudiate it on attaining his majority or within a reasonable time afterwards (*v*). Where partition would be detrimental to the shares, the Court, it has been held, can refuse to decree a division (*w*). But a somewhat different view was taken in *Ram Pershad Narain* v. *The Court of Wards* (*w*). See further upon this point in Book II. the *Digest of Vyavasthas* Chap. III., sec. 1, Q. 1.

§ 4 c. 4. *Absentees.*—The absence of one or more coparceners does not bar partition (*y*), if it is desired by the coparceners present (*z*). All that the law requires is that their equitable shares, like those of the minors, be set apart in the division. For the definition of what constitutes absence in a foreign country, enabling the coparceners present to dispense with any expression of assent on the part of the absentee, see 1 Str. H. L. 188; Col. Dig., Book II., Chap. III., T. 26 and 27. The great change of circumstances that has occurred in recent times would make it necessary, for practical purposes, to fall back, in this case as in others, on the reason of the law, the essential part of which here is evidently the supposed impossibility of communicating with the absent co-sharer. The remarks of Sir T. Strange, *loc. cit.*, as to the periods of twelve and twenty years, appear to refer to the propriety or impropriety of a distribution of

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(*t*) In England a sale under the Partition Act sought on behalf of an infant will not be allowed unless it is for his benefit, *Rimington* v. *Hartley*, L. R. 14 C. D. 630.

(*v*) *Kallee Sunkur Saunyal et al.* v. *Denendro Nath Saunyal et al.*, 23 C. W. R. 68 C. R.; *Dharmaji et al.* v. *Gurrav Shrinivas et al.*, 10 Bom. H. C. R. 311; *Balkishan* v. *Ram Narain*, L. R. 30 I. A. 139; S. C. I. L. R. 30 Cal. 738.

(*w*) *Durbaree Sing et al.* v. *Saligram et al.*, 7 N. W. P. R. 271.

(*x*) 21 C. W. R. 152.

(*y*)Viramitrodaya, quoted below, Book II., Vyav., Chap. I., sec. 1, Q. 7. The Smriti Chandrika, Chap. XIII., p. 21 ss., says that when, a parcener having absented himself, the other parceners have divided the property in ignorance of his existence, he on his return is entitled to only half a share. Brihaspati is cited to this effect, but the passage is really inconsistent with others which follow.

(*z*) As to the presumption of death in the case of a person not heard of, this arises in the case of one who went away at less than forty years old after twenty years, at less than sixty years after fifteen years, at any greater age after twelve years. The authorities, however, vary, see 1 Str. H. L. 188, 2 *ibid.* 237, 316; Steele, L. C. 34; *Musst. Anundee Koonwar* v. *Khedoo Lal*, 14 M. I. A. 412. For the present law see Act I. of 1872, secs. 107, 108.

the property, without reserving the absentee's share. There is no text which enjoins the postponement of the division for the advantage of an absentee, and his interests are otherwise sufficiently protected, but there is, according to the Hindu Law, a presumption of death in case of a Hindu travelling in a foreign country and not heard of for twelve years (*a*). The descendants of an absentee may claim down to the seventh degree (*b*).

§ 4 c. 5. *Wives, Mothers, &c.*—Wives, mothers, grandmothers, sisters, &c., the female members of a united family, entitled to shares on partition (*c*), are still not invested with any power to demand a partition of the estate (*d*). This disability rests on the

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(*a*) *Musst. Anundee Koonwar* v. *Khedoo*, 14 M. I. A. 412; S. C. 18 W. R. 69.

(*b*) 2 Str. H. L. 329; *Moro Vishvanath et al.* v. *Ganesh Vithal et al.*, 10 Bom. H. C. R. 444. As to Limitation, see above, p. 588 (*c*), and sec. 4 D.

It was formerly a rule in most if not in all parts of India, that a tenant of land paying assessment to the government as proprietor or *quasi*-proprietor might abandon the land for an indefinite time during which the Government could dispose of it for the benefit of the revenue, but subject always to a resumption of his former rights by the absentee on his return. See *Bhaskarappa* v. *The Collector of North Canara*, I. L. R. 3 Bom. 525. *Appa* v. *Juggoo*, 1 Morr. 57; above, p. 174; and below, sec. 5 B. As to the disposal of a share of a village during the absence of a sharer by his co-sharers, see *Sirdar Sainey* v. *Piran Singh*, I. L. R. 3 All. 458. The partition binds absentees who have been effectively represented, *Sakharam Bhargao* v. *Ramchandram Bhaskar*, Bom. H. C. P. J. 1881, p. 280.

(*c*) This right arises on a partition whether voluntary or enforced by a creditor or purchaser in execution, *Bilaso* v. *Dinanath*, I. L. R. 3 All. 88; *Chowdhry Ganesh* v. *Jewach*, L. R. 31 I. A. 10; *Lakshman* v. *Satyabhamabai*, I. L. R. 2 Bom. 504; *Badri* v. *Bhagwat*, I. L. R. 8 Cal. 649.

According to the Bengal School the mother on partition is entitled to a share equal to her sons, and when there are different groups of sons each of these taking a share proportional to its number has then to sub-divide by the number of its own members plus one in order to provide a share for the mother, *Hemagini Dasi* v. *Kedarnath*, I. L. R. 16 Cal. 758, P. C.; S. C. L. R. 16 I. A. 115; *Beni* v. *Puran*, I. L. R. 23 Cal. 262; *Amrita Lal* v. *Manick Lal*, I. L. R. 27 Cal. 551. In Madras even the mother is not held entitled to a share on partition by her sons, *Venkammal* v. *Andiappa*, I. L. R. 6 Mad. 130. The stepmother is entitled to a share by the Mitakshara, *Damodardas* v. *Senabutty*, I. L. R. 8 Cal. 537; but the Dayabhaga (Chap. III., sec. II., 30) excludes her and so does the Madras law.

(*d*) *Isri* v. *Nasib*, I. L. R. 10 Cal. 1017; *Damodar Das* v. *Uttamram*, I. L. R. 17 Bom. 271. In Bengal a grandmother not a party to a partition suit was allowed to sue the parceners in order to secure her share along with the grandsons and grand-daughters, *Sibbosoondery Dabia* v. *Bussoomutty Dabia*, I. L. R. 7 Cal. 191. Her right to a share is again recognized, *Badri Roy* v. *Bhugwat Narain*, I. L. R. 8 Cal. 649; *Purna* v. *Sarojini*, I. L. R. 31 Cal. 1065; though

principle that males alone in a united family are regarded as heirs, with rights untransferable to females. The source of the

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she is held as not entitled to a share by the Allahabad High Court, *Radha* v. *Buchhaman*, I. L. R. 3 All. 118. The position of sisters in the line of heirs is by Nanda Pandita and Balambhatta fixed as next after that of brothers for reasons (see Col. Mit., Chap. II., sec. 4, pl. 1 note; Stokes's H. L. B. 443; *Rindabai* v. *Anacharya*, I. L. R. 15 Bom. 206,) rejected by the Privy Council in *Thakoorain Sahiba* v. *Mohun Lall*, 11 M. I. A., at p. 402, but deriving some support from the use of the word *Santana*=issue, in sec. 5, pl. 4 (Stokes's H. L. B. 446), compared with sec. 2, pl. 6 (*ibid.* 441) and sec. 11, pl. 9 (*ibid.* 460). The right of sisters to an equal share seems to be recognised in the passage of Manu IX. 212, quoted in the Mitakshara, Chap. II., sec. 9, para. 12 (Stokes's H. L. B. 454). See also Narada, Pt. II., Chap. XIII., sl. 13. But Manu IX. 118 is different. See above, pp. 464, 468. In *Lalljeet* v. *Raj*, 20 W. R. 336, it has been held that a maiden sister is entitled to a quarter share in a partition effected by the sons after the father's death. According to the *Mithila* School this share is intended as sufficient property to defray her marriage expenses. The *Mitakshara* lays down that she gets it independent of its sufficiency for defraying the expenses at her wedding, while the *Viramitrodaya* asserts that this share is given to her in addition to the expenses to be incurred at her marriage.

The mother of two out of four sons of one father is entitled on partition to maintenance from all four, *Musst. Muncha* v. *Brijbooken et al.*, Bom. Sel. Ca. p. 1. But according to Vijnanesvara, "it is a mere error to say that the wife takes nothing but a subsistence from the wealth of her husband (who died leaving no issue), and though she cannot demand a partition, she is, when a partition is made by the sons, entitled as their father's widow to a share equal to one of theirs, as his unmarried daughter to one-fourth of a share," Mit., Chap. I., sec. 7 (Stokes's H. L. B. 397), Chap. II., sec. 1, pl. 31 (Stokes's H. L. B. 436). See below, Rights and Duties arising on Partition; *Lalljeet Singh* v. *Raj Coomar Singh*, 12 B. L. R. 373, 383; *Jodoonath Dey Sircar et al.* v. *Brojonath Dey Sircar et al. ibid.* 385; *Ramappa Naiken* v. *Sithamal*, I. L. R. 2 Mad. 182, 186. In the last case it is pointed out that according to the Smriti Chandrika the share or portion allotted to a mother is not to be regarded strictly as daya, seeing she had not an ownership in it before. See above, p. 238. On partition each of the father's wives is entitled to a share equal to that of a son (*Ganesh* v. *Jewach*, L. R. 31 I. A. 10; *Sumrun* v. *Chunder*, I. L. R. 8 Cal. 17; *Damodar* v. *Uttamram*, I. L. R. 17 Bom. 271) which she gets by virtue of her co-ownership with her husband in all the properties belonging to him (*Jamna* v. *Machul*, I. L. R. 2 All. 315). As partition according to the Mitakshara is based upon pre-existing rights, her right to a share comes into existence from the time of her marriage. She has been held to this share even against the father's wishes in those cases in which she would be entitled to a separate maintenance (*Dular* v. *Dwarka*, I. L. R. 32 Cal. 234). In Madras she is only entitled to maintenance and not to a share. Whether she takes it as her stridhan has already been dealt with.

In England the Court in dealing with a suit for partition will regard the equitable rights of all persons interested in the estate, *Rowlands* v. *Evans*, 30 Bea. 302; *Davis* v. *Turvey*, 32 *ibid.* 554.

right of females to a share on partition is the necessity to secure for them a certain provision, which otherwise might fail. In Bengal it has been ruled (*e*) that the widow of a member of a united family may claim a partition, the concession of which rests in the discretion of the Court. There, however, the widow of an undivided coparcener inherits his share (*f*), on failure of sons, grandsons, and great-grandsons, though she has only the life enjoyment of the property, except under special circumstances (*g*). Under the law of the Mitakshara she succeeds only to a separated coparcener. Even in Bengal (*h*) it seems to have been admitted that there were no reported decisions in favour of the widow's right, though it had apparently been recognized in numerous unreported cases. What is said in the same judgment as a reason for decreeing partition, "Otherwise she would be unable during her life to improve the heritage of her children," these children being daughters, implies the succession of the daughters, who also, according to the Mitakshara law, would be excluded in a united family. Their succession in Bengal would rest on their being, in the event of their survival, the next heirs, at the death of their mother, to her husband, their father.

§ 4 c. 6. *Disqualifications for demanding a separation.*—Disqualifications to inherit operate equally to exclude from a share on partition, and consequently, from the right to demand a separation. The maintenance (*i*) of the excluded members must be provided for (*k*).

According to Strange, Man. H. L. sec. 319, a person who has fraudulently concealed a portion of the family property loses, on discovery of such fraud, his right to a share. Sir T. Strange

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(*e*) *Soudaminey Dossee* v. *Jogesh Chunder Dutt et al.*, I. L. R. 2 Cal. 262; *Bimola* v. *Dangoo Kansaree*, 19 W. R. 189. There is no ground for the exclusion of a Hindu widow from a claim to partition, for, as the law now stands, she may re-marry and have male issue. In Bombay a childless widow of a Hindu was in *Ram Joshi* v. *Lakshmibai*, I. L. R. 1 Bom. 189, held competent to enforce actual division of the family property when the share of her husband had been ascertained, though not actually set apart in specie, after his separation.

(*f*) Daya Bhaga, Chap. XI., sec. 1, pl. 19, 44, 56; Stokes's H. L. B. 308, 315, 320.

(*g*) *Ibid.* pl. 62; Stokes's H. L. B. 321.

(*h*) *Pokhnarain et al.* v. *Musst. Seesphool*, 3 C. S. D. A. R. 114.

(*i*) See Book I., pp. 141, 241, and Digest of Vyavasthas, pp. 541, 543.

(*k*) See below, "LIABILITIES."

also, in H. L. Vol. 1, p. 232, seems to be of opinion that the Mitakshara, Chap. I., sec. 2, paras. 4, 5, and 12 (*l*), agrees with this rule, which is certainly laid down by Manu, IX. 213. But with regard to the Mitakshara, it would seem that the paras. 4—12 do not refer to the loss of the right to a share in case of fraud practised by a co-sharer, but to the criminality of the act only. The author first states the positive rules regarding the treatment of fraudulently concealed and recovered property in paras 1—3, and then he goes on to combat the opinion held by some Hindu lawyers, that such a concealment of property by a coparcener is not criminal. He is forced to do this, because the text of Yajnavalkya does not touch on the point, and, for the same reason, he is also forced to base his arguments on the verse of Manu (para. 5), though the doctrine contained in the latter is partly at variance with his own. The argument of the Mitakshara has been understood in this manner by Mitramisra also, who, after repeating the substance of Mitakshara, *loc. cit.*, paras. 1—12, adds: (*m*)

"But the co-sharers ought not to inform the king, (if fraud has been committed by one of them). But even if an information has been laid, he (the king) ought to cause it to be restored by kind exhortations and the like. For Katyayana gives a rule, the manifest object of which is to enjoin that kindness only ought to be used, saying :—'He (the king) shall never use force to cause the restoration of property taken away by a relation.'"

Hence it appears that, according to the authorities prevailing in the Bombay Presidency, a co-sharer, practising fraud, does not lose his right to a share. The same has been held also by the Mad. S. A. in *C. Lutchmeedavee* v. *Narasimmah* (*n*), and is recognized as law by the Smriti Chandrika, Chap. XIV., para. 4 ss, and by Jagannatha in Col., Dig. Book V., Commentary on T. 376, and on T. 378 *ad fin* (*o*). Compensation may be taken in a partition for flagrant malversation (*p*).

§ 4 D. *Will to effect a separation.*—The will of the united coparceners to effect a separation may be

1. *Stated explicitly*; 2. *Or implied.*

(*l*) Stokes's H. L. B. 377, 380.

(*m*) Viramitrodaya, f. 220, p. 2, l. 4, Transl. p. 247.

(*n*) Reports for 1858, p. 118.

(*o*) The Sarasvati Vilasa, sec. 784, is to the same effect. See the corrections at the end of the translation of that work.

(*p*) See below, sec. 7; Steele, L. C. 212.

1. As to *express will*, it may be evidenced by documents (*q*), or by declarations before witnesses (*r*). In some of the older cases, it was held that the execution of a deed by the coparceners and a distribution *in specie* were not merely evidence of a partition, but were essential to make it valid (*s*). But this doctrine has, for some time, been abandoned, and it is now recognized, that all which would be evidence of an assent or expression of will in other cases would be equally so in a case of partition (*t*),

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(*q*) Borr. Col. Lith. 39, 83, 100; Steele, L. R. 220, 221. *Balkishen* v. *Ram Narain*, L. R. 30 I. A. 139; *Parbati* v. *Naunihal Singh*, L. R. 36 I. A. 71; *Maharaja Ram Kissen* v. *Sheonandan Singh*, 23 W. R. 412, P.C.; *Baboo Doorga Persad* v. *Kundun Koowar*, L. R. 1 I. A. 58; S. C. 13 Beng. L. R. 235.

(*r*) A partition deed, as it requires registration, is inadmissible in evidence unregistered. Unregistered partition may, however, be proved by other evidence, *Govindaya* v. *Kodsur Venkapa Hegde*, Bom. H. C. P. J. F. for 1880, p. 210; *Kachubhai bin Gulabshand* v. *Krishnabai*, I. L. R. 2 Bom. 635. See Act III. of 1877, secs. 17 and 50, and the cases *Burjorji* v. *Muncherji*, I. L. R. 5 Bom. 143; *Ramasami* v. *Ramasami*, I. L. R. 5 Mad. 115.

A family arrangement with respect to the estate must be given effect to when proved, *Mantappa* v. *Buswuntrao*, 14 M. I. A. 24.

(*s*) A farikhat or deed of mutual release has in several replies of the Sastris, as those below, Book II., Vyav., Chap. IV., been thought essential to the completeness of a partition. See *Ooomedchund* v. *Gungadhar*, 3 Morr. 108. It was required by the custom of many castes, see Steele, L. C. pp. 213, 214. Similar answers were given in some instances to Borradaile's questions. Generally, however, it was deemed only one of the means of proof important on account of its formality, see Steele, L. C. 56, 214, and could be replaced by separate residence and enjoyment of shares, *ibid.* 215 (art. LXII.).

In Madras the mere execution of releases seems to have been thought insufficient without a corresponding severance of actual possession, see *Nagappa* v. *Mudundee*, M. S. D. A., Dec., for 1853, p. 125; *Kuppanmaul* v. *Panchanadaiyane*, M. S. D. A., Dec., for 1859, p. 263. But when the intention is clear neither the other cases cited nor the original texts exact a physical division for a severance of interests. A father's deed of partition was held inoperative as not having been acted on, but it may have been thought that without action a unilateral expression of will was incomplete, *Bhowannychurn* v. *Heirs of Ramkannt Binshoojea*, 2 C. S. D. A. R. 202. On the other hand, a quiescent enjoyment of a particular portion of the once united estate for 19 years was held to imply assent to a partition assigning that partion to the holder of it, *Linga Mulloo Pitchama* v. *Linga Mulloo Gonappah*, M. S. D. A., Dec., for 1859, p. 84; and generally a partition in fact is as binding as one by express agreement, *Doe dem Gocalchandar Mitter* v. *Tarrachurn Mitter*, 1 Fult. 132; *i.e.*, it may be proved by oral testimony and the conduct of the parties implying separation.

(*t*) *Rungama* v. *Atchama et al.*, 4 M. I. A., at p. 68; *Mantena Rayaparaj* v. *Chekuri Venkataraj*, 1 M. H. C. R. 100; *Appovier* v. *Rama Subha Aiyan*

and that the expression of will, whether immediate or implied, is the sole criterion of division (*v*). This has been carried so far, that, where a partition had been planned and agreed to by coparceners, but not actually effected, the widow of one of the coparceners, who died in the meantime, was allowed to recover the

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et al., 11 M. I. A. 75; *Pandit Suraj Narain* v. *Ikbal Narain*, L. R. 40 I. A. 40; *Brijraj* v. *Sheodan*, *ibid.* 161; *Kewal* v. *Parbhu*, L. R. 44 I. A. 159. Partition, not by metes and bounds, may yet be effectual. So *R. S. Venkata Gopala Narasimha Row* v. *R. S. Lakshama Venkama Row*, 13 M. I. A., at p. 139. See also Mit., Chap. I., sec. 9, para. 1 (Stokes's H. L. B. 404); May., Chap. IV., sec. 3, para. 2, quoted in a corrected translation under Book II., Digest of Vyavasthas, Chap. III., sec. 3, Q. 5. In the case of *R. S. Lakshma Venkama Row* v. *R. S. Venkata Gopala Narasimha Row*, 3 M. H. C. R. 40, and in *Timama Kom Timapa* v. *Amchimani Parmaya*, S. A. No. 452 of 1874, Bom. H. C. P. J. F. for 1875, p. 257, an agreement to be separate was held to constitute a separation. Indeed "the question, in every particular case, must be one of intention, whether the intention of the parties, to be inferred from the instruments they have executed and the acts they have done, was to effect such a division"; *Doorga Pershad et al.* v. *Musst. Kundun Koowar*, 21 W. R. 214; S. C. 13 B. L. R. 235. *Rewun Persad* v. *Musst. Radha Beeby*, 4 M. I. A. 137, recognized a partition by mere agreement as good, though made during subsistence of a life-estate. In the case of *Roopchund* v. *Phoolchund et al.*, at 2 Borr. 670, the Zilla Judge found that there had been no writing executed, but "that the brothers perfectly understood that certain parts were the share of each." The law officer and the Sudder Court held this sufficient to constitute a partition. In *Musst. Bannoo* v. *Kasheeram*, I. L. R. 3 Cal. 315, the Judicial Committee drew an inference in favour of partition from a petition by a member of a family asking that his name might be entered as owner of a moiety of land purchased by his father and his uncle out of joint hereditary funds.

Where, though there has not been an actual distribution *in specie*, the shares have been ascertained and an agreement made to hold in severalty, the former co-sharer is of course unfettered as to the disposal of his own portion, *Hurdwar Singh et al.* v. *Luchmun Sinch et al.*, 4 Agra H. C. R. 42.

But a mere definition of a parcener's interest, in terms of a fraction of the whole, does not, it has been said, itself constitute a legal separation, *Musst. Phooljhuree Kooer* v. *Ram Pershun Singh et al.*, 17 W. R. 102, C. R. So also *Ambika Dat* v. *Sukhmani Kuar et al.*, I. L. R. 1 All. 437, referred to below under sec. 4 D 2 *d*. Comp. the cases below, p. 633.

In *Devapa Mahabala* v. *Ganapaya Annaya et al.*, S. A. No. 125 of 1877, Bom. H. C. P. J. F. for 1877, p. 194, an oral agreement for partition having been made, one of the dividing coparceners, who subsequently received no part of the rents for more than 12 years, was then held barred, notwithstanding Art. 127 of Sch. II. of Act IX. of 1871, as the property from the time of the agreement ceased to be joint.

(*v*) *Pandit Suraj Narain* v. *Ikbal Narain*, L. R. 40 I. A. 40; *Girjabai* v. *Sadasiv*, L. R. 43 I. A. 151; *Kewal* v. *Parbhu*, L. R. 44 I. A. 159.

share allotted to her deceased husband (*w*). But there must be an actual severance of interests. An inchoate partition does not alter the rights of the co-sharers (*x*). In *Kadapa et al.* v. *Adrashapa* (*y*), of two co-sharers suing a third for partition, one died; the remaining plaintiff insisted on his right to two-thirds as united with the deceased and virtually separated from the defendant by the institution of a suit, but the Court awarded him only a moiety of the joint estate (*z*).

In a suit not in terms for a partition, but seeking a distinct share, a decree awarding a separate interest destroys the joint estate according to the doctrine of *Appovier* v. *Rama Subha Aiyan* (*a*). In *Babaji Pareshram* v. *Ramchandra Anunta* (*b*), it was held that a decree declaring mortgagors divided, not carried out pending appeal by mortgagee, during which pendency one mortgagor died, had not effected a partition. This decision, resting on *Prankissen's Case*, must be compared now with that of the Privy Council in *Chidambaram Chettiar* v. *Gouri Nachiar* (*c*). There had in that case been an adjudication that the plaintiff was entitled to a moiety of the joint estate, but it did not appear that

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(*w*) *Ram Joshi* v. *Lakshmibai*, 1 Bom. H. C. R. 189; *Appovier* v. *Rama Subba Aiyan et al.*, 8 C. W. R. 1. P. C., S. C., 11 M. I. A. 95. But see also *Sheo Dyal Tewaree* v. *Judoonath Teware et al.*, 9 C. W. R. 62 C. R. as to (1) definition, (2) distinct enjoyment; and *Timma Reddy* v. *Achamma*, 2 Mad. H. C. 325; *Bai Suraj* v. *Desai Harlochandas*, B. H. C. P. J. 1881, p. 123. Tenants to three brothers, after a division amongst their landlords paid one of them his share of the rent, but on his death paid it to the surviving brother. The widow of the deceased recovered as heir to her husband in a suit for this share of the rent against the tenants, *Rakhmabai* v. *Bayaje*, S. A. 172 of 1874, Bom. H. C. P. J. 1874, p. 289.

(*x*) *Prawnkissen Mitten* v. *Shreemutty Ramsoondry Dossee*, 1 Fult. 110.

(*y*) R. A. No. 30 of 1874, Bom. H. C. P. J. F. for 1875, p. 182.

(*z*) The same principle, as to an adjustment of shares in ancestral property, caused by the death of a coparcener before actual partition, was adopted in *Duljeet Sing* v. *Sheomunook Sing*, 1 Beng. S. D. A. R. 59, wherein the eldest of three undivided brothers having died leaving behind him a son, and the second without issue, the son of the eldest brother and the surviving brother were awarded each half a share in the property. In *Gungoo Mull* v. *Bunseedhur*, 1 N. W. P. R. for 1869, p. 79, a coparcener was held entitled, during his father's lifetime, to bring a suit to assert his right in the share which the father inherited from his deceased brother. See also sec. 5 A, 1 *a*, below.

(*a*) 11 M. I. A. 75; *Joy Narain Giri* v. *Girish Chandru Myti*, L. R. 5 I. A. 228; see Book II., Digest of Vayavasthas, Chap. III., sec. 3, Q. 7.

(*b*) P. J. 1879, p. 535.

(*c*) L. R. 6 I. A. 177.

a decree had been drawn up. Still their Lordships held that the judgment was "equivalent to a declaratory decree declaring that there was to be a partition of the estate into moieties and making the brothers separate in estate from that date," so as to bring the case within the principle of *Appovier* v. *Rama Subha Ayana* (*d*). In the same case, however, between the same parties, a decree for partition appealed against is suspended as to its definitive operation on the relative rights disposed of by it, and is subject to decree in appeal, which has regard to the state of facts existing at its own date (*e*).

An agreement to divide certain lands still to be recovered was held, in *Ramabai* v. *Jogan Soorybhan et al.* (*f*), not to constitute a severance of interest. Until recovered, the property would, it was ruled, continue joint estate. So property under mortgage may, when redeemed, be open to partition (*g*).

By some of the Hindu lawyers a separation such as to give one or more members their several shares is regarded as necessarily involving a general partition (*h*). Those who have not separated are on this theory looked on as reunited, see Col. Dig., Book V. T. 433 *sub. fin.*, and the Mit., Chap. I., sec. 6, paras. 1, 7, where it is assumed that in a partition under Mit., Chap. I., sec. 2, para. 1, all the sons have become separated though some may have reunited with the father; see also Manu. IX., 212. Jagannatha does not adopt this view, and it involves perhaps a certain confusion of thought as pointed out in the case above

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(*d*) Under the English Law it was held that a decree for sale and division of proceeds in a partition suit operated as a conversion of the estate even before the sale, *Arnold* v. *Dixon*, L. R. 19 Eq. 113.

(*e*) *Sakharam Mahadev Dange* v. *Hari Krishna Dange*, I. L. R. 6 Bom. 113, distinguishing *Joy Narain Giri* v. *Girish Chunder Myti*, I. L. R. 4 Cal. 434.

(*f*) S. A. No. 260 of 1871, Bom. H. C. P. J. F. for 1873, No. 35.

(*g*) *Balkrishna* v. *Harishankar*, 8 Bom. H. C. R. 64 A. C. J.

(*h*) *Sham Narain et al.* v. *The Court of Wards*, 20 C. W. R. 201 C. R. Such a general partition might be supposed to be intended in *Gopal Anant* v. *Venkaji Narayan*, Bom. H. C. P. J. F. for 1878, p. 13, though the plaintiff was entitled to but one-fiftieth of the property. But the decree is, in its operative part, confined to the parties; and the ascertainment and declaration of all the shares which the High Court directed the Subordinate Judge to make, would not of itself constitute a partition where there was no mind amongst the parceners to divide. See *Gopal Anant Kamut* v. *Narayan Anant*, Bom. H. C. P. J. F. for 1878, pp. 13, 230, and same case, *ibid.* 1879, p. 370; *Samatsang* v. *Shivasangji*, Bom. H. C. P. J. 1882, p. 404; *Chidambaram Chettiar* v. *Gouri Nachiar*, I. L. R. 2 Mad. 83. Above, p. 632.

quoted (*i*), but it rests also, probably, to some extent on the general necessity, under the Hindu law, of seisin or possession to validate any change of title (*k*), no ownership of any definite share being predicable of a particular coparcener while united (*l*). The Vivada Chintamani, p. 79, says that a division of the property actually made into lots, but not completed by distribution, raises no separate interests.

When a parcener has been excluded from joint family property for twelve years, satisfactorily proved and shown to be

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(*i*) *Appovier* v. *Rama Subba Aiyan et al.*, 11 M. I. A. 68.

(*k*) *Tarachand* v. *Lakshman*, I. L. R. 1 Bom., at p. 93; *Lallubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom. 299. But registration serving as notice may complete an ownership without physical possession, *ibid.* 332; *Icharam Dayaram* v. *Raiji Jaga*, 11 Bom. H. C. R. 41, and prevents rights subsequently arising which would be inconsistent with the one thus secured, *Hasha* v. *Ragho*, I. L. R. 6 Bom. 165. In *Special Appeal* 668 *of* 1881, followed in a recent case, *Pemraj Bhavaniram* v. *Narayam Shivram*, I. L. R. 6 Bom. 215, it was ruled that in the case of a gift, even to a son, actual transfer of possession was requisite to complete the title of the donee. Registration, it was held, would not in such a case supply the want of possession. In the case of 2 Str. H. L. 7, Colebrooke says that "no doubt a gift may be made to an absent person," but there a delivery may have been contemplated to a person on account of the donee. Under sec. 25 of the Indian Contract Act IX. of 1872, a gift to a son duly registered would apparently bind the father and his representatives without delivery of possession. Sec. 123 of the Transfer of Property Act, IV. of 1882, provides for the completion of a gift either by registration of the instrument, or in the case of movable property by delivery, but this Act is not yet in force in Bombay, see above, p. 180. In Madras possession is not necessary to complete a sale, *Vasudeva Bhattu* v. *Narasamma*, I. L. R. 5 Mad. 6. The instrument was registered after the executant's death by his widow. In *Bai Amrit's Case*, I. L. R. 2 Bom. 299, registration is pronounced generally equivalent to possession. See the Transfer of Property Act, IV. of 1882, sec. 54.

Possession obtained during the pendency of a suit gives the acquirer of it no *locus standi* to resist the successful plaintiffs when the new possessor has omitted to get himself made a defendant, *S. B. Shringarpure* v. *S. B. Pethe*, I. L. R. 2 Bom. 662. See *Radhabai kom Shrikrishna* v. *Shamrao Vinayak*, Bom. H. C. P. J. F. for 1881, p. 218.

A change of possession is not necessary to validate the transfer of a right not exercised by possession, such as the reversion of a landlord, or an equity of redemption in the case of a usufructuary mortgage. See *Kachu* v. *Kachoba* above, and *Lallubhai Surchant* v. *Bai Amrit*, I. L. R. 2 Bom., at pp. 325, 326; *Shripati* v. *Balvant*, Bom. H. C. P. J. 1881, p. 221. But one who has gained possession before the suit is a necessary party.

(*l*) Compare also above, pp. 564, 589, and see the case of *Puree Jan Katoom et al.* v. *Bykunt Chunder et al.*, 9 C. W. R. 483, C. R.

continuous and public and adequate to the circumstances of the case (*m*), a suit on his part to enforce his right to a share is barred by limitation (*n*). His right is extinguished. His ground for a claim to partition is by this withdrawn, a partition having been practically effected by the law in his favour as well as against him, since exclusion implies mutual exclusion (*o*).

§ 4 D. 2. As to *implied will,* the Hindu authors are prolix in their discussions of the circumstances from which separation or union may be inferred (*p*). According to them the "signs" of separation are:

a. The possession of separate shares.

(*m*) *Jagjivandas* v. *Bai Amba*, I. L. R. 25 Bom. 362.

(*n*) Act XV. of 1877, Sch. II., art 127, and sec. 28. The same limitation applies to a claim to an hereditary office (art. 124), a periodical benefit (art. 131), and possession due on the death of a female (art. 141).

(*o*) See above, p. 589. The adverse possession by which those who enjoy it profit through limitation must be a possession incompatible with a recognition of the alleged concurrent right. Thus non-participation in the general profits of an estate is not an exclusion while the parcener holds certain lands in that character, *Pertabnarain* v. *Opindurnarain*, 1 C. S. D. A. R. 225. Conversely an enjoyment in the form of commensality bars limitation, *Rajoneekant Mitter* v. *Premchand Bose*, Marsh. R. 241. Mere non-participation in the profits was held not to constitute a cause of action from which limitation could be counted in *Shebo Sundari Dasi* v. *Kali Churan Rav*, C. W. R. for 1864, p. 296. So *Benud Naik* v. *Doorga Churn Naik*, 1 C. W. R. 74. In *Chaghanlal* v. *Bapubhai*, Bom. H. C. P. J. 1880, p. 123, it was held that where a degree for a share of a vatan had been made in favour of a plaintiff he was not barred by the lapse of more than twelve years from recovering arrears due on account of such share. This may possibly be open to question, as the bar of limitation shuts out any consideration of the validity of the title thus barred, and the possession previously adverse, and as such made a cause of action, did not become less adverse through a decree against the possessor. Where, on the other hand, possession has begun under a title or in the exercise of a right implying the existence of another superior to itself, or concurrent with itself, the mere continuance of such possession does not constitute an exclusion. There must be some act contradictory of the right known to the person affected to impose on him the necessity of taking any step for the assertion of the right. See Ind. Evidence Act, I. of 1872, secs. 114, 110; Lim. Act, XV. of 1877, Sch. II., art. 127; *Dadoba* v. *Krishna*, I. L. R. 7 Bom. 34; and comp. Burge, Com. Vol. III., pp. 13, 14; Domat. Ci. L. Vol. I. 886; *Board* v. *Board*, L. R. 9 Q. B. 48; *Williams* v. *Pott*, L. R. 12 E. Ca. 149.

(*p*) Mit., Chap II., sec. 12; Stokes's H. L. B. 466-7; May., Chap. IV., sec. 7, paras. 27—35; Stokes's H. L. B. 80—82.

b. Living and dining apart.

c. Commission of acts incompatible with a state of union, such as trading with or lending money to each other, or separately to third parties, mutual gifts or suretyship. They add also giving evidence for each other, but from this in the present day no inference can be deduced (*q*).

The burden lies on a member, asserting that his acquisition of property has been made subsequently to a partition, of proving that it was not required as part of the joint estate (*r*). In other words, if he sets up a partition at a particular time or prior to particular transactions he must prove as he has averred it.

d. The separate performance of religious ceremonies, *i.e*. of the daily Vaisvadeva, or food-oblation in the fire preceding the morning meal; of the Naivedya, or food-oblation placed before the tutelary deity; of the two daily morning and evening burnt-

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(*q*) "A writing attested by them (kinsmen) is the best proof; on failure of that, one attested by other witnesses; failing that, mere oral testimony; and lastly, evidence of separate acts. Such is the order of proof." Jagannatha, in Col. Dig., Book V., T. 381. Narada, Pt. II., Chap. XIII., para. 36, cited by Vyav. May., says, (1) evidence of kinsmen, (2) documentary proof, (3) separate transaction of affairs. Vyav. May., Chap. IV., sec. 7, p. 27; Stokes's H. L. B. 80. Nilakantha adds separate possession of house and field, and so Vijnanesvara, Mit., Chap. II., sec. 12, Stokes's H. L. B. 466-7.

Under the English law a severance of a joint tenancy is caused by a course of dealing which implies such severance amongst the parties to such dealing. See *Williams* v. *Hensman*, 1 J. & H. 546, and a similar principle seems to be involved in *Ujamsi* v. *Bai Suraj*, Bom. H. C. P. J. 1881, p. 66. In *Ramchundur Dutt* v. *Chundar Coomar Mundul*, 13 M. I. A., at p. 198, it seems to have been thought that a mere alienation of a share to a stranger would bring the relation of the parcener as a member of a joint family to an end, and make the alienee a co-owner with the other parceners. A sale by a joint tenant in England severs the joint-tenancy, but in India it is either ineffectual under the strict Hindu law or it gives to the purchaser a right only to have the transaction made good so far as is equitable by means of a partition. See above, pp. 563 ss.

(*r*) *Musst. Anundee Koonwur* v. *Khedoo Lal*, 14 M. I. A. 412; see also *Rewan Persad* v. *Musst. Radha Beeby*, 4 M. I. A. 137; *Moti Mulji* v. *Jamnadas Mulji et al.*, S. A. No. 77 of 1877, Bom. H. C. P. J. F. for 1877, p. 123. As there may be separate property without a division of the united family, the question is perhaps still more frequent of whether particular property of an undivided coparcener is to rank as joint or as separate property. For such cases see below, sec. 5. A.

offerings; of the Sraddhas (*s*) or funeral oblations to the parents' manes, &c. (*t*).

None of these signs of separation can be regarded as by itself conclusive. Living and dining apart, on which the Sastris appear to set great value, may justify an inference that separation has taken place, but it is not conclusive of the fact, since many coparceners live and dine apart, sometimes in the same village or house, for the sake of convenience. Other reasons too may necessitate the same arrangement, *e.g.* Government service taken by one or more of the coparceners. The Privy Council indeed have said that cesser of commensality is strong, but not conclusive, evidence of partition (*v*). What is required is the division of the estate, which when once effected cannot be altered by the subsequent conduct of the parties (*w*).

The separate performance of the Vaisvadeva sacrifice, of Sraddhas and other religious rites is still less conclusive. In Book II., *Digest of Vyavasthas*, Chap. IV., Q. 4, a passage of Bhattojidikshita is quoted, according to which coparceners, living apart, may or may not perform the Vaisvadeva each for himself, and, in the present condition of Hindu society, the performance of all religious rites has become so lax and irregular as to afford no safe ground for inference (*x*). Separate contracts, entered into by coparceners mutually or with third parties, constitute, according to 1 Macn. H. L. 54 and 1 Str. H. L., p. 225—227, the most certain evidence of a partition. But even these raise no

(*s*) On the Sraddhas see H. H. Wilson, Works, VIII. 113; Col. Essays, vol. II., p. 180 ff. At p. 196 reference is made to the enumeration in the Nirnaya Sindhu. On the Vaisvadeva, *ibid.*, pp. 203, 307, and Journ B. R. A. Soc., vol. XV., p. 253. Comp. Mommsen, Hist. of Rome, vol. I., pp. 173, 174, for the Roman domestic sacrifices. See also the Tagore Lectures for 1880, Lec. I.

(*t*) See Colebrooke and Ellis at 2 Str. H. L. 392.

(*v*) *Anundee Koonwar et al.* v. *Khedoo Lal.* 18 C. W. R. 69 C. R., S. C. 14 M. I. A. 412; and as to separate residence, see *Vinayek Lakshman et al.* v. *Chimnabai*, R. A. No. 44 of 1876, Bom. H. C. P. J. F. for 1877, p. 170; *Sheshapa* v. *Igapa bin Surapa*, R. A. No. 12 of 1873, *ibid.* for 1875, p. 37.

(*w*) *Balkishen* v. *Ram Narain*, L. R. 30 I. A. 139.

(*x*) "When brothers living apart separately perform the daily ceremonies of *Naivedya* and *Vaisvadeva* and have separate house and other property, they may be considered separated." Q. 685, Poona, 17th August, 1849, MS. Although three brothers may have had undivided family property some *prima facie* improbability of their continuing joint arises from their respectively carrying on the profession of pleaders in three different places, *Bhagirthibai* v. *Sadashivrav*, Bom. H. C. P. J. 1880, p. 126.

conclusive presumption *per se*, since it is consistent with a condition of union, that a coparcener should, concurrently, possess separate property (avibhajya), which implies separate transactions (*y*). As no one of the marks of partition above enumerated can be considered conclusive, so neither can it be said that any particular assemblage of these alone will prove partition. It is in every case a question of fact to be determined like other questions of fact, upon the whole of the evidence adduced, circumstantial evidence being sufficient, as distinctly admitted indeed by Brihaspati (*z*). This principle has been followed by the Privy Council in *Rewan Prasad* v. *Radha Bibi* and in other cases, and, in effect, supersedes the artificial rules of the Hindu Law (*a*)—rules, as Jagannatha points out (Col. Dig., Book V., T. 389, Comm. *ad fin.*), drawn from texts "founded on reason, not revelation, leaving room for the admission of presumptive proof" (*b*).

(*y*) Separate trading and separate acquisition are not proof of partition, *Vedavalli* v. *Narayana*, I. L. R. 2 Mad. 19.

(*z*) See Dayabhaga, Chap. XIV., p. 8; Stokes's H. L. B. 362; see also Borr. Col. Lith. 264; Mor. Dig., Partition, pp. 484, 485; 2 Macn. H. L. 152; *Ruvee Bhudr* v. *Roopshunker*, 2 Borr. 713; *Sheshapa et al.* v. *Igapa bin Surapa*, R. A. No. 12 of 1873, Bom. H. C. P. J. F. for 1875, p. 37.

(*a*) In *Lalla Mohabeer Pershad et al.* v. *Musst. Kundun Koowar*, 8 C. W. R. 116 C. R. there is a case of a coparcenary converted by agreement into a simple mercantile partnership, in a judgment, affirmed by the Privy Council, *Doorga Pershad et al.* v. *Musst. Kundun Koowar*, 21 C. W. R. 214; S. C., L. R. 1 I. A. 55. See Dayabhaga, Chap. XI., sec. 1, p. 30; Stokes's H. L. B. 311; Str. H. L. 395. Separation for fifty years was pronounced proof of a partition. See below, page 640.

(*b*) In his essay "On the Deficiencies," &c., the late Prof. Goldstücker objected to what he called "the summary rejection as legal proof of all and each of the signs of separation." If by "legal proof" the Professor meant evidence forming a fit ground for inference, he went much beyond the statement he was criticizing. If by "legal proof" he meant "conclusive proof," then the criticism is unfair only in substituting "the rejection of all and each," for a denial that any particular group of signs can, apart from its logically evidential weight, be conclusive. Jagannatha, in Col. Dig., after a discussion of the various signs of partition, which shows that they have severally a probative but not a conclusive force, winds up by saying: "The texts are founded on reason, and the several arguments on each being equal, presumptive proof may be admitted on failure of written and oral evidence," Book V., Chap. VI. *ad fin.* In the same sense Mitramisra says of the several indications enumerated by Narada, "It is not to be supposed that the inference arises only when all these jointly subsist; the intention is that the inference arises from all or some of them, the text being based on reason," Viram. 262. On the difference between actual proof and a mere "*Adyuharana*" (*i.e.*, *Ud-aharana*) or indication, see the remark of Ellis, 2 Str. H. L. 392, who, at p. 398, says that the

On the other hand, from the separate possession, by individual members of a family, of portions of the property once held in common, a presumption, though not an indisputable presumption, of partition arises (*c*). This presumption is strengthened by length of time, and Narada, Pt. II. Chap. XIII. sl. 41 (*d*) states, that a continuous separation for ten years is a proof of partition. This verse is quoted in the Smriti Chandrika, Chap. XVI., as from Katyayana; and in the Sarasvati Vilasa, secs. 34, 811, as from the same source. In the latter work there is a long discussion of the means of proof of partition ending with a statement that where there is positive direct evidence, that is to be relied on; in its absence efficient causes, such as transactions which involve separateness of interests inconsistent with a continued union; and finally what are called memorial causes, as the separate performance of religious ceremonies, which, continued for a period

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weight to be given to such tokens is "one of the many points reserved by the Hindu Law for equitable judgment." In *Ambika Dat* v. *Sukhmani Kuar et al.*, I. L. R. 1 All. 437, a definition of shares, separate entries of the parceners' names as owners of those shares in the Government records, and the substitution on their deaths of their respective sons' names, were held insufficient, in the absence of evidence of separate enjoyment of profits, to prove partition. This is perhaps an extreme case, reference being made to *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A., at p. 89, and to the separate contracts with the Government constituted by the separate entries of the parceners' names for several shares; but on the whole evidence the Court thought the intention to divide must have been abandoned. See *R. S. Venkata Gopala Narasimha* v. *R. S. Lakshmi Venkama Roy*, 3 Beng. L. R. 41 P. C.; *Baboo Doorga Pershad* v. *Musst. Kundun Koowar*, L. R. 1 I. A., at p. 70; *Pragdas* v. *Kishen*, I. L. R. 1 All. 503.

(*c*) See above, pp. 631, 638.

(*d*) A various reading of Narada, Part II., Chap. XIII., sl. 36, gives "*bhoga lekhyena*" = "by enjoyment or record," instead of "*bhaga lekhyena*" = "record of division." See Col. Mit., Chap. II., sec. 12, p. 3 note, Stokes's H. L. B. 467, and the case of *Bharangowda* v. *Sivangowda et al.*, S. A. No. 356 of 1873, Bom. H. C. P. J. F. for 1874, p. 184. Ten years is the period prescribed by Manu (Chap. VIII. 148) as that by which ownership is lost through adverse possession, but his rule does not give a prescriptive title to encroachments on land, or to public property, that of an infant, a pledge or a deposit (VIII. 149). Gautama also (Chap. XII., para. 37) gives ten years as the period of prescription except in favour of Srotriyas, ascetics and Government officers; but he excludes land as well as females and animals from the rule. That the right to land was widely regarded as imprescriptible in the customary law has been shown above, p. 174; see too below, sec. 5 B. Why female slaves should have been excepted from the general rule is less easy to explain, perhaps because of the more positive identification possible in their cases than in those of ordinary chattels. Yajnavalkya, II. 24, assigns twenty years for land and ten years for movables. See *Lalubhai Surchand* v. *Bai Amrit*, I. L. R. 2 Bom., at p. 307 ss.

of ten years, become effective in producing separation. This seems but another way of saying that a presumption, weak at first, grows in strength with a repetition or continuance of the facts that give rise to it, until it becomes conclusive.

The fact that certain portions are admittedly held in severalty does not, it has been said, rebut the presumption of non-partition as to the rest of the family property (*e*), and separate enjoyment merely as a matter of arrangement for the convenience of the family will not constitute partition (*f*). This is the normal condition of a Khoti estate in Ratnagiri, and will not prove a partition as intended to be permanent, as held in *Babashet* v. *Jirshet* (*g*). This last decision must, so far as it extends, qualify the rulings in *Musst. Mohroo Kooeree* v. *Musst. Gunsoo Kooeree et al.* (*h*), *Shib Narain Bose* v. *Ram Nidhee Bose et al.* (*i*), and the old case of *Ruvee Bhudr* v. *Roopshunkur Shunkurjee et al.* (*k*), in which separate collections, and even a division of the income derived from a village, were held to be sufficient proofs of a partition. Even if, for common convenience, the parties took the profits of an estate in certain defined shares, still it would not be conclusive evidence of a separation (*l*). Nor would false statements made by the parties for their common benefit (*m*). In *Sonatun Bysack* v. *Sreemutty Jugatsoondree Dossee* (*n*) the Privy Council say, "Their Lordships are very clearly of opinion that the mere division of income for the convenience probably of the different members of the family did not amount to a division of the family." So as to mortgaged property redeemed by one member and then held by him exclusively for 20 years (*o*). In a recent case it was held that

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(*e*) *Sreeram Ghose et al.* v. *Sreenath Dutt Chowdhry et al.*, 7 C. W. R. 451 C. R.

(*f*) *Musst. Josoda Koonwur* v. *Gowrie Byjonath Sohaesing*, 6 C. W. R. 144 C. R.

(*g*) 5 Bom. H. C. R. 71 A. C. J.

(*h*) 8 C. W. R. 385 C. R.

(*i*) 9 *ibid.* 88.

(*k*) 2 Borr. 713.

(*l*) *Hariparsad* v. *Bapuji Kirpashankar*, S. A. No. 150 of 1872, Bom. H. C. P. J. F. for 1872, No. 134; *Vinayek Lakshman et al.* v. *Chimnabai*, R. A. No. 44 of 1876, *ibid.* for 1877, p. 170; *Sakho Narayan* v. *Narayan Bhikhaji*, 6 Bom. H. C. R. 238 A. C. J.

(*m*) *Musst. Phooljhuree Kooer* v. *Ram Pershun Singh et al.*, 17 W. R. 102 C. R.

(*n*) 8 M. I. A., at p. 86.

(*o*) *Balu bin Bapurao* v. *Narayen Bhivrav*, P. J. 1874, p. 132.

a decree, which had on an agreement between the co-owners awarded to the one two-fifths and to the other three-fifths of a village, was not to be deemed an adjudication of partition in a subsequent suit between the representatives of the parties (*p*). If it effected a severance of the rights it would apparently constitute a partition, but not if it merely defined the proportions of the interests (*q*).

Where there had been a really exclusive enjoyment of any portion of the patrimony, a suit would, it was said, ordinarily be barred by the Limitation Act, XIV. of 1859, sec. I., para. 13, after the lapse of twelve years (*r*), and as to the general principle, it would seem that the older Bombay decision was more strictly in accordance than the recent ones with the Hindu Law as viewed by the Indian commentators. A division of the proceeds is a recognized mode of distribution of the family property, *see* below, sec. 7; and in the case of *Somangouda* v. *Bharmangouda* (*s*), it was held that where a plaintiff admitted having had separate possession for sixteen years of a portion of the ancestral estate, it lay on him to prove that the family had remained undivided (*t*).

(*p*) *Samatsang* v. *Shivasangji and Ramsangji*, Bom. H. C. P. J. 1882, p. 404.

(*q*) *Jay Narayan Giri* v. *Girishchundar Myti*, I. L. R. 4 Cal. 434. See the cases referred to above, and sec. 7 A 1 *b* below. It may be doubted whether this refinement would be admitted by a purely Hindu lawyer taking his stand on the principles stated in *Rama Subayanna's Case*.

(*r*) *Umbika Churn Shet* v. *Bhuggobutty Churn Shet at al.*, 3 C. W. R. 173 C. R.; *Vidyashankar et al.* v. *Ganpatram*, S. A. No. 260 of 1873, Bom. H. C. P. J. F. for 1875, p. 351; *Shidojirav* v. *Naikojirav*, 10 Bom. H. C. R. 228, wherein it was held that the period during which the property was under attachment by Government, and during which neither party was in possession, is excluded from the operation of the Limitation Act (now Act XV. of 1877).

(*s*) 1 Bom. H. C. R. 43.

(*t*) The separate possession being *prima facie* an exclusive possession as owner (In. Ev. Act, I. of 1872, sec. 110; *Keval* v. *Vishnu*, Bom. H. C. P. J. 1875, p. 368). It does not appear that the Hindu, like the Roman, lawyers elaborated any very clear theory of possession, distinct from proprietorship, as itself conferring rights. In the Vyavahara Mayukha, Chap. II., sec. 2 (Stokes's H. L. B. 31), possession is regarded merely as a means of proof, comparatively valueless without a title otherwise established. A law of prescription, however, is distinctly recognized, (Col. Dig., Book I. T. 113; Book V. T. 395, 396,) defined for the Bombay Presidency by Reg. V. of 1827; and in the case of conflicting titles possession gives him who holds it the preference. Col. Dig., Book I. T. 128 sqq. In the case of *Rajah Pedda Vencatapa* v. *Aroovala Roodrapa Naidoo*, 2 M. I. A. 504, it is laid down that "the title of possession must prevail until a good title is shown to the contrary." This is an adoption

Exclusive possession for thirty years affords conclusive proof of

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of the English law, the doctrine of which on this point, as Sir T. Strange (1 H. L. 38) observes, is substantially the same as that of the Hindu Law. See to the same effect *Pemraj* v. *Narayan*, I. L. R. 6 Bom. 215.

The Hindu law generally requires in the case of material property a transfer of possession to complete a change of ownership. Yajn. II. 27; Narada, Pt. I., Chap. IV., paras. 4, 5 : but a right of entry or redemption may as such be transferred by mere contract, see *Bai Suraj* v. *Dalpatram*, I. L. R. 6 Bom. 380, referring to *Raja Saheb Prahlad Sen* v. *Baboo Budhusing*, 12 M. I. A. 275, 307; *Mathews et al.* v. *Girdharlal Fatechand*, 7 Bom. H. C. R. 4 O. C. J.; *Kachu* v. *Kachoba*, 10 Bom. H. C. R. 491; *Vasudev Hari* v. *Tatia Narayan*, I. L. R. 6 Bom. 387; and the cases cited in *Lakshmandas* v. *Dasrat*, I. L. R. 6 Bom. 175. In the last case the effect of non-possession and of registration in many different cases is discussed by Sir M. Westropp, C.J. See also *Lalubhai* v. *Bai Amrit*, I. L. R. 2 Bom. 299, 331, 332. In *Sobhagchand* v. *Bhaichand*, I. L. R. 6 Bom. 193, the effect of purchase at a sale in execution of property already equitably charged is considered.

Under the older English law transfer of possession was as necessary as under the Hindu law for a change of the right *in re*; see Bl. Com., Book II., Chaps. X., XX. Butler's note to Co. Lit. 330 *b*.

Possession giving a preference to the mortgagee having it over one without it is sufficiently acquired by a *bona fide* attornment of the mortgagor as tenant to the mortgagee, *Anunt Bapu* v. *Arjun Gondu*, P. J. 1880, p. 293. The possession requisite to perfect a title may be acquired notwithstanding an irregularity in taking it, *Lillu* v. *Annaji*, I. L. R. 5 Bom. 387. The mortgagee's possession continued after payment of the mortgage debt does not necessarily become adverse, *Babla* v. *Vishnu Ballal Thakur*, Bom. H. C. P. J. F. of 1880, p. 294; Comp. Steele, L. C. 72; and on Pledges, pp. 251 ss.

As to possessory actions there have been very conflicting decisions. Compare *Khajah Enaetoollah* v. *Kishen Soondur et al.*, 8 C. W. R. 386 C. R., with *Musst. Tukroonissa Begum et al.* v. *Musst. Mogul Jan Bebee*, 8 *ibid.*, p. 370; *Kalee Chunder Sein et al.* v. *Adoo Shaikh et al.*, 9 C. W. R. 602 C. R.; and *Kunbi Komapen Kurupu* v. *Changarachan Kandil*, 2 M. H. C. R. 313; and see also *Radha Bullub Gossain et al.* v. *Kishen Govind Gossain*, 9 C. W. R., 71 C. R.; and *George Clarke* v. *Bindavun Chunder Sircar et al.*, C. W. R. Special Number, p. 20. The Specific Relief Act, I. of 1877, sec. 9, gives a summary remedy to one dispossessed illegally, see *Sayaji* v. *Ramji*, I. L. R. 5 Bom. 446. A jurisdiction in such cases is given to Mamlatdars by Bombay Act, III. of 1876. The present Limitation Act is Act XV. of 1877.

The relations of different parties concerned in a dispossession are discussed in *Virjivandas* v. *Mahomed Ali Khan*, I. L. R. 5 Bom. 208. A possession acquired permissively or by tenancy does not become adverse by mere non-payment of rent for more than twelve years. It must have become distinctly adverse and remained so for twelve years, in order that a claim for recovery may be barred. See the Limitation Act, XV. of 1877, Sched. II., arts. 139, 144; *Radha Govind* v. *Inglis*, decided by the Privy Council on 6th July, 1880; *Ramchandra Govind* v. *Vamanji*, Bom. H. C. P. J. 1881, p. 198.

In many cases of so-called tenancy in India it may be remarked the possession

partition and bars an action for further partition (*v*). In Anandrao *Padaji* v. *Shidooji Anandrao* (*w*) one member of a Vatandar family had exclusively held the Vatan lands and another the personal emoluments for 30 years (*x*). It was held that this raised a presumption of partition, and in *Sitaram Vasudev* v. *Khanderao* (*y*) it was ruled, that where there had been a separation of residence and non-participation by the plaintiff for more than 30 years before Act IX. of 1871 came into operation, an exclusive prescriptive title had been acquired by the defendant, under Reg. V. of 1827. The learned Judges in this last case must have supposed that there had been an exclusive possession held, in good faith, as sole proprietor for 30 years, as otherwise the possession by one joint tenant would have been the possession of all (*z*). Under Act IX. of 1908,

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of the land is not really intended to be given to the cultivator. He is, especially where the produce is divided, rather in the position of a *colonus*, or of a farmer, as in the earlier English law (see Bracton, 27 *b* 220, Butler's note to Co. Lit. 330 *b*; Bl. Com. Book III., Chap. IX., and Chap. XI.) with a licence to enter and use the land but no interest in the land itself, only a personal right against the owner should the latter eject him. See *Venkatachalam Chetti* v. *Andiappan Ambalam*, I. L. R. 2 Mad. 232. On the other hand, payments are sometimes made by " tenants " who do not hold by a derivative title from their over-lord, and where there is not really a " reversion," there never having been a lease. The possession is that of owners subject only to a rate or quit-rent. See *Bhaskarappa* v. *The Collector of North Canara*, I. L. R. 3 Bom., at pp. 545, 564; *Babaji* v. *Narayan*, *ibid.* 340, and the cases there referred to.

(*v*) *Girdhur Purchotum et al.* v. *Govind et al.*, 7 Harr. 371; *Bhana Govind Guravi* v. *Vithoji Ladoji Guravi*, 3 Bom. H. C. R. 170 A. C. J.; *C. D. Rane et al.* v. *G. R. Rane*, 3 *ibid.* 173 A. C. J.; *Svamirayacharya* v. *The Heirs of Moodgalacharya et al.*, S. A. No. 94 of 1872, Bom. H. C. P. J. F. for 1875, p. 89, and the File for 1876, p. 132. Acquiescence in a distribution for 19 years was held conclusive in *Inga Mulloo Pitchanna* v. *L. M. Goruppa*, M. S. D. A., Dec., for 1859, p. 84. Under Act XV. of 1877, sec. 25, the title by possession held continuously will generally be completed by limitation concurrently with the extinction of the right to sue.

(*w*) S. A. No. 453 of 1871, Bom. H. C. P. J. F. for 1872.

(*x*) *Bharangowda* v. *Sivangowda et al.*, *supra*, p. 692.

(*y*) I. L. R. 1 Bom. 286.

(*z*) See above, p. 589; 16 Vin. Abridgt. 456; Cr. Dig. Tit. XXXI., Chap. II.; 2 Sm. L. C. 606 ss.; 2 Ev. Pothier, 127; *Denys* v. *Shuckburgh*, 5 Jur. N. S. 21; *Murray* v. *Hall*, 18 L. J. C. P. 161; *Luchman Singh* v. *Shumshere Singh*, L. R. 2 I. A. 58; *Runjeet Singh et al.* v. *Kooer Gujrai Singh*, L. R. 1 I. A. 9.

As to absolutely exclusive possession being necessary to constitute a bar against coparceners, see above, p. 589; *Shidoji* v. *Naikoji*, 10 B. H. C. R. 288, quoting *K. Subbaiya* v. *K. Rajesvara*, 4 M. H. C. R. 357; *Atmaram Baji* v. *Madhavrao Bapuji*, Bom. H. C. P. J. 1880, p. 311; *Kazi Ahmed* v. *Moro Keshav*, Bom. H. C. P. J. 1878, p. 120. In *Ramchandra* v. *Venkatrao*, I. L. R. 6 Bom.,

Sch. A., art. 127, time is counted for limitation against a claimant of a share only from his knowing of his exclusion (*a*).

§ 4 E. The separation may be general or partial, *i.e.*, it may extend to a partition of the whole of the property, or only to a portion of it (*b*). In the latter case the mutual rights and duties of

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at p. 600, it was stated as a ground for inferring non-partition between the parties "that each is in enjoyment of some portion of the family property."

The Hindu law of prescription is considered in the case of *Moro Vishvanath et al.* v. *Ganesh Vithal et al.*, 10 Bom. H. C. R. 444. The law of prescription under the Regulation is further discussed in the case of *Rambhat* v. *The Collector of Poona*, at I. L. R. 1 Bom. 592; and see above, Book I., pp. 70, 174; also *Thakur Durryao Singh* v. *Thakur Davi Singh*, 13 B. L. R. 165; S. C., L. R. 1 I. A. 1.

Under the older Roman Law there was no usucapion of provincial land; but it might be acquired by a *longi temporis prescriptio of* 10 years during the presence of the former proprietor and of 20 years during his absence. (Comp. Yajn. II. 24; Manu VIII. 147; Narada, Pt. I., Chap. IV., paras. 6, 7.) This was, by Justinian, made the universal law. He added a general prescription of 30 years free from the condition of an initial title provided the possession had begun in good faith, Cod. L. 7; 39, 8. See Poste's Gaius, pp. 159, 160. This is the original source of the term prescribed in Bom. Reg. V. of 1827, sec. 1. See West's Bombay Code, *ad loc.*, and Savigny's Syst. Vol. III. 380.

(*a*) *Hari* v. *Maruti*, I. L. R. 6 Bom. 741.

(*b*) *Rewun Persad* v. *Musst. Radha Beeby*, 4 M. I. A. 137; *Appovier* v. *Rama Subba Aiyan et al.*, 11 *ibid.* 75; 2 Str. H. L. 377, 380, 387. A partition carried out partly in foreign territory was completed in British territory, *Kasi Yesaji* v. *Ramchandra Bhimaji Nabur*, Bom. H. C. P. J. for 1878, p. 151. In *Manjanatha* v. *Narayan*, I. L. R. 5 Mad. 362, the case is dealt with of a claim to partition by a representative of one branch against the representative of another after partial partitions. These having been obtained by younger members during their fathers' lives and membership with others of a joint family could not properly have been enforced, see pp. 608, 613, and comp. p. 647. It is only when no progenitor in his own branch intervenes that a junior has an unqualified right to a severance of his share. The share due to each branch and sub-branch was held to be what it would have been had there been no partition, since the right centred in a single ancestor, minus so much as had in the partial partitions been previously given to members of such branch or sub-branch. According to the theory of those who regard a partial partition as involving a general partition and partial reunion, each branch and sub-branch in the case just discussed would be regarded as having rejoined with a share diminished by the sub-share of the severed member. There would then be room for an application of the principle stated in the Vyav. May., quoted above, p. 132; and equally so in the case of a reunion of one of two or more brothers who as a group had previously left the family and also separated *inter se*. One such bringing back but a third of what his branch had taken out could not be allowed to claim a repartition and the full share of his branch in the reunited estate, already diminished by two-thirds of that share. By treating the relative

the former coparceners in relation to the undivided residue of the estate remain generally as before partition (*c*). If there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement (*d*). A partial division, however, cannot be enforced (*e*); the coparcener or the purchaser of a coparcener's rights must claim the whole of his share (*f*). There is a conflict of decisions as to the rights of a purchaser of the undivided interest of a coparcener in a portion of the joint family property to enforce partition of the portion only (*g*). But in case of compulsory alienation by an execution sale all over India, and voluntary alienation in Bombay and Madras, of a coparcener's interest in a *specified property* forming a portion only of the joint estate a suit for partition of that property only it seems is maintainable (*h*); but if the alienation be of the entire interest of a co-

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claims as subject to deduction as in the case quoted, a result is brought out identical with that contended for in the Mayukha, if ancestral estate only is in question. It is in this sense that the reunited parcener " is remitted to his former status." According to the Mit. (Chap. I., sec. 5, para. 31) there can be no partition directly between the grandfather and grandson while the father is alive, *Rai Bishen Chand* v. *Asmida Koer*, L. R. 11 I. A. 164, *per Curiam.*

(*c*) *Ramabai* v. *Jogan Soorybhan et al.*, S. A. No. 260 of 1871, Bom. H. C. P. J. F. for 1873, No. 35. In *Atmaram Baji* v. *Madhavrav Bapuji*, Bom. H. C. P. J. F. for 1880, p. 31, it was held that a family house reserved from partition was open to a supplemental partition, and that a family arrangement, if not shown to have been abandoned, was enforcible, though not acted on, *Lachmi* v. *Janki*, I. L. R. 23 All. 216.

(*d*) Lord Westbury in *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A. 75. See also *Timmi Reddy* v. *Achamma*, 2 M. H. C. R. 325.

(*e*) *Haridas Sanyal* v. *Prannath Sanyal*, I. L. R. 12 Cal. 566.

(*f*) *Dadjee Deorav* v. *Vitul Deorav*, Bom. Sel. Ca. 172; *Ragrindrapa* v. *Soobapa*, S. A. No. 3948, 27th September 1858; *Nanabhai* v. *Nathabhai*, 7 Bom. H. C. R. 46 A. C. J.; *Jaitaram Bechur* v. *Bai Gunga*, 8 *ibid.* 228 A. C. J.; *Trimbak Dikshit* v. *Narayan Dikshit*, 11 *ibid.* 69; *Murariapa* v. *Krishnapa et al.*, S. A. No. 372 of 1872, Bom. H. C. P. J. F. for 1873, No. 15; *Mahadew et al.* v. *Trimbuk Gopal*, S. A. 90 of 1872, *ibid.* No. 127; *Bajyram Vithal* v. *Atmaram Vithal*, Bom. H. C. P. J. 1881, p. 302. Comp. *Parbati Churn Deb* v. *Ainud Deen*, I. L. R. 7 Cal. 577; *Jogendra* v. *Jugobundhu*, I. L. R. 14 Cal. 122; *Venkayya* v. *Lakshmayya*, I. L. R. 16 Mad. 98; *Shivamurteappa* v. *Virappa*, I. L. R. 24 Bom. 128.

(*g*) *Shivamurteappa* v. *Virappa*, I. L. R. 24 Bom. 128; *Kristayya* v. *Narasimha*, I. L. R. 23 Mad. 608.

(*h*) *Ram* v. *Mul*, I. L. R. 28 All. 39; *Ram* v. *Ajudhia*, *ibid.* 50; *Barabi Debi* v. *Deb Kamini*, I. L. R. 20 Cal. 682.

parcener, a partition in respect of a portion only will not lie (*i*). The sale, however, of the undivided coparcenary interest of a father or a son in the execution of a decree is equivalent to a partition and the father's wife can claim her share (*k*). See below, "LIABILITIES ON INHERITANCE."

It sometimes happens that litigation occurs as to a particular part of a joint estate without the existence of the remainder being disclosed (*l*). In such cases the property in suit is naturally treated as the whole estate. Sometimes the whole of the interests of the members of a joint family in a defined property, as for instance in a "hakk," have been sold to several persons who become litigants. In such a case (*m*) it seems to have been tacitly assumed that the purchasers and mortgagees, by dealing with the parceners for their several interests in the fragment of the whole family property as distinct from the remainder, recognized their capacity to enter into such transactions without a general partition, and the continuance of mutual rights and obligations arising out of the union of the family with respect to the residue of the common estate. The case was disposed of by reference to the respective aliquot shares to which the grantors were *primâ facie* entitled, compared with each other and with those of the other members of the family. The latter members might, however, have claims which would diminish the *primâ facie* shares of the grantors; and the determination of the rights *inter se* of grantees from one member or branch, or between such grantees and their grantors, members of a joint family, must always be subordinate to the relative rights of such grantors and their coparceners in the joint estate (*n*).

Though partial division is of very frequent occurrence in practice, the law books do not contain any special rules on the subject (*o*). But that it is not a mere modern innovation may be interred from the passages relating to "Naturally Indivisible Property" in the older Smritis (*p*). In the absence of definite

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(*i*) *Shivamurteappa* v. *Virappa*, I. L. R. 24 Bom. 128.

(*k*) *Bilaso* v. *Dina*, I. L. R. 3 All. 88; *Pursid* v. *Honorman*, I. L. R. 5 Cal. 845.

(*l*) *Vainder Bhat* v. *Venktesh*, 10 Bom. H. C. R., at pp. 158, 159, 162.

(*m*) *Galla Motiram* v. *Naro Balkrishna*, Bom. H. C. P. J. F. for 1878, p. 69.

(*n*) *See Rakhmaji* v. *Tatia*, Bom. H. C. P. J. F. for 1880, p. 188.

(*o*) Partial partition cannot, it was said, be decreed except by consent, *Radha Churn Dass* v. *Kripa Sindhu Dass*, I. L. R. 5 Cal. 474.

(*p*) "A remainder of an estate being undivided is not deemed disproof of a

authorities, it is necessary to fall back here, as in other cases, on general principles and on actual decisions. Lands assigned for the subsistence of a widow or disqualified member are commonly reserved for future partition. Property left undivided (*q*), because mortgaged, was redeemed by the widow of one of the parties to the partition. She died and her daughter succeeded, but was compelled to give up the property redeemed to the son of one of her father's coparceners on a recoupment of the expenses of redemption (*r*). So also where there had been a former suit for partition excluding a portion mortgaged (*s*). So as to a part advisedly reserved for common enjoyment (*t*). Limitation does not operate in such a case until, by exclusive possession as sole owner, one branch becomes entitled by prescription (*v*).

One of the most important questions arising in connexion with this subject is that of whether the law regulating the succession to an undivided or that applicable to a divided male's estate regulates the devolution of an undivided residue. Mr. Colebrooke (*w*) states that opinions have differed on this subject, but that the former view seems preferable. Most of the Sastris (*x*) hold the same opinion, in favour of which the following considerations also may be urged. The law, which bases partition on the will of the coparceners, extends the partition no further than such will. If this extends only to a portion of the estate, their mutual rights and duties with respect to the remainder are unaltered. To the

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partition, for it frequently happens that disunited co-heirs have (retain) some joint property," Jag. in Col. Dig., Book V. T. 387, Comm., *ad fin.* Though partition may by accident have been incomplete, the parties are then in status divided, Smriti Chandrika, Chap. XIV., para. 10. See above, pp. 681, 684, 692.

(*q*) *Narayan* v. *Pandurang*, 12 Bom. H. C. R. 148; *Kristayya* v. *Narasimha*, I. L. R. 23 Mad. 608.

(*r*) *Khondaji Bhavani* v. *Salu Shrivram*, S. A. No. 199 of 1874, Bom. H. C. P. J. F. for 1875, p. 50, following *Balkrishna Vithal et al.* v. *Hari Shunker*, 8 Bom. H. C. R. 64 A. C. J.

(*s*) *Narayan Babaji* v. *Pandurang Ramchandra et al.*, 12 Bom. H. C. R. 148.

(*t*) *Gopalacharya* v. *Keshav Daji*, S. A. No. 240 of 1876, Bom. H. C. P. J. F. for 1876, p. 244.

(*v*) *Swamirayachari* v. *The Heirs of Moodgalacharyi et al.*, S. A. No. 94 of 1872, Bom. H. C. P. J. F. for 1875, p. 89, and the File for 1876, p. 132; *Salu et al.* v. *Yemaji*, S. A. No. 291 of 1873, *ibid.* for 1873, p. 89; *Devapa* v. *Ganpaya et al.*, S. A. No. 125 of 1877, *ibid.* for 1877, p. 194.

(*w*) 2 Str. H. L. 387. See p. 648, note (*t*).

(*x*) See Book I., Vyav., Chap. I., sec. 2, Q. 9, 11, 14, 22; *supra*, pp. 328, 330, 331, 334, 335.

same effect is 1 Macn. H. L. 53 (*y*). It was said, however, that when an actual partition of part of a family estate had been proved it lay on those who asserted non-partition of the remainder (a banking business) to prove it (*z*).

§ 4 F. *Partition final.*—A partition once agreed to is final (*a*), except in the case of a mistake or fraud which has materially affected the distribution. In both cases a redistribution may be claimed by any parties injured, which, however, extends only to the portion overlooked or fraudulently abstracted (*b*). It is subject to a proportional deduction from each coparcener's share on the birth of a posthumous son (*c*). Misconduct in dealing with the

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(*y*) Col. Dig., Book V., Chap. VIII. T. 431 Comm.; *Rewana Prasad* v. *Radha Bibi*, 4 M. I. A. 137; *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 M. I. A. 539; *Timmi Reddy* v. *Achama*, 2 M. H. C. R. 325; *Maccandas* v. *Ganpatrao*, Perry's Or. Ca. 143.

(*z*) *Umiashankar* v. *Bai Ratan*, Bom. H. C. P. J. F. for 1878, p. 217, referring to *Narayan Babaji* v. *Nana Manohar*, 7 Bom. R. 153 A. C. J. Comp. p. 589, *supra*, and next note.

(*a*) Manu IX. 47; *Maharajah Hetnarain* v. *Baboo Modnarain Sing*, 7 M. I. A. 311; *Rango Mairal* v. *Chinto Ganesh et al.*, S. A. No. 297 of 1874, Bom. H. C. P. J. F. for 1876, p. 74. A distribution acquiesced in will not be set aside, *Kunnyah Pande et al.* v. *Ram Dhun Pande*, 9 S. D. A. R. N. W. P. for 1854, p. 383; *Balabux* v. *Rukhmabai*, L. R. 30 I. A. 130.

But in the case of fraud or ignorance or of a part left undivided by arrangement, the Court will entertain a suit for partition of that residue, *Narayan Babaji et al.* v. *Nana Manohar et al.*, 7 Bom. H. C. R., at p. 178 A. C. J.; *Lakshman* v. *Krishnaji Ramajee et al.*, S. A. No. 289 of 1869, Bom. H. C. P. J. F. for 1870.

Where shares of co-sharers are defined so as to consist solely of particular parts of the family property, but it is not actually divided in specie, the brothers are severally entitled to the shares as so defined notwithstanding subsequent changes in value, *Amrit Rav Vinayak* v. *Abaji Haibat*, Bom. H. C. P. J. for 1878, p. 293.

(*b*) Mit., Chap. I., sec. 9, paras. 1 and 2; Stokes's H. L. B. 404; May., Chap. IV., sec. 7, paras. 24 and 26; Stokes's H. L. B. 79. So, in the Roman law, a partition, really incomplete, though supposed to be complete, does not prevent the coparceners from afterwards claiming their further shares, because the provisional partition, without an abandonment of rights, is not juridically binding on them; Sav. Syst. III. 411. Compare the Smriti Chandrika, Chap. XIV., paras. 7, 11 ff. When a previous partition has taken place, the burden of proving, in a subsequent suit, that the property of which a division is sought remained undivided, rests on the plaintiff, *Narayan Babaji et al.* v. *Nana Manohar et al.*, 7 Bom. H. C. R. 153 A. C. J.; *Maruti et al.* v. *Vishwanth*, S. A. No. 233 of 1877, Bom. H. C. P. J. F. for 1877, p. 347; *Lachman* v. *Sanwal*, I. L. R. 1 All. 543.

(*c*) See below, § 7, "DUTIES AND RIGHTS ARISING ON PARTITION."

common property to the injury of the co-sharers is a usual charge both in suits seeking to have a partition reopened and in those claiming a partition and an account. A partition is sometimes fraudulently resorted to, or the incapacity of the debtor is set up, or sham debts are admitted, and sham securities executed, in order to cheat the creditors of one or more co-sharers. On the other hand, creditors come forward with or without collusion on the part of particular coparceners, especially ex-managers, to claim a partition or a revised partition for the satisfaction of unjust claims. Many decisions have had for their aim to defeat such schemes on the one side or the other, consistently with the recognized principles of the Hindu law (*d*).

In Hindu as in English law, fraud vitiates every transaction (*e*).

(*d*) As to limitation see above, pp. 589, 644. Under the older law of limitation a plaintiff had to show his own possession within 12 years. Under Act IX. of 1871 he could sue within 12 years of the possession challenged by him having become adverse, by the denial of a claim actually made by him. Possession by the Collector to protect the land revenue was not deemed adverse to the real proprietor, *Rao Kasan Singh* v. *Raja Baker Ali Khan*, L. R. 9 I. A. 99. The law is the same under the Limitation Act, XV. of 1877, Sch. II., art. 127, the time being counted from *knowledge of exclusion*. As to the coalescence of rights arising from sequence of possession by legal succession or privity but not without it, see Domat, C. L. vol. I., pp. 874, 875, and the cases referred to in *Asher* v. *Whitlock*, L. R. 1 Q. B. 1. The prescriptive title arising under section 28 of the Limitation Act is not created for the last of a series of mere possessors not connected by a legal derivation of right from the first to the last. It is only the original right that is extinguished by discontinuance of possession under Schedule II., art. 142. If mere accidental instances of possession might be combined, each in turn would properly be connected with the original rightful possession, and being derived out of it would not avail for a greater interest than could be based on an accompanying title, which in such a case would not exist. That mere non-enjoyment is not equivalent to exclusion giving an adverse character to another parcener's possession, is shown by the case of *Vishnu Vishvanath* v. *Ramchandra Narhar*, Bo. H. C. P. J. 1883, p. 53. There a sole enjoyment of immovable property by one brother for about 30 years, was followed by a partial partition, and that by a suit 7 or 8 years afterwards, which was not pronounced unsustainable. In *Hanaji Chhiba* v. *Valabh Chhiba*, Bom. H. C. P. J. 1883, p. 57, the common case is referred to of a son's going away for several years to gain his livelihood, leaving his father and brothers in sole enjoyment but on a joint right. This it was thought would not cause even Act XIV. of 1859 to bar a subsequent claim. See above, pp. 625, 634, 636, 642.

(*e*) Manu VIII. 165; Col. Dig., Book IV. T. 184; Vyav. May., Chap. IX., para. 10; *Vaman Ramchandra* v. *Dhondiba Krishnaji*, I. L. R. 4 Bom. 126, 153; *Bayabai* v. *Bala*, 7 Bom. H. C. R. 1, 22, 23, App.; *Balaram Nemchand* v. *Appa*, 9 Bom. H. C. R. 121, 146, 147; *Khushalbhai Narsidas* v. *Kabhai Jorabhai*, Bom. H. C. P. J. 1881, p. 231; *Moro Vishvanath* v. *Ganesh*, 10 Bom. H. C. R. 444.

It affords a ground for setting aside or rectifying a partition, equally with any other transaction by which one parcener may endeavour, with or without assistance, to gain an unfair advantage at the cost of the others. But neither is the coparcenership allowed to be made a means of cheating outsiders who have engaged in transactions with particular members of the family. In *Khushalbhai* v. *Kabhai* (*f*), a partition was set aside on the ground that a parcener had been unfairly used by his brothers. But in Bengal a nephew was allowed to profit by his suppression of a will which prevented his uncle's widow from adopting (*g*). In some instances individual coparceners have affected, contrary to the law of the Mitakshara (Chap. I., sec. 1, pl. 30, Stokes's, H. L. B. 376), to sell or mortgage the common property or particular parts of it. The Privy Council have as to brethren adhered to the Mitakshara: " Between undivided coparceners, there can be no alienation by one without the consent of the other " (*h*), at the same time that effect is given to the principle laid down by James L.J., in *Syud Tuffuzzool* v. *Rughoonath Pershad* (*i*), that the undivided share is property that a creditor can make available for payment of his claim (*k*). A purchaser of an undivided share, though not entitled to any particular portion of the estate, can sue for a partition on the same terms as his vendor, and in the partition effect is to be given, so far as justice allows, to the particular transaction with the vendee or the mortgagee (*l*). Neither, therefore, is a partition actually made allowed to defraud him (*m*). But to prevent a

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(*f*) *Supra*, p. 650, note (*e*).

(*g*) See above, p. 350.

(*h*) *Musst. Cheetha* v. *B. Miheen Lall*, 11 M. I. A. 369; *Balgohind* v. *Narain*, L. R. 20 I. A. 116; *Madho Pershad* v. *Mehrban*, L. R. 17 I. A. 194; *Lakshman* v. *Ramchandra*, L. R. 7 I. A. 18, on law in Bombay, when he can alienate his own undivided share for value. In England a covenant by a joint tenant to sell severs the joint tenancy in equity as regards his share, *Brown* v. *Randle*, 3 Ves. 257; see *supra*, Book II., sec. 4 C, p. 617.

(*i*) 14 M. I. A., at p. 40.

(*k*) As to gift and devise see *Gangubai et al.* v. *Ramanna*, 3 Bom. H. C. R. 66 A. C. J.; see p. 588, note (*v*). This agrees with the English law as to a joint tenancy, Co. Lit. 185 *b*.

(*l*) *Udaram Sitaram* v. *Ranu Panduji et al.*, 11 Bom. H. C. R. 76; *Vithal Pandurang et al.* v. *Purshottam Ramchandra et al.*, S. A. No. 3 of 1876, Bom. H. C. P. J. F. for 1876, p. 77; *Devapa et al.* v. *Hemsheti Shivapa*, S. A. No. 384 of 1874, *ibid.*, p. 93; *Bai Tulsa* v. *Bhaiji Adam Abraham*, Bom. H. C. P. J. F. for 1878, p. 263.

(*m*) See above, p. 616.

converse fraud the purchaser from a single member must, in his suit, join all the members as defendants (*n*). If the undivided coparcener is in sole possession, which he transfers to a vendee, the vendee may retain such possession as tenant in common with the other coparceners (*o*). A contrary rule would tend to frauds on innocent purchasers. Until their several rights are ascertained the whole undivided property may be attached by a judgment creditor of one coparcener (*p*), and if a coparcener's share be sold in execution, the purchaser acquires a right to demand a partition from the other coparceners (*q*), though not more, even when the managing member has been sued only in his individual capacity (*r*). Though in particular circumstances the manager may be held to have represented the whole family (*s*), yet a suit for partition is generally necessary; since the sale of his interest *as such* as answerable for the decree transfers no more than his share (*t*). The purchaser has acquired the rights of one co-sharer. In that character he obtains the legal position of a tenant in common (*v*), and if put in possession, he may retain it in that character (*w*); but unless

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(*n*) *Sitaram Chandrashekhar* v. *Sitaram Abaji*, S. A. No. 379 of 1874, Bom. H. C. P. J. F. for 1875, p. 140.

(*o*) *Kariapa Irapa* v. *Irapa Solbapa et al.*, S. A. No. 231 of 1875, Bom. H. C. P. J. F. for 1876, p. 9; *Govind Narayan et al.* v. *Vasudev Vinayak*, I. L. R. 1 Bom. 95; compare *Babaji* v. *Ramaji*, 2 Borr. R. 698.

(*p*) *Goma Mahad Patil* v. *Gokaldis Khimji*, I. L. R. 3 Bom., at p. 84.

(*q*) *Pandurang* v. *Bhaskar*, 11 Borr. R. 72; *Keshav Sakharam Dadhe* v. *Lakshman Sakharam*, Bom. H. C. P. J. F. for 1878, p. 123; *Udaram Sitaram* v. *Ranu Panduji et al.*, 11 Bom. H. C. R. 76.

(*r*) See *Mahabalaya* v. *Timaya*, 12 Bom. H. C. R. 138; *Venkataramayyan* v. *Venkatasubramania*, I. L. R. 1 Mad. 358; *Pandurang Kamti* v. *Venktesh Pai*, Bom. H. C. P. J. F. for 1879, p. 513; *Laxman Nilkant* v. *Vinayak Keshav*, I. L. R. 40 Bom. 329; *Kharajamal* v. *Daim*, L. R. 32 I. A. 23.

(*s*) See *Narayan Gop* v. *Pandurung Ganu*, I. L. R. 5 Bom. 685; *Mayaram Sevaram* v. *Jayvantrav Pandurung*, Bom. H. C. P. J. F. for 1874, p. 41; *Gopal Anant Kamat* v. *Venkaji Narayan Kamat*, Bom. H. C. P. J. F. for 1879, p. 370; *Ram Sevak Das* v. *Raghabar*, I. L. R. 3 All. 72; *Gaya Din* v. *Bunsi Kuar*, *ibid.*, p. 191; *Jogendro Deb Roy Kut* v. *Funendro Deb Roy Kut*, 14 Moo. I. A., at p. 376; *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*, L. R. 6 I. A. 236; *Sheo* v. *Jaddo Kunwar*, L. R. 41 I. A. 216.

(*t*) *Harsahaimal* v. *Maharaj Singh*, I. L. R. 2 All. 294; *Deen Dayal* v. *Jugdeep Narayan*, L. R. 4 I. A. 247; *Nanhak Joti* v. *Jaimangal Chaubey*, I. L. R. 3 All. 294.

(*v*) *Udaram Sitaram* v. *Ranu Panduji*, 11 Bom. H. C. R., at p. 81.

(*w*) *Mahabalaya Parmaya et al.* v. *Timaya Appaya et al.*, 12 *ibid.*, 138; *Babaji Lakshman et al.* v. *Vasudev Vinayek*, I. L. R. 1 Bom. 95. As to separate possession by a united parcener see below. A purchaser at a Court

this has occurred the Court will not give him joint possession. He is put to his suit for a partition. So in a case of a mortgage improperly made and a suit thereon against the manager alone (*x*). But a decree and execution, against a father as representative of a family, were held binding on his sons (*y*). This implied limitation, however, of the sons' liability for want of representation is no longer in force, as a creditor is enabled to enforce his claim during the life of the father against the entire family property by decree and execution (*z*). See *Babu Deen Dayal Lal* v. *Babu Jugdeep Narain Singh* (*a*), where, referring to *Sadabart Prasad Sahu* v. *Fool Bash Koer et al.* (*b*), and *Mahabeer Pershad* v. *Ramyad Singh et al.* (*c*), it was said that though the mortgage of an undivided share be invalid, yet execution may be had against it by a suit for partition by the purchaser in execution of the undivided share. This judgment established the seizable character of an undivided share (*d*) and a charge created by such attachment.

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sale can only seek for partition by suit; he is not entitled to joint possession. *Balaji Anant* v. *Ganesh Janardhan*, I. L. R. 5 Bom., at p. 500; *Dugappa Sheti* v. *Venkat Ramnaya*, *ibid.* 493; *Pandurung Anandro* v. *Bhaskar Sadashiv*, 11 Bom. H. C. R. 72; *Krishnaji* v. *Sitaram*, I. L. R. 5 Bom. 496; contra *Indrasa* v. *Sadu*, *ibid.* 505. See above, p. 567.

When one of two coparceners aliens to a stranger his share in a piece of family property, the other may either exercise his right of interdiction, or affirm the act and claim by partition to recover from the stranger that share to which the alienation cannot extend, and which has now become his separate property. *Sripatti Chinna Sanyasi Razu* v. *Sripatti S. Razu*, I. L. R. 5 Mad. 196. The right of interdiction does not seem to exist. By the strict Hindu law a concurrence of all the coparceners is necessary to give effect to an alienation. By the decisions one coparcener may dispose of his interest against the will of the others, but an interest to be ascertained by a general partition; see *Pandurang* v. *Bhaskar*, *supra*.

(*x*) *Baji Shamraj Joshi* v. *Dev bin Babaji Jadhav*, Bom. H. C. P. J. F. for 1879, p. 238.

(*y*) *Ram Narayan Lall* v. *Bhowani Prasad*, I. L. R. 3 All. 443, F. B. As to the case in which a father defendant may be held not to represent his infant sons, see *Gurusami* v. *Chinna Mannar*, I. L. R. 5 Mad. 37, 42.

(*z*) *Khalilall Rahman* v. *Gobind*, I. L. R. 20 Cal. 328, 338; *Ramasami Nadan* v. *Ulagantha*, I. L. R. 22 Mad. 49, F. B.; *Badri Prasad* v. *Madan Lal*, I. L. R. 15 All. 75, F. B.; *Govind Krishna* v. *Sakharam*, I. L. R. 28 Bom. 383; *Dattatraya Vishnu* v. *Vishnu Narayan*, I. L. R. 36 Bom. 68; *Laxman Nilkant* v. *Vinayak Keshav*, I. L. R. 40 Bom. 329.

(*a*) L. R. 4 I. A. 247.

(*b*) 3 B. L. R. 31 F. B.

(*c*) 12 B. L. R. 90.

(*d*) *Suraj Bunsee Koer* v. *Sheo Prasad*, L. R. 6 I. A. 88, 109; *Vasudev Bhat* v. *Venkatesh Sanbhav*. 10 Bom. H. C. R. 139; *Balaji* v. *Ganesh*, I. L. R. 5 Bom.

In all such cases as these effect may be given to transactions approved by the law, and those disapproved may be defeated not only by means of a compulsory partition, but by the revision of one actually or fictitiously made.

III.—Distribution of the Common Property.

§ 5 A. In a (suit for) partition the whole property of each member is presumed to belong to the common stock (*e*). Every Hindu family is presumably joint in food, worship, and estate (*f*). The common property may be distributable or undistributable. In both classes it may be:

1. A grant to united parceners without distinction of shares (*g*)
2. *Ancestral*, which may again be:
   a. Inherited, *b.* Or recovered.
3. *Self-acquired.*

2. *a.—Ancestral inherited property.*—Ancestral property, as amongst descendants, comprises property, transmitted in the direct male line from a common ancestor, and accretions to such property, made with the aid of the inherited ancestral estate (*h*).

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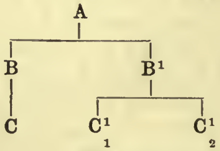
499. Several of the decisions quoted in this paragraph have more or less distinctly been referred to different principles, but the purpose of the reference has generally been the prevention of fraud by moulding the Law of Partition to the exigencies of modern life.

(*e*) *Luximom Raw Sadesew* v. *Mullarow Baji*, 2 Knapp P. C. Ca. 60; Bapu *Purshotam* v. *Shivlal Ramachandra*, Bom. H. C. P. J. 1879, p. 571. As to debts due by or to the family, see below, § 7 B. 1.

(*f*) *Neelkishto Deb Burmono* v. *Beer Chunder Thakoor*, 12 M. I. A. 540; *Narayan Deshpande* v. *Anaji Deshpande*, I. L. R. 5 Bom. 130; *Prit Koer* v. *Mahadeo Pershad Singh*, L. R. 21 I. A. 134.

(*g*) *Radhabai* v. *Nanarav*, I. L. R. 3 Bom. 151.

(*h*) *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*, L. R. 6 I. A. 233. In a family descended as follows:



C^1_1 having purchased property out of the profits of the family estate, it was held that C was entitled as against C^1_2 to a moiety, *Keshoo Tewaree* v. *Ishree Tewaree et al.*, N. W. P. R. for 1861, p. 565. Immovable property purchased

In the absence of proof to the contrary it is assumed that a purchase by a member of a joint family is made on the joint account (*i*). In *Rajmohun Gossain* v. *Gourmohun Gossain* (*k*), the Privy Council say of the term "ancestral" in an agreement amongst brothers: "Ancestral is here employed . . . in the sense of paternal, *i.e.*, as meaning the property of the father in whatsoever manner or by whatsoever title the father had acquired it." To him it might be self-acquired, but to the sons it was ancestral estate. Thus, in the case of a father, head of a family, property inherited from his father or grandfather is ancestral property, however acquired by its previous possessors. Ancestral property, mortgaged by the father and sold in execution, is subject to the claim to partition of the sons (*l*). In *Gungoo Mull* v. *Bunseedhur* (*m*), three sons having inherited on the death of the father, and one of them having afterwards died, the sons of a surviving brother were held to have an interest in the addition thus caused to their father's share, enabling one of them to sue a purchaser in execution for the allotment to him of his proper portion. The Court say: "The father has no more absolute and exclusive right in ancestral property, which devolves on him by his brother's death than he has in the like property, which he inherits from his father." The case seems to have been imperfectly brought before the Court. The family being joint, it does not appear how one of the three brothers could, on the death of another, succeed to the whole instead of a moiety of his share, or how one of his three sons could sue alone, or sue his father's judgment-creditor or execution-purchaser alone for his one-third share in his father's estate, without claiming a general partition of the family property.

On the other hand, property inherited by a father from females, brothers, or collaterals, or directly from a great-great-grandfather,

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with the capital or profits of ancestral movable property ranks as immovable ancestral property, not as movable. It cannot be disposed of by a father without the assent of his sons, and the latter may insist on partition, *Shib Dayee* v. *Doorga Pershad*, 4 N. W. P. 71.

(*i*) *Gopeekrist Gosani* v. *Gungapersaud*, 6 M. I. A. 53; *Bissessur Lall Sahoo* v. *Maharajah Luchmessur Singh*, L. R. 6 I. A., at p. 236. So *Nathu* v. *Mahadu*, Bom. H. C. P. J. 1879, p. 569. See below, "SELF-ACQUIRED PROPERTY."

(*k*) 8 M. I. A., at p. 96.

(*l*) *Lochun Singh et al.* v. *Nemdharee Singh et al.*, 20 C. W. R. 170.

(*m*) 1 N. W. P. R. 79.

appears to be subject to the same rules as if self-acquired (*n*). Ancestral property, in fact, may be said to be co-extensive with the objects of the *apratibandhadaya,* or " unobstructed inheritance ": the contrast drawn in the Sanskrit authorities is between *pitrarjit*

(*n*) *Baboo Nund Coomar Lall et al.* v. *Moulvie Razee-ood-deen Hoosein,* 10 Beng. L. R. 183 S. C., 18 C. W. R. 477; *Gooroochurn Doss et al.* v. *Goolukmoney Dossee,* 1 Fult. 165; *R. Nallatambi Chetti* v. *R. Makunda Chetti,* 3 M. H. C. R. 455, 457. In *Muttayan Chetti* v. *Sivagiri Zamindar,* I. L. R. 3 Mad., at p. 375, it is said that property inherited from a mother (which according to the now prevailing doctrine would generally be looked on as inherited from her father, or some other male relative) is not to be ranked in the same class with self-acquired. This, which may perhaps be regarded as extra-judicial, is opposed to the judgment of Sir A. Bittlestone and the other authorities referred to in this note. The chief ground for the doctrine seems to be a passage in the Mit., Chap. I., sec. IV., para. 2, in which Vijnanesvara extends the condition of a separate acquisition having been made without detriment to the paternal estate by analogy to the maternal estate, which in some cases brothers inherit equally (Mit., Chap. II., sec. XI., para. 20). There is no inborn right of a son to a maternally as to a paternally descended estate. In the case of patrimony the right is one of co-ownership, and it is this right only that qualifies the father's ownership and power of disposition. It is on this that Vijnanesvara grounds the son's right to an interdiction : in its absence the father might dispose of the ancestral as well as of the other property, and a mother's estate is not ancestral within the meaning of the Sanskrit term, though for some purposes the analogy of the patrimony has been extended to it. These particular extensions imply a general difference in kind, and a usual incident of ownership is not to be extinguished without a clear rule to that end. The Mayukha in dealing with the Sanskrit text of Yajnavalkya, on which Vijnanesvara's discussion is founded (see Vyav. May., Chap. IV., sec. VII., para. 2 ff; Yajn. II. 118), does not, any more than the text itself, mention a maternal heritage. In sec. II., of the same chapter, though it quotes a passage limiting " daya " to the " wealth of a father," it says that father stands for " relations in general," but again in sec. X., para. 26, it does not place the son's inheritance to the mother's property on an immediate participation by birth as in the case of the patrimony. On the theory of the woman's estate being merely interpolated, the maternal grandson's right may be called " daya " but not patrimonial. On the whole Jagannatha's reasoning seems to be the best. Complete ownership in him who takes an estate is the general principle of the Hindu law, modified only by the texts which dedicate ancestral and in part self-acquired lands to the nurture of the agnatic line of manes and descendants. Had Vijnanesvara recognized in the sons a joint ownership along with their mother in her separate estate it is unlikely that he should not have said so in the discussion by which he establishes their joint ownership with the father over ancestral property. The text of Yajnavalkya, which declares the equal ownership of father and son, does not include a mother. (See Mit., Chap. I., sec. V., para. 13 ff.) The inheritance to her is rather by succession than by survivorship (see Vyav. May., Chap. IV., sec. II., paras. 1, 2), and the estate which the son has not himself gained through joint ownership need not in his hands be subject to a joint ownership

"acquired by fathers," and *svarjit* "acquired by one's self" (*o*). The view here stated agrees with that arrived at by Jagannatha (*p*), after a discussion of the contrary doctrines held by other lawyers (*q*). This discussion itself shows, however, that there is much to be said on both sides, and the question must be regarded as one still in controversy. Those who hold that all property descending to the father from relations ranks as ancestral property, interpret the text of Yajnavalkya (*r*), which relates to the grandfather's property, as an example of the principle that all property, taken by right of affinity (*s*), is to be regarded as ancestral. Those, on the other hand, who maintain that property regularly transmitted from ancestors in the male line, and that alone, is ancestral property, understand the text to imply affinity only of that closest kind which its terms necessarily import, namely, that existing between an ancestor and his first three descendants (*t*). On considering the former of these conflicting views, it presents this difficulty, that it assigns, in many cases, to a son equal power with his father over property which, but for his father's taking it, could never come to him, while, in the example given in the text, the intervention of the father is immaterial. The property held by a grandfather must come to his grandson, and that of a great-grandfather to his great-grandson, in the male line, whether the intervening descendants survive or not, whereas the property of a great-grandfather descends to his great-grandson, through his daughter,

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and the other incidents of an ancestral heritage. Amongst some of the tribes in the Panjab, property inherited through the mother is excluded from the aggregate for partition. Amongst others all property of every kind is included. Panj. Cust. Law, Vol. II. 170.

(*o*) Book I., pp. 61, 73, ss. A similar distinction is made by the Customary Law: see Steele, L. C., p. 53.

(*p*) Col. Dig., Book V., Chap. II., T. 103. "What is received from the maternal grandfather must not be considered as having descended from ancestors, but as acquired by the man himself." Col. Dig., Book II., Chap. IV. T. 28, Comm.

(*q*) This view was approved and adopted in the case of *B. Nund Comar Lall et al.* v. *Moulvee Razee-ood-deen Hoosein et al.*, 18 C. W. R. 477.

(*r*) Mit., Chap. I., sec. 5, para. 3.

(*s*) See also Col. Dig., *loc. cit.*

(*t*) See also Col. Dig., *loc. cit. sub fin.* In Kangra, "by ancestral lands is generally understood land once held by the common ancestor, not all land whatsoever inherited by the donor" (to a daughter and her children), Panj. Cust. Law, Vol. II., p. 185.

only if first inherited by his daughter's son (*v*). It may further be objected that the equal right of the grandson with his father in the property of the grandfather is a supersession of the more ancient rule, supported by numerous texts, of the father's independence and supremacy over his family and estate (*w*). It would appear dangerous to extend the supersession in the absence of explicit texts, on the strength of an interpretation.

An objection, commonly urged against the second view, is that, by classing property inherited by the father from relations with self-acquired property, an undue extension is given to the latter term, since acquisition (arjana) implies an individual effort. Jagannatha, *loc. cit.*, felicitously meets this objection by showing that such an extension must be allowed in other cases, such as those of a priest inheriting from his Yajamana, that is, the person for whom he sacrifices, and of an Acharya or religious teacher inheriting from his pupil (*x*). It is impossible to class such inheritances as ancestral property, since the text, by instancing a grandfather, whose relationship is one of blood, cannot imply the spiritual relationship existing between a teacher and his pupil, or between a priest and his Yajamana. Though inherited, therefore,

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(*v*) As the passage of Yajnavalkya, Mit., Chap. II., sec. I., para. 2, specifying the daughter is extended, *ibid.*, sec. II., para. 6, by the aid of Vishnu XV. 47, to a daughter's son, but no further.

(*w*) See Narada, Pt. I., Chap. III., paras. 36, 40; Pt. II., Chap. IV., para. 4; Pt. II., Chap. V., para. 39; Manu IX. 104; Vyav. May., Chap. IV., sec. 1, pl. 4, 5; Stokes's H. L. B. 43; Mit., Chap. I., sec. 1, para. 24; Stokes's H. L. B. 375. The father appears in the earliest form of the law to have had unqualified administrative power and to have had complete dominion over the family (see above, pp. 65, 270, 599). The rights of the manes at the same time made an alienation of the ancestral estate unlawful, and the interest felt in a son as a continuator of the family sacra to be celebrated with indispensable offerings out of the patrimony (see Vishnu, Transl. 189) raised him first in religion and then in law to a joint-ownership with his father. It became recognized far earlier than at Rome that the "*patria potestas in benignitate non in atrocitate consistit*," as the highly affectionate character of the Hindus readily admitted sons to a position of secure equality in title, though not till afterwards in administration. Then followed the right of interdiction to guard against impious waste, and lastly the right to partition as a logical consequence of co-ownership. The archaic law has in part been revived by recent cases. As to sale of ancestral property by a father or by the Court, see above, pp. 587, 592 ss.; *Narayanacharya* v. *Narso Krishna et al.*, I. L. R. 1 Bom. 262; *Kastur Bhavani* v. *Appa and Sitaram*, S. A. No. 124 of 1876, Bom. H. C. P. J. F. for 1876, p. 162.

(*x*) As to a Vritti regarded as a heritable estate, see 2 Str. H. L. 12.

such estates still rank in contradistinction to the "pitrarjit," as "syarjit" or self-acquired, which thus becomes equivalent to "in any way acquired except by succession through descent and participation of rights."

In a recent case (*y*) the Privy Council have said that a zamindari inherited through a mother was not self-acquired property, but they expressed no opinion whether it was subject to the same restrictions on alienation or hypothecation as if it had descended to the zamindar from his fathers or grandfather. It may be concluded, therefore, that the more extensive construction of "pitrarjit" or "ancestral" is that which in the future is to prevail, though probably without the consequence of giving to the son equal power with the father over such ancestral property which is not in the stricter sense "patrimonial" by agnatic descent (*z*). In the Madras decision it is said that property may at the same time be not "ancestral in the sense in which property inherited by the father from the paternal grandfather is liable to partition under the Mitakshara Law at the instance of the son," and yet "not self-acquired property on that ground for purposes other than those of partition." This notion of the property being of one class for one purpose and of another for another is a subtilty which the authorities do not apparently warrant, and which would lead to contradictory consequences. The rules for partition of inherited property point to male lineal inheritance, leaving property owned in any other right to be distributed as self-acquired, or according to the special rules applicable on account of the character of the property as sacred or secular, or as affected or not with the support of public duties (*a*).

The nature of ancestral property, as between a father and his sons, is not affected by the circumstance of a partition having taken place between the father and his coparceners. The general principle is laid down by Yajnavalkya (*b*): "The ownership of father and son is the same in the land which was acquired by the grandfather, or in a corrody or in chattels, which belonged to him." Vijnanesvara, in his remarks introducing the text quoted,

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(*y*) *Muttayan Chettiar* v. *Sangili Vira Pandia*, L. R. 9 I. A. 128, reversing I. L. R. 3 Mad. 370.

(*z*) See Mit., Chap. I., sec. I., para. 27; sec. II., para. 6; Chap. VI., sec. 7, paras. 9, 10, and the judgments referred to in p. 656, note (*n*).

(*a*) Above, pp. 179—80.

(*b*) Mit., Chap. I., sec. 5, para. 3; Stokes's H. L. B. 391.

explicitly states, that it is given to meet the case of a doubt that might otherwise be felt, in the case of a separation having taken place between a father and a grandfather. The doctrine has been correctly apprehended by the Calcutta High Court, in *Muddun Gopal Thakoor et al.* v. *Ram Baksh Panday et al.* (*c*), where the authorities are discussed at length. It has been said indeed that "the divided share of a Hindu in property, which had previously belonged to the united family, is separate estate, and, like any other estate held in severalty (such, for instance, as self-acquired property), is assets, while yet in the hands of the heir, for payment of the debts of the deceased proprietor" (*d*). In *Girdharilal's Case* (*e*), and some others (*f*), this last rule has been practically absorbed in a wider one, but at the date of the earlier decision separateness of estate was thought essential to the liability. In the case of *Katam Natchiar* v. *The Raja of Sivaganga* too (*g*), the Privy Council laid down the rule, "When property belonging in common to a united Hindu family has been divided, the divided shares go in the general course of descent of separate property." But from this it must not be understood that the nature of the property, as ancestral estate, is changed. Such a view, originally held in the case of *Lakshmibai* v. *Ganpat Moroba et al.* (*h*), was dissented from on appeal (*i*). The share taken on a partition is indeed separate estate as regards the other branches of the

(*c*) 6 C. W. R. 7 C. R.

(*d*) *Udaram Sitaram* v. *Ranu Panduji et al.*, 11 Bom. H. C. R., at p. 83.

(*e*) 22 W. R. 56 C. R.; S. C., L. R. 1 I. A. 321.

(*f*) *Haza Hira* v. *Bhaiji Modan*, S. A. No. 444 of 1874, Bom. H. C. P. J. F. for 1875, p. 97.

(*g*) 9 M. I. A. 609. The judgment of their Lordships was subjected to some hypercriticism by the late Prof. Goldstücker (On the Deficiencies, &c., p. 14 ss.), who seems to have overlooked (p. 16) that the religious benefits for which ancestral property is inherited (see Dayabhaga, Chap. XI., sec. 1, para. 32; Stokes's H. L. B. 312, sec. 6, paras. 30, 31; Stokes's H. L. B. 351) are not a cause for the disposal of property not acquired by descent from a former owner, assumed to be still, in the spirit world, interested in the purposes to which it is applied. That undivided members may make separate acquisitions, see Col. Dig., Book V. T. 38 Comm., and above, Book I., Chap. II., sec. 6A, Q. 9, p. 378. Several cases occur in 2 Str. H. L., at p. 439, the Smriti Chandrika being quoted as assuming such acquisitions to be possible. So at p. 441 the Madhavya.

(*h*) 4 Bom H. C. R. 150 O. C. J.

(*i*) See 5 Bom. H. C. R. 135 O. C. J.

family (*k*); but in the branch to which it belongs, it is ancestral estate, subject in the hands of sons to the father's debts, with the exception of those immorally incurred, on account of the special obligation arising from filial duty (*l*), but not on account of its ranking as self-acquired property of the father. Jagannatha says that ancestral property, remaining in the hands of a father on a partition with his sons, retains that character for the purposes of a partition with subsequently born sons (*m*), while free from obligations to those who have separated. Nor can special restrictions be imposed on the dealing of a co-sharer with his divided share by an agreement made amongst the sharers at the time of partition inconsistent with the nature of the estate taken by the co-sharer (*n*).

§ 5 A. 2. *b.—Ancestral property, Recovered.*—As regards *property recovered*, the cases must be distinguished of

(1) Recovery by a father, head of the family, and of

(2) Recovery by another coparcener,

(*a*) With or without the aid of the patrimony.

(*b*) Of movables or of immovables.

(1) Ancestral property recovered by a father, head of a family, ranks as self-acquired (*o*). This rule, however, is in the Mayukha

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(*k*) See the case of *Gavuri Devama Garu* v. *Raman Dora Garu*, 6 M. H. C. R. at p. 93, quoted under Digest of Vyavasthas, Chap. II., sec. 11, Q. 5, p. 428; above, p. 428; *Periasami* v. *Periasami*, L. R. 5 I. A. 61. In that case a family estate made over by the eldest to the younger brothers was said by the Privy Council to have passed "with of course all its incidents of impartibility and peculiar course of descent" (*ibid.*, at p. 75). A property renounced by an elder brother in favour of the younger ones becomes their estate as in a partition, though there be no general partition. See *Gauri Devama's Case.* The "incidents" in these cases would depend on the family law or the political conditions of the estate; see above, pp. 153, 174, 180, 231.

(*l*) Above, pp. 151, 596.

(*m*) Col. Dig., Book V., T. 392. Similarly under the English law, "If parceners make a partition of their land, they are still in of their respective shares by inheritance, though these shares are no longer held in coparcenary, but in severalty." 1 Steph. Comm. 443. So *Doe Dem Crosthwaite* v. *Dixon*, 5 A. & E. 835. And thus in *Baijun Doobey* v. *Brij Bookun Lall Awwasti*, L. R. 2 I. A. 278, the Privy Council call a share obtained or ascertained and severed in a partition "separate estate," but at the same time, "ancestral estate derived from the father." Tenants of the united family retain their rights as against the individual member to whom the land held by them has been assigned in a partition of the estate, *Narayan Bhivrav* v. *Kashi*, I. L. R. 6 Bom. 67. See below, Book II., Vyav., Chap. I., sec. 1, Q. 5, Remark.

(*n*) *Venkatramana* v. *Brammana*, 4 M. H. C. R. 345.

(*o*) Mit., Chap. I., sec. 5, para. 11; Stokes's H. L. B. 393.

qualified by a text (*p*) cited from Brihaspati, which imposes the condition that such a recovery must have been made without the aid of the ancestral property.

(2) Ancestral property recovered by another coparcener with the aid of the patrimony becomes an accretion to the common estate. Immovables, recovered by such a coparcener without the aid of the patrimony, but with the acquiescence of the other co-sharers, rank likewise as an accretion to the common property, subject to a deduction of one-fourth for the acquirer (*q*). This rule has been recognized by the Bombay High Court in *Mulhari* v. *Shekogi* (*r*). It seems probable from the wording of the texts upon which this doctrine rests, that they contemplate the cases only of property forfeited or withdrawn from the family estate otherwise than by voluntary and valid alienation. This view seems to be strongly supported by the word " hrita " (that is, that which has been taken or seized) (*s*), and " nashta " (that is, that which has been lost), and " uddharet " (that is, if he rescue or win back) (*t*). Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means, to enjoy it, as in the case of another acquisition, free from claims to partition by his coparceners, yet neither is any express limit set to such enjoyment, and it would probably now be held that such property stands on the same footing as any other purchased property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo*

(*p*) May., Chap. IV., sec. 4, para. 5; Stokes's H. L. B. 48. So Viram. Tr. p. 74. Compare also Dayabhaga, Chap. VI., sec. 2, paras. 31—35; Stokes's H. L. B. 285, 286; Jagannatha's Commentary, Col. Dig., Book V., T. 25; and Smriti Chandrika, Chap. VIII., para. 28.

(*q*) Mit., Chap. I., sec. 4, para. 3; Stokes's H. L. B. 385; May., Chap. IV., sec. 7, para. 3; Stokes's H. L. B. 74. See Smriti Chandrika, Chap. VII., paras. 32—38; *Naraganti Achammagaru* v. *Venkatachalapati*, I. L. R. 4 Mad. 259, 260; cf. *Bajaba* v. *Vishvanath*, I. L. R. 34 Bom. 106. Ancestral property bought by a member out of his private funds does not *ipso facto* become family property. It must be shown that he intended to make it a part of the family property.

(*r*) S. A. No. 534 of 1864, decided 20th September, 1864.

(*s*) Roer and Montriou translate " purloined." Yajn. II. 119.

(*t*) In answer to Q. 585 MSS. the Sastri said that when a Vatan had been granted to one brother, resumed in part on his death, but recovered by the other brother, it did not become the property of the undivided family to which he belonged.—*Dharwar, 24th February*, 1848. This agrees with the view taken by the P. C. in the Shivagunga Case. Comp. the cases above, p. 154, notes (*p*) and (*q*).

Pershad Roy et al. v. *Debee Pershad Tewaree* (*v*); and a case at 2 Str. H. L. 377, with the comments of Messrs. Colebrooke and Ellis, shows that "recovered property" is of the nature of that which should have been, but could not be, divided, owing to its detention by strangers. The views here expressed are substantially repeated in the case of *Visalatchi Ammal* v. *Annasamy Sastry* (*w*). The introduction of the condition of acquiescence on the part of co-sharers is due probably to the necessity of guarding them against any underhand proceeding by one of their number (*x*). Recovered property, it has been held, does not include what is regained from one claiming as a member of the family, but only property held adversely by strangers; and one who, in a suit brought by him against a stranger, purposely ignores his co-heir, is not entitled to any extra share (*y*). Ancestral movables, recovered by a coparcener, without the use of the patrimony, but with the consent of the co-sharers, become his separate property.

The author of the Mitakshara has quoted Manu IX. 209 in support of his view of the father's independent power over ancestral property recovered by him. His explanation of the passage, though differing in terms, agrees in substance with that of Manu's Commentator Kullukabhatta. The translation of Sir W. Jones does not correctly render the sense of Manu's words, inasmuch as he has translated the word putraih, "with his sons" by "with his brethren." While the family is undivided, however, the acquisitions of its several members are usually made by the aid of the common property and unite with it. Hence a presumption arises of all the possessions of the several members being joint estate subject to distribution like ancestral property. In *Dhurm Das Pandey* v. *Musst. Shama Soondri Dibiah* (*z*), the Judicial Committee say: "It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is

(*v*) 6 C. W. R. 58 C. R.

(*w*) 5 M. H. C. R. 150, see also *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*, I. L. R. 3 Mad., at p. 300, and *Naraganti Achammagaru* v. *Venatachalapati*, I. L. R. 4 Mad., at p. 259.

(*x*) 1 Str. H. L. 217.

(*y*) *Bissessur Chuckerbutty et al.* v. *Seetul Chunder Chuckerbutty*, 9 C. W. R. 69 C. R.

(*z*) 3 M. I. A., at p. 240.

that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of separate property." That this applies when the transactions of a father are in question is shown by *Suraj Bunsee Kooer's Case* (*a*) and many others. The case is consequently almost unknown in practice of a father's uncontrolled power being asserted on the ground of recovery referable solely to his own exertions or fortune.

§ 5 A. 3.—*Self-acquired property.*—*Acquired*, as distinguished from *inherited* or *recovered*, property has a twofold character as being the acquisition

a. Of a father, head of a family, and

b. Of any other coparcener.

§ 5 A. 3. *a*.—Self-acquired property, as between a father and his sons, includes all separate acquisitions by the father, such as a grant of a village as an inam (*b*), as well as ancestral property

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(*a*) Above, p. 568.

(*b*) *Bahirji Tannaji* v. *Odatsing*, R. A. No. 47 of 1871, Bom. H. C. P. J. F. for 1872, No. 33.

The following cases connected with grants of land may be useful as showing when the grantee has, and when he has not, a full power of disposal.

A grant to a man, his children and grandchildren, confers an absolute estate, *Tagore Case*, 4 B. L. R. 182 O. C., and if to a gift are added "words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected [as a] qualification which the law does not recognize." *Tagore Case*, 9 B. L. R. 395, quoted by the Judicial Committee in *Bhooban Mohini Debya* v. *Hurish Chunder Chowdrey*, L. R. 5 I. A., at p. 147. (Comp. Laboulaye, Prop. Fonce. en. Oc. 368.) As to the extent of the property conferred by a grant in Bombay, see *Waman J. Joshi* v. *The Collector of Thana*, 6 Bom. R. 191 A. C. J., and *Nagardas* v. *The Conservator of Forests*, I. L. R. 4 Bom. 264; *Bayaji* v. *The Conservator of Forests*, P. J. 1880, p. 342. In *Jamna Sani* v. *Lakshmanrao*, Bom. H. C. P. J. 1881, p. 6, it was said that ordinarily the holder of a jaghir or saranjam can make a valid grant only for his own life; and the Government having defined an estate previously granted as a saranjam, and untransferable from the family meant to be benefited, a subsequent alienation to a stranger was pronounced invalid as against the grantor's heirs. In *Nagardas' Case* (*supra*) it was held that an Izafatdar's title does not necessarily involve any proprietary right, and that even though a Khot may be a proprietor yet this is not implied in his "Khoti" office or grant, so as to make him owner of timber growing on the village lands subject to his authority.

When a grant has once been made by the Government, or a sanad has been granted settling the land tax under Bombay Act VII. of 1863, the executive cannot reform or annul it, *Dholsang Bhavsang* v. *The Collector of Kaira*, I. L. R. 4 Bom. 367. If the settlement has been made with a person not the rightful owner, the owner is bound by it, but he may recover the property subject

recovered (*c*), and property taken by inheritance, but not in the direct male line of descent (*d*). The acquisition or recovery must have been made without the aid of the family estate; otherwise the property will rank as ancestral (*e*). In the Mitakshara this qualification is not distinctly drawn out. The general rule only is laid down, that sons become by birth participators in both the property inherited by their father and the property by him acquired (*f*), and that the right of sons and grandsons in the grandfather's estate is equal, without any express provision for accumulations or

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to the settlement from the possessor holding the sanad as from a trustee. On the other hand, the grantee (an inamdar) is strictly bound by the terms of his grant from the sovereign power, see above, pp. 125, 416. Unless expressly empowered by his grant he has not a right to enclose land used immemorially as pasture ground by the inhabitants of a village, *Vishwanath* v. *Mahadaji*, I. L. R. 3 Bom. 147.

In *Collector of Surat* v. *Ghelabhoy Narandas*, 9 Harr. 603, the State taking by escheat an estate granted free of service was held bound by a mortgage effected by the last deceased inamdar. Comp. *Raja Salig Ram* v. *Secretary of State*, L. R. Supp. I. A. 119, 129. As to a grant by a Zamindar, see *Raja Nursingh Deb* v. *Roy Koylasnath*, 9 M. I. A. 55. See Steele, L. C., pp. 207, 237, 269.

(*c*) *Krishnasami* v. *Rajah Gopala*, I. L. R. 18 Mad. 73, 83.

(*d*) See above, p. 655 ss.

(*e*) *Rampershad* v. *Sheochurn*, 10 M. I. A. 490; *Tribhovandas* v. *Yorke Smith*, I. L. R. 21 Bom. 349; *Jagmohandas* v. *Mangaldas*, I. L. R. 10 Bom. 528; *Chand Hari Maiti* v. *Rajah Norendro Narain Roy*, 19 Cal. W. R. 231, P. C.; *Bukshee Bimodi Lal* v. *Bukshee Deokee Nundon*, 19 Cal. W. R. 223. In the common case of a purchase by the father out of funds separately acquired by himself of property in the name of his son, the presumption is not as under the English law of an intended advancement of the son, but of a purchase, benami (*i.e.*, without his name or in another name) for the father himself, see *Naginbhai Dayabhai* v. *Abdula bin Nasar*, I. L. R. 6 Bom. 717. The auspicious fortune of the son is thus sought to be attached to the acquisition, and a unity of interest is generally recognized in feeling even when not acknowledged as a legal obligation. "By the Mitakshara law . . . the son has a vested right of inheritance in the ancestral immovable property . . . the ancestral property is only that which is actually inherited, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property, for the income is the property of the tenant for life to do as he likes with it,"—the judgment, overruled at 8 C. W. R. 456 (*Sudanund Mohapattur* v. *Soorjomonee Bebee*), was subsequently held to be *res judicata* between the parties and decisive of Chakardhur's right to dispose of acquisitions out of profits, *Soorjomanee Dayee* v. *Saddanund Mohapatter*, P. C. 20 C. W. R. 377; S. C., L. R. S. I. A. 212, though the correct doctrine is upheld in *Umrithnath Chowdry* v. *Goureenath Chowdry et al.*, 13 M. I. A. 542.

(*f*) Mit., Chap. I., sec. 1, pl. 27; Stokes's H. L. B. 375; sec. 5, p. 10; *ibid.* 393.

increments of the estate. The section (4 of Chapter I.) which treats of property not subject to partition, since it lays down no explicit rules regarding acquisitions made by a father, might be taken as relating only to independent or equal coparceners, such as brothers or collaterals. But in the Mayukha, Chap. IV., sec. 4, para. 5 (*g*), the text of Manu, which excludes property recovered by a father from ancestral property, is modified by a text of Brihaspati, which declares that such recovery must take place through the father's own ability [and without the use of the patrimony]. The effect would seem to extend to the case of separate acquisitions made by the father with the aid of the ancestral estate. In *Sudanund Mohapattur v. Bonomallee et al.* (*h*) quoted in *Sudanund Mohapattur* v. *Soorjamonee Debee* (*i*), it was said that ancestral property did not include that purchased out of the income; but this has been overruled (*k*).

§ 5 A. 3. *b*. Self-acquired property, as between coparceners generally, includes gifts of friends, or at marriage, gains of science, valour, and chance, obtained by one or some of the coparceners apart from the others (*l*) without the use of the family property (*m*). If in the acquisition of property directly gained by

(*g*) Stokes's H. L. B. 48.

(*h*) 1 Marshall, 317.

(*i*) 8 C. W. R. 456 C. R.

(*k*) C. W. R., *loc. cit.*, and *Sudanund Mohaputtur* v. *Bonomallee Doss*, 6 *ibid.* 256 C. R.

(*l*) See *Radhabai* v. *Nanarao*, I. L. R. 3 Bom. 151. An inam resumed by the Government and afterwards bestowed on a single member of the family was held to be self-acquired by him, *Kristniah* v. *R. Panakaloo*, M. S. D. A. Dec. for 1849, p. 107. This agrees with the *Shivaganga Case*, 9 M. I. A. 609. In Bombay the resumption of an inam in the sense of re-imposing the land-tax on the death of the inamdar was held not to create a new estate. The encumbrances created by the inamdar were held still to subsist as against his representatives, *Vishnu Trimbak* v. *Tatia*, 1 Bom. H. C. R. 22, Comp. p. 154, *supra*.

(*m*) Mit., Chap. I., sec. 4, paras. 1-15; Stokes's H. L. B. 384-7; May., Chap. IV., sec. 7, paras. 1-14, *ibid.* 73-77; *Nahak Chand* v. *Ram Narayan*, I. L. R. 2 All. 181. Property acquired by use of inherited funds is joint, *Musst. Mooniah et al.* v. *Musst. Teeknoo*, 7 C. W. R. 440, and from union a persumption arises of all property being joint, *Taruck Chunder Poddar et al.* v. *Jodeshur Chunder Kondoo*, 11 B. L. R. 193; *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 M. I. A. 53; *Neelkisto Deb* v. *Beerchunder Thakoor*, 12 M. I. A. 540. When two brothers lived together without paternal estate and acquired land chiefly through capital supplied by the elder and improved it by their joint exertions, the younger suing for a moiety was awarded one-third, *Koshal Chukurwutty* v. *Radhanath Chukurwutty*, 1 Cal. S. D. A. Rep. 335. But conveyances in a single name and prolonged separate enjoyment raise a presumption of separate

science, valour, &c., the result is in a considerable proportion evidently due to the use of the family estate, an equitable distribution of such acquisition between the family and the separate estates, should, it appears, be made (*n*). Such seems to be the effect, when interpreted according to the reason of the law, of the text of Vasishtha, cited Mit., *loc. cit.*, para. 29, on which see Mr. Ellis's remarks quoted at 2 Str. H. L. 383 (*o*). The difficulty as to the relation of Mit., Chap. I., sec. 4, para. 29 to para. 31 (*p*), may be solved with Mr. Colebrook and Sir T. Strange by regarding the former paragraph as referred to a *wholly separate acquisition*, obtained by the aid of the family property, whereas the latter refers to augmentations, blending as they accrue with

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acquisition, *Guracharya* v. *Bhimacharya*, S. A. No. 223 of 1876, Bom. H. C. P. J. F. for 1876, p. 241.

In the Dera Ghazi Khan District it is noted that gifts from a father-in-law or maternal grandfather are excluded from partition, Panj. Cust. Law, Vol. II., p. 261.

With the gain by valour may be compared the Roman law on that subject. Gaius says : "Ea quoque quae ex hostibus capiuntur naturali ratione nostra fiunt," Lib. II., sec. 69. He links this with the doctrine of title by first occupation. The right to the peculium castrense was specially constituted as against the patria potestas, see Juv. Sat. XVI. 51.

(*n*) The distribution of property acquired by different parceners is to be in fair proportion to their contributions of labour and capital, *Krippa Sindhu Patjoshe* v. *Kanhaya Acharya*, 5 M. S. D. A. R. 335.

(*o*) Gains of science, through learning acquired while the gainer was supported by a stranger, are separate and self-acquired property. So is a reward for any extraordinary achievement. But all other acquisitions of an undivided coparcener are family property. Q. 594, Poona, 17th August, 1849, and Q. 685 MSS.; see also 2 Str. H. L. 374. But Jagannatha says, Col. Dig., Book V., T. 346 Comm. : "The meaning is that wealth gained by superior attainment in any art or science belongs exclusively to him who acquired it." Sir William Jones, at 2 Str. H. L. 250, translates Manu apparently as recognizing separate property held by an undivided coparcener, and to be inherited by his widow, as distinguished from the doctrine of the Dayabhaga, which makes her heir even in an undivided brotherhood, though with a right limited to mere enjoyment. At 2 Str. H. L. 346 is a case of a member living apart and acquiring separate property, but without any division; whom the Sastri pronounced answerable for his brother's debt only if he had received assets. A *Srotriyam* grant for learned service was pronounced descendible to the grantee's sons only, to the exclusion of his brothers, *ibid.* 365. A village obtained without the use of the patrimony was pronounced separate property, *ibid.* 377.

The custom of London, which prescribed a particular distribution of a freeman's property, did not extend to his gains by the profession of chemistry or of medicine, 1 Vern. 61, Bac. Abrt. Customs. (C.).

(*p*) Stokes's H. L. B. 390.

the original estate (*q*). In Col. Dig., Book V., T. 354, 355, Jagannatha seems to lay down that what is acquired without any aid at all from the patrimony is separate property; that what is acquired with such aid, whether previous or concurrent, is partible with the learned brothers; and that if the aid has been both previous and concurrent, the acquisitions are partible with all the brothers. In commenting on the text of Vasishtha, Jagannatha (T. 356) says that aid from the patrimony includes supplies previously received out of it, and under T. 359 he assumes that the double share is in an acquisition made without using the patrimony concurrently or as capital (*r*). In *Chala Condu Alasani* v. *C. Ratnachalam et al.* (*s*), the subject of the gains of science is discussed at great length, the conclusion being that such acquisitions, made by one supported and instructed at the expense of the family, form part of the joint estate (*t*). In *Ramasheshaiya Panday* v. *Bhagavat Panday* (*v*), it is said that any property acquired by a Hindu while drawing an income from the family is joint property (*w*). In the case of *Lukhun Chunder Dallal* v.

(*q*) When the self-acquired property is so held that the profits blend with those of the ancestral, the whole is to be deemed a common stock, *Gooroo Churn Doss et al.* v. *Goluck Money Dossee*, 1 Fulton, 165, which is cited and followed in *Lakshman* v. *Jamnabai*, I. L. R. 6 Bom. 225. Where a distinction is possible a double share belongs to the acquirer, but this does not apply to a manager, who is bound to devote his abilities to the interest of the family, see above, p. 591; *Lal Bahadur* v. *Kanhaia Lal*, L. R. 34 I. A. 65; *Bai Parson* v. *Bai Somli*, I. L. R. 36 Bom. 424.

(*r*) The case at 2 Str. H. L. 371 distinguished the three cases of (1) an augmentation of the common stock, (2) separate gains by the aid of the patrimony, in which the acquirer takes a double share, and (3) gains independently acquired and forming wholly separate property. "The common stock, however improved or augmented, is to be equally divided; but if separate acquisitions have been made to which the patrimony was instrumental the acquirer is rewarded with a double share. Separate gains of specified sorts to effect which the patrimony was not used would belong exclusively to the acquirer." Colebrooke in 2 Str. H. L. 371. As to the last class, see *ibid.* 374.

(*s*) 2 M. H. C. R. 56. To the same effect see *Durvasula Gangadhurudu* v. *Durvasula Narasammah*, 7 M. H. C. R. 47.

(*t*) This case is referred to in *Bai Mancha* v. *Narotamdas*, 6 Bom. H. C. R. 1 A. C. J., in which there was clearly a joint capital as the basis of acquisition by a single coparcener.

(*v*) 4 M. H. C. R. 5.

(*w*) In *Lakshman* v. *Jamnabai*, I. L. R. 6 Bom. 225, a leading case in the Bombay Presidency, it was laid down that the gains of science divisible amongst members of the family when the science has been acquired at the joint expense do not include such gains obtained by a specific profession in the learning of which

Modhoo Mockhee Dossee (*x*), it was ruled that an allegation of separate acquisition by the use of a gift must be proved, and in *Dhurm Das Pande* v. *Musst Shama Soondri Debia* (*y*), that when property has been acquired by a coparcener in his own name, the criterion for determining its character is the source of the funds employed (*z*).

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the gainer was not maintained by the co-parceners. The ordinary rudiments of education imparted at the common expense create no right against the acquirer any more than his ordinary subsistence. This case was followed in *Krishnaji Mahadev* v. *Moro Mahadev*, I. L. R. 15 Bom. 32, 41, and in Allahabad in *Lachman Kuar* v. *Debi Prasad*, I. L. R. 20 All. 435. At 2 Str. H. L. 376, Sutherland questions Ellis's *dictum* that an education at the cost of the father makes subsequent gains divisible as family property. See also *per* Mitter, J., in *Dhunoopdaree Lall* v. *Gunpat Lall*, 10 C. W. R. 122. In *Pauliem Valoo* v. *Pauliem Sooryah*, L. R. 4 I. A., at p. 117 (S. C., I. L. R. 1 Mad. at p. 261), the Privy Council say that the doctrine, favoured in Madras and followed in Bombay (in *Bai Manchha* v. *Narotamdas*, 6 Bom. H. C. R. 1 A. C. J.), involves "the somewhat startling proposition," that "if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property." The member might acquire full capacity by a separation, but even without a separation his acquisitions should not, it appears, become, without distinction, joint property. Their distribution between the joint and the separate estates should, it would seem, be governed by the principles above set forth, as deducible on a just construction from the Smriti. See Manu IX. 208, as quoted in Mit., Chap. I., sec. 4, pl. 10; Stokes's H. L. B. 387; Col. Dig., Book V., T. 347, 348. In the same case, it was held that the education of *B* out of the estate of his father *A*, that estate ranking as self-acquired property, was not an instruction at the cost of the joint estate, so as to make *B*'s property subsequently acquired joint as between him and his sons, C, C^1, C^2, &c., and thus raise a question as to the testamentary power with respect to it, exercised by *B* in favour of C^1, C^2, &c. to the exclusion of *C*. According to the Mitakshara and the Mayukha, as construed above, sec. 5A 2*a*. pp. 664, &c., the instruction of *B* at *A*'s expense would entitle brothers, if he had any, to share with him in gains directly attributable to the instruction, but it would make no difference as between *B* and *C*, C^1 C^2, &c., whether *A*'s property was ancestral or self-acquired, see Mit., Chap. I., sec. 5, pl. 3; Stokes's H. L. B. 391. The question would be whether the acquisition of property by *B* was or was not substantially founded on what he took from *A*, or held jointly with *A*, so as to make *C*, C^1, C^2, &c. joint owners on *A's* death. See Narada, Pt. II., Chap. XIII., paras. 6, 11; Mit., Chap. I., sec. V., para. 3; Viram. Th., p. 68; the Dayabhaga, Chap. VI., sec. 1, para. 16 note, Stokes's H. L. B. 269; Col. Dig., Book V., T. 354 Comm. *ad fin*, and T. 379 Comm.; *supra*, Book II., sec. 5 A, 1A.

(*x*) 5 C. W. R. 278 C. R.

(*y*) 9 M. I. A. 229.

(*z*) "Unequal gains . . . using for the purpose the family property make no difference upon partition. It must still be equal." This *dictum* of the

In *Lakshman* v. *Jamnabai* (*a*) it was said after a review of the previous decision: "We think that we shall be doing no violence to the Hindu texts, but shall only be adapting them to the condition of modern Hindu society, if we hold that when they speak of the gains of science which have been imparted at the family expense they intend the special branch of science which is the immediate source of the gains and not the elementary education which is the necessary stepping-stone to the acquisition of all science. Adopting this principle and applying it to the present case, we find, as we have said, that there is no reason to suppose that Dayaram acquired at Dharwar and Belgaum anything more than a rudimentary education. We see no reason to doubt that the knowledge of law and judicial practice which qualified him for the post of a Judge was acquired by him in a lawyer's office in Bombay and in the Sadar Adawlat. Assuming that the burden of proving that this knowledge was acquired without any aid from the family estate lies upon the respondent (though the observations of the Privy Council in *Luximon Row Sudasew* v. *Mullar Row Bajee*, 2 Knapp 60, tend to the opposite conclusion), we find sufficient in the evidence, and especially in the earlier letters written by Dayaram from Bombay, to show that Dayaram was not receiving pecuniary aid from his father, but on the contrary was supplying his father with such money as he could spare." The Court accordingly confirmed the decision of the Subordinate Judge that Dayaram's estate was to be regarded for purposes of inheritance as separate and self-acquired. The decision rests generally on the principles above set forth, and shows that acquired property does not rank as joint where there is not really an obligation of the acquirer to the family going beyond mere ordinary sustenance and rudimentary education. Whether there had been some aid from the family such as to limit Dayaram's right to a share double that of his brother, however, was a question not raised, it would seem, in the case (*b*).

Sastri is approved by Colebrooke, 2 Str. H. L. 313, who quotes Mit., Chap. I., sec. 4, p. 31 (Stokes's H. L. B. 390).

(*a*) I. L. R. 6 Bom. 225, 243.

(*b*) For the presumptions which arise when amongst parceners separate acquisition is asserted by some and denied by others, see the cases of *Laxmanrav Sadasev* v. *Mulharrav*, 2 Kn. 60; *Dhuramdas Pandey* v. *Musst. Shama Soondri*, 3 M. I. A., at p. 240; *Gopeekrist Gosain* v. *Gangapersad Gosain*, 6 M. I. A. 53; *Neelkisto Deb Burmano* v. *Beerchundur Thakoor*, 12 M. I. A. 540; *Bodhsing Doodhomia* v. *Ganesh Chundur Sen* (Pr. Co.) 12 Beng. L. R. 117;

§ 5 B. *Property naturally indivisible.*—Naturally indivisible property is that which cannot be distributed retaining its essential characteristics (*c*). In the Hindu law there are enumerated common roads or ways, tanks, wells, pasture-ground (*d*), hereditary offices (vritti, vatan), religious and charitable dedications (yoga-kshema), as endowments and reservoirs for travellers (*e*),

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Amritnath Chowdry v. *Gowreenath Chowdry*, 13 M. I. A. 542; *Tamek Chunder Poddar* v. *Jodeshur Chundur Koondoo*, 11 Beng. L. R. 193; *Bholanath Mahta* v. *Ajoodha Persad Cookul*, 12 B. L. R. 336; *Dinonath Shaw* v. *Hurrynarain Shaw*, 12 B. L. R. 349; *Gobind Chundar Mookerjee* v. *Doorgapersad Baboo*, 22 C. W. R. 248; *Vishnu Vishwanath* v. *Ramchandra*, Bom. H. C. P. J. 1883, p. 53. The principal cases are discussed by Scott, J., in *Mooljee Lilla* v. *Goculdas Valla*. The learned Judge is brought back as the result to the texts of Manu IX. 268, and the Mitakshara, Chap. I., sec. IV., para. 10, already referred to.

Parceners claiming a share in property acquired by others must prove that the latter received aid from the paternal estate, according to *Cahotty Pillai* v. *Yella Pillai*, 1 M. S. D. A. Dec. 148, and the burden has been similarly laid in several of the more recent cases above referred to. But the presumption in a united family is of continued unity of estate. See *Musst. Cheetha* v. *Miheen Lall*. 11 M. I. A. 369, though the presumption is one easily displaced by facts indicating a separate and substantially independent acquisition. In *Musst. Bannoo* v. *Kasheeram*, I. L. R. 3 Cal. 315, the Judicial Committee would not allow it to prevail, though in some property there had been an hereditary joint estate. The circumstances of the family, it was said, rebutted the ordinary presumption. See now Ind. Ev. Act, secs. 4, 114, and the observations of Phear, J., at 12 Beng. L. R. 342 ss.

(*c*) See Ellis in 2 Str. H. L. 329.

(*d*) Steele, L. C. 223. Amongst the ancient Irish, the forest, bogs, and wastes remained undivided after a general partition. So in the German Mark-genossenschaft, the mass of the land was held jointly, while his house and enclosure were held by the individual owner. *Nathubhai* v. *Bai Hansgavri*, I. L. R. 36 Bom. 399; *Govind* v. *Trimbak*, I. L. R. *ibid.* 275.

(*e*) Viram. Tr. p. 249. The Dharwar Sastri (30th June 1848) says that a Bhat's vritti and a Zamindar's vatan are alike divisible according to Brihaspati, Q. 643 MSS. See Steele, 218, 228; Viram. Tr. p. 3, and above, p. 389. The books of genealogies of the periodical pilgrims to places like Nasik are on a division of the family distributed amongst the members of the priestly families, who thenceforward have an exclusive interest in the families allotted to them. Steele, L. C. 85. Viritti is a "right of personal service," and may belong to a joint family, fees being divisible and service done in rotation; it is inalienable to a stranger and cannot be attached, *Ganesh* v. *Ramchandra*, I. L. R. 10 Bom. 395; *Mancharam v. Pranshankar*, I. L. R. 6 Bom. 298. The fees received from *jajmans* are divisible, in Bengal also, and females are entitled to a share, *Khedro Ojha* v. *Deo Ranee Kunwar*, 5 Cal. W. R. 222; *Becharam* v. *Debia*, 10 Cal. W. R. 114. In Madras the right to a priestly office with its emoluments appears to be regarded as indivisible property. The senior member takes the whole for life and on his death he is succeeded by the survivor holding a similar

clothes in use, books, tools, ornaments, vehicles, and furniture (*f*). To these may be added indivisible rights arising from obligations contracted towards the common ancestor, or towards the family, whilst in a state of union (*g*). Vyasa includes the dwelling in indivisible property (*h*). The Vyav. May (*i*) explains this away in a very confused manner. The passages seem to point to the sacredness under the antique law of the house and its curtilage (*k*). In the case of *Mangala Debi et al.* v. *Dinanath Bose* (*l*)

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position. The succession goes by seniority in the group next in rotation according to descent. A female is not recognized as having any right, so long at any rate as any male coparceners remain, *Manally Chenna* v. *Vaidelinga*, I. L. R. 1 Mad. 343, 346.

(*f*) 2 Str. H. L. 370; Col. Dig., Book V., T. 362, 474 Comm.; Mit., Chap. I., sec. 4, para. 19; May., Chap. IV., sec. 7, para. 15, Stokes's H. L. B. 77; Mit., Chap. I., sec. 4, paras. 17—20; *ibid.* 388. In para. 20, "If they cannot be divided, the number being unequal, they belong to the eldest brother," means that the indivisible remainder goes to him. This is the interpretation of the Subodhini, and is supported by the text of Manu, quoted by Vijnanesvara. Goldstücker (On the Deficiencies, &c.) thinks that Jones and Colebrooke were wrong in their translation, and that in the case of an unequal number of cattle, no partition at all could be made, but their construction is as grammatical as that of their learned critic, and more reasonable and convenient. Mit., Chap. I., sec. 4, para. 19.

According to the borough-English custom the family dwelling (called astre or hearth) was reserved to the youngest son. See Elt. Tenure of Kent, 173. Under the ordinary law to the eldest, Glanv. VII. 3.

(*g*) See Colebrooke on Oblig. Art. 433; Pothier, Oblig Art. 294; *Musst. Ameeroo Nissa Bibee* v. *B. Otool Chunder et al.*, 7 C. W. R. 314 C. R.; *Dewakur Josee et al.* v. *Naroo Keshoo Goreh*, Bom. Sel. Cal. 215.

(*h*) Col. Dig., Book V., T. 354; so also Sankha and Likhita, T. 362.

(*i*) Chap. VI., sec. 7, p. 21; Stokes's H. L. B. 78.

(*k*) The family estate, once regarded as inalienable, a quality extending even to acquisitions by acceptance of religious gifts (see Viram. Tr. p. 99, above p. 128), next became disposable by the joint will of all interested. In *Lallubhai* v. *Bai Amrit*, I. L. R. 2 Bom., at p. 328, the progress from this stage through the allowance of religious gifts to freedom of sale is traced by reference to the Hindu authorities. When the separate performance of the family sacrifices by brothers residing apart once became recognized as a right, and then as a duty, the close connexion between the sacra and the estate made a law of partition almost inevitable. Still the ancient habits and traditions made this a slow growth. Union under the eldest (Manu IX. 106) must long have remained the sacred type of the family, until the progress and increase of the other castes invited the Brahmans, the sole legislators of the codes, to dispersion, and to the encouragement of dispersion amongst their clients for the multiplication of religious functions. It seems from such Smritis as the one quoted, Mit., Chap. I., sec. 1, para. 30, that the partition of the immovable patrimony was regarded, when first allowed, rather as a distribution for use than a division of interests.

Sir B. Peacock, C.J., refers to Katyayana, as quoted in Col. Dig., Book II., Chap. IV., T. 19, to show that an adopted son cannot,

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To this may be ascribed some apparent contradictions of precept. Thus, notwithstanding a partition, the concurrence of all the co-sharers, though separated, was required for the gift or sale of any part of the ancestral lands, Steele, L. C. 239. To this may probably be traced the right of pre-emption amongst members of the same stock recognized by some local usages of the Hindus. The right recognized amongst Hindus in Gujarath has been referred to a Mahomedan origin, *Gordhandas* v. *Prankor*, 6 Bom. H. C. R. 263 A. C. J., and in Bengal, B. L. R. F. B. R. 143, but a Gujarath Sastri referred it to the prohibition against alienation of the family estate, MS. Q. 746. See Steele, L. C., p. 211; and comp. Tupper, Panj. Cust. Law, vol. III., p. 147.

The Mitakshara, written after the sacred and perpetual unity of the patrimony had passed away, says that the concurrence of one separated kinsman in the sale of his land by another is required only to prevent future dispute, but this utilitarian reason for the continuance of the rule was obviously not the source of it. The Smritis regard the patrimonial lands generally as indivisible. Thus Usanas (in Mit., Chap. I., sec. 4, pl. 26, Stokes's H. L. B. 390, Smriti Chandrika, Chap. VII., para. 44) says that land and sacrificial gains are wholly impartible. Prajapati (para. 46) is to the same effect. (See also Smriti Chandrika, Chap. XII., para. 21.) He says that the assent of every coparcener is requisite to the validity of any act touching the immovable property. Unanimity amongst the sharers was perhaps meant by Prajapati to warrant partition and even alienation, as Yajnavalkya also (para. 49) says, "No one can make a partition of the inheritance. It must be enjoyed merely, not aliened by gift or sale," and yet he lays down rules for partitions. (Yajn. II. 114, &c.) The text of Brihaspati quoted in Mit., Chap. I., sec. 1, para. 30 (Stokes's H. L. B. 376, and Smriti Chandrika, Chap. XV., para. 3), "A single person (even separated) never has power over immovables," though differently explained by the modern commentators, points back to the same primitive notion. The differences of custom which have sprung from this may be seen in Steele, L. C. 238.

The ancient rule of the Hindu Law which forbade sale but allowed mortgage of the inheritance, Mit., Chap. I., sec. 1, para. 32, was the basis of the law of Kanara, whereby a mortgagee who had entered on default was compelled, after any lapse of time, to restore the property on payment of the debt with interest and compensation for improvements. See 5th Rep. 130. So, too, the occupier of vacant land deserted by its owner had to restore it on his return with or without compensation for his expenditure, see *Bhaskarappa* v. *The Collector of North Kanara*, I. L. R. 3 Bom. 525 ss. A similar law, resting on the same ideas, is still operative in the Panjab, though there, as elsewhere, restrictions are creeping in, see Tupper, Panj. Cust. Law, vol. III., pp. 145-150; and the same, vol. I., pp. 93, 94; vol. II., p. 214, for the right asserted by village communities over the common land, and vol. II., p. 8 ss., for the tribal origin of property in land and the derivative constitution of the family and individual ownership, contrary to Sir H. Maine, Early Hist. of Inst., pp. 77-82. Amongst the Garos all land is held in common by a Mahari or clan. . . . It can be aliened only by common consent. Damant in Ind. Antq., vol. VIII., p. 205. In the Delhi

by selling the family house, deprive his adopted mother of her right to a residence in it. This was followed in *Gauri* v. *Chandramani* (*m*), where the purchaser at an execution sale of the rights of a nephew was successfully resisted, as to one-half of the family

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territories, according to native custom, " a sharer cannot dispose of his landed property by sale or gift nor introduce a stranger without the general acquiescence of the pane or thola or other division to which he belongs," his co-members of the community having also a right of pre-emption. Mr. Fortescue's Rept. of 28th April, 1820, III. R. and J. Sel. 404. In Lahore sales of land are not recognized, while usufructuary mortgages are common, Panj. Cust Law, vol. II., p. 187. The consent of townsmen and neighbours (see Col. Dig., Book II., Chap. IV., sec. 2, T. 183), referred to in Mit., Chap. I., sec. 1, p. 31 (Stokes's H. L. B. 376), may have been required on account of the joint enjoyment of the common pasture land appendant to the holding, and of the close connection and community of interest of the several members of the ancient village. They were dependent on each other for many services and subject to taxation in common. It was natural then that the relatives first and then co-villagers should have a perferential right to vacant lands. See Proc. Beng. Soc. Sc. Assn., vol. I., p. 31. The consent of the Mirasdars is said by Ellis (Madras Mirasi papers, pp. 206, 207) to be necessary for the admission of an outsider to ownership either of a share in the integral property in the village or of a particular portion of the land. The form of such assent is retained in many modern grants, such as that under Tippoo's Government, set forth in vol. I., p. 73, of the Evidence in the Kanara Land Case, which, it is said, is made " with the consent of the Desais, Gavkaris, Bhavis, and Potbhavas of the village." Sales were formerly attested in many cases by the whole village community, see Wilks, South of India, vol. I., p. 132. See further Laveleye's Primitive Property, p. 60; Stubbs, Const. Hist., vol. 1., pp. 95, 96; 5th Rep. on E. I. Affairs (1812), vol. II., pp. 136, 826; and Mountst. Elphinstone's Hist. of Ind., vol. I., p. 126; Maine, Anc. Law, Chap. VIII., p. 263.

The endeavour to preserve the land to the family to which it was originally allotted formed part of the polity of many of the Grecian States. The famous Agrarian law of the Jews had the same object in view, see Milman, Hist. of the Jews, Book V., vol. I., p. 231. The Teutonic laws generally prohibited alike female succession, which might deprive the community of a defender, and the alienation of the patrimony without the consent of all the sons, or as in Sweden of all members of the family except in case of extreme necessity. Captivity was such a case, and at a later time overwhelming debt. A right of retraction subsisted for a year. See Maine, Anc. Law, Chap. VI., p. 198; Lex. Salica, Ti. 62, sec. 6; Baring Gould, Germany, Past and Present, vol. I., p. 74. In Sweden, as in India, the right of occupation of waste was at one time unrestricted except by the liability to taxation, but this latter was in both countries expanded into a right or claim to superior ownership; see Geiger, Hist. of Sweden, Chap. IV.; *Bhaskarappa* v. *The Collector of North Kanara*, I. L. R. 3 Bom. 540, 544 ss. In Norway an indefeasible right of redemption was always recognized; Elt. Orig., p. 209.

(*l*) 4 B. L. R. 72 O. C. J.

(*m*) I. L. R. 1 All. 262.

dwelling, by the widow of the judgment-debtor's uncle. And it has since been held that the widow of an undivided Hindu has a right to residence in the family dwelling-house and can assert it against the purchaser of the house at a sale in execution of a decree against another member of the family (*n*).

As regards clothes, furniture, vehicles, ornaments, books, and tools, it must be understood that an equitable distribution (*o*) of them or of the proceeds of their sale is sanctioned, when they are numerous and of value, or form the sole property of the family. As to ornaments it is said that those commonly worn by a woman during her husband's life are not subject to partition, after his death, by his coparceners (*p*), and they are expressly excluded from partition in the husband's life by Vishnu, XVII., p. 21, unless given in fraud of the coparceners (*q*). Property subject to partition, but the existence of which was not known and which could not therefore be included in a general partition, is, on its discovery, to be distributed, and in the same proportion as that actually divided (*r*).

§ 5 c. *Property legally impartible.*—Property, not naturally indivisible, may be impartible on account of the political condition of the owners or of a local or family law governing its devolution (*s*). The succession to a principality is by the Hindu Law

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(*n*) See Book I., Vyav., Chap. I., sec. 2, Q. 9; *Talemand Singh* v. *Rukmina*, I. L. R. 3 All. 353; *Parvati* v. *Kisansing*, Bom. H. C. P. J. 1882, p. 183. See above, p. 245. According to the custom of London and other places under the English Law, " while the house went to the youngest heir, the chief room was reserved as the widow's chamber." See Elt. Tenure of Kent, 42.

(*o*) May., *loc cit.*, paras. 22 and 23; Stokes's H. L. B. 78-9; Mit., Chap. I., sec. 4, paras. 17-19; *ibid.* 388. Otherwise they are retained by the possessors, allowance being made for their value; Steele, L. C. 60, 223.

(*p*) Viram. Transl. 250; *infra*, Book II., sec. 7 A 2. A widow's ornaments are not partible amongst her husband's coparceners, Steele, L. C. 35. See above, p. 295.

(*q*) See above, pp. 186, 205, 295.

(*r*) Steele, L. C. 60, 223.

(*s*) See Col. Dig., Book II., Chap. IV., T. 15 Comm.; Maine, Anc. L. 223. Under the Maroomakatayam law a partition requires the assent of all members of the family, M. S. D. A. R. for 1857, p. 120. Under the English Common Law cases arose of coparceners inheriting property, such as a fortress, a corody uncertain, or common appendant which could not be divided. In such cases the eldest took the impartible property and made an equivalent contribution in money to the others. So, too, when the youngest coparcener took the whole of the impartible property under the law of borough-English. See Bract. II. 76; Co. Litt. 165*a*; Elt. Tenure of Kent, 172.

usually confined to a single line of chieftains (*t*). The preference of individual members of the reigning family may be governed by a simple rule of primogeniture (*v*) and exclusion of females (*w*); it may admit of collateral representatives coming in under particular circumstances; or a power of selection of the heir-apparent from a larger or a smaller class may be exercised by the chief in

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(*t*) Steele, L. C. 60, 62, 229; 1 Macn. H. L. 7; 2 Str. H. L. 328. The custom arose, or maintained itself amidst a general change, partly from the sacred character ascribed to the eponymous founder of a line of chieftains and his descendants retaining power or nearly connected with those who held it; partly, too, under the pressure of necessities such as those which gave rise to a similar rule in the Feudal system. Before this had become developed we find the sons of Clovis dividing the empire (Coulanges, Hist. Inst., p. 427) under the Salic law (Hessels and Kern, 379 ss.) like a private estate. In England, before the Norman Conquest, the succession to the throne, though confined to a single family, was determined, as to the individual, by election, a method which, unless the electors as well as the person chosen belong to the princely family, is not consonant to Hindu ideas of chieftainship. Feudal tenure required a defined and single successor to the fief. But in Germany, where allodial patrimony was often held along with the fief, the former was distributable as under the Hindu law, though the latter was impartible, at least from the 14th century downwards. The rule of primogeniture established as to their fiefs amongst the electors by the Golden Bull of Charles IV. was imitated generally by the princely houses as a family law, while partition was still the general law. See Freeman, Hist. of Norman Conquest, vol. I. 107; Maine, Early Hist. of Inst. 199 ss.; Baring Gould, Germany, vol. I., 78, 79; *Rawut Urjun Singh* v. *Rawut Ghunsiam Singh*, 5 M. I. A. 169; *Chowdhry Chintamon Singh* v. *Musst. Nowlukho Koonwari*, L. R. 2 I. A. 263.

(*v*) Notwithstanding the almost universal acceptance of the law of equal divisible ownership of the patrimony by several sons and their descendants, the traces of the older system of a theoretical permanence of union under a single head are still perceptible. See Steele, L. C. 62, 205, 215, 228, 229, 230, 375, 409, 417. The "vadilki" or eldership of a family of vatandars (hereditary functionaries) is still often contested with great acrimony, and that, too, when the rights or privileges annexed to the position are, according to an English estimate, of but the most trivial value, or of no value at all. The question between the grandson by a deceased elder son and a surviving younger son, and between the representatives of the eldest branch and of the branch nearest to the last holder gave rise in England and in Germany to contests like those which have arisen in India, see above, p. 65, note (*i*), and Comp. Reeves, Hist. of Eng. Law, Chap. III. The Wars of the Roses sprang from an analogous dispute. In Germany the determination of the competing rights of the elder and the younger branch passed the skill of the lawyers and was committed to a single combat of champions. See Glanv. by Beames, p. 158; Meyer, Inst. Judiciaries, vol. I., p. 344; Laboul. *op. cit.* 420.

(*w*) *Hiranath Koer* v. *Ram Narain*, 9 Beng. L. R. 274; *Raja Rup Singh* v. *Rani Bansi*, L. R. 11 I. A. 149.

possession or after his death by a group of chiefs (x). Such rules recognized as controlling the succession in a State are hardly to be classed with those of the ordinary municipal law. They can but seldom come under the cognizance of the ordinary Civil Courts (y), the sanction requisite to enforce the decision as to a disputed succession, an appanage, or a maintenance, being in general an act of State. The analogy only of the ordinary law is usually followed, because this, forming a part of the popular consciousness, has moulded the natural expectations and the standard of propriety existing in the princely family and those connected with it. The custom of the family has equal or even greater influence, and its enforcement by the paramount power (z) rests ultimately on the same considerations as those which give weight to the ordinary Hindu law, the desire to satisfy the general sense of right (a). The usage does not affect newly purchased zamindaries (b).

The primogeniture of the ancient Hindus was much more a headship than an ownership excluding the other members or branches of the family (c). The head was an administrator for all, and a master of all, because the refinements of more recent times had not been invented. At this stage of social development the idea of purely individual proprietorship was but growing up

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(x) As to the tribal limitations and the customs of succession in Rajputana, see Sir A. C. Lyall's Asiatic Studies, p. 200 ss.

(y) See *Rajkumar Nobodip Chundro Deb Burmun* v. *Rajah Bir Chundra Manikya et al.*, 25 C. W. R. 404, 12 M. I. A. 523 (the Tipperah case).

(z) *Mootoor Engadachellasamy Manigar* v. *Toombayasamy Manigar*, M. S. A. Dec. 1849, p. 27; Steele, L. C. 229. The character of the grant determined the rights as to inheritance and partition of an inam or jaghir. See Steele, L. C. 207; above, pp. 152, 174.

(a) *See Neelkisto Deb.* v. *Beer Chunder Thakoor et al.*, 12 M. I. A. 523; *Maharaj Kuwar Busdev Singh* v. *M. Roodur Singh*, 7 C. S. D. A. R. 228; Col. Dig., Book II., Chap. IV., sec. 1, T. 15 Comm. In Germany the property of the nobility "of the nature of a raj" is subject to various special rules of descent, having for their object the preservation of each estate as a support for the title. Besides primogeniture there are the rules of Majority, of Seniority, and of Secundo and Tertio-geniture. For an explanation of these terms, the last of which implies the enjoyment of an appanage for life by a junior member of a family, according to a rule common in India, see Baring Gould, Germany, I. 81. Rules analogous to those of Majority and Seniority are to be found in operation in many States and Chieftainships.

(b) *Jagunnadharow* v. *Kondarow*, Mad. S. D. A. Dec. for 1849, p. 112; 3 Mor. Dig. 188.

(c) Above, pp. 65 ss.; Steele, L. C. 178, 228.

through the separate possession of movables (*d*). When the breaking-up of families had been received into the legal system the former supremacy of the senior was recognized by the allowance to him of a greater portion or of some special parts of the estate, perhaps as an inducement to consent to a partition (*e*), but probably also on account of the duty specially devolving on him of maintaining the sacra (*f*). Precedence in public religious ceremonies, though sometimes burdensome, is still much prized by Hindu gentlemen, and has kept the minds of the people familiar with the idea of supremacy in families and individuals (*g*) notwithstanding the difficulty of reconciling the latter with the doctrine of equal rights acquired by birth. For ordinary public functions and the emoluments attending them, the generally received principle is that of a rotation of enjoyment amongst those entitled (*h*), and this affords a means of transition, through cases where there must be some precedence, to an hereditary and singular succession to more exalted stations (*i*). Both sets of ideas are at work in regulating the customary inheritance of the so-called "raj-es" of the present day, while the younger members of the territorial families claim appanages as of right in virtue of kinship (*k*). But in each sub-branch a general secular precedence is conceded to the senior representative according with his pre-eminence in nearness to the ancestor and in ceremonial observances (*l*).

With such cases as we are considering may be classed for some purposes the one relating to the confiscated estates of the late King of Delhi, of *Raja Salig Ram and others* v. *The Secretary of State for India* (*m*), where it was said: "The territories were assigned to him for the support of his royal dignity, and the due maintenance of himself and family in their position. If he had died, or abdicated, his successor would have taken the property

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(*d*) See Steele, L. C. 53, 179. Comp. Morgan, Anc. Soc., pp. 6, 528, 535.

(*e*) See Sir H. Maine, Early Hist. of Inst., p. 191 ss.

(*f*) See Steele, L. C., *loc. cit.*, 208, 218, 225.

(*g*) See Steele, L. C. 417.

(*h*) Steele, L. C. 205, 218, 229.

(*i*) See Col. Dig., *loc. cit.*; Steele, L. C., pp. 60, 63.

(*k*) Col. Dig., *loc. cit. ad fin.;* above, p. 256.

(*l*) See Steele, L. C. 217, 218, 221, 229, 413, 417.

(*m*) L. R. Suppl. I. A. 119, 128. The raj, in that case, was not of course subject to the Hindu law, but the principles relied on are equally applicable to the estate of a Hindu raja.

in the same way, free from all charges. It was a tenure (so far as it was a tenure at all), *durante regno*, and on his deposition his estate and interest ceased, and all charges and incumbrances created by him out of that estate fell with the estate itself." In the same case a letter of the Government of India is quoted with seeming approval: "The general rule is that rent-free estates, secured by grants from Government, are not liable for the debts of deceased grantees. The exception is in the case of such estates which have been confiscated, and this exception is based on the consideration that 'the interests of justice' require the protection of creditors from the effects of a political catastrophe which they could not have foreseen" (*n*).

The rule and the exception above stated imply, however, that there may be what is called a *Raj*, or an estate held after the manner of a *Raj*, when there is no special political status at all (*o*). In such cases the inheritance to the zamindari or other estate resembles in general the succession to a true principality. The question is then usually one of "family custom and usage" (*p*); and the rules of primogeniture and of exclusion of females in favour of male collaterals may prevail under a "Kulachar" or family custom, as to an estate that is not a "raj" even in the popular sense (*q*). The appanage assigned by a chief to a cadet member of his family and his descendants may or may not be resumable on the death of a subsequent childless holder (*r*). The

(*n*) *Ibid.* 129, and *infra*, Book II., Vyav., Chap. III., sec. 4, Q. 3*a*. Steele, L. C. 227, 237, 269.

(*o*) 2 Str. H. L. 329; Col. Dig., Book II., Chap. IV., T. 15 Comm. See *per* Judicial Committee in *Chowdhry Chintaman Singh* v. *Nowlukho Koonwar*, 24 C. W. R., at p. 256; S. C., L. R. 2 I. A. 269.

(*p*) Book I., above, p. 151; *Soorendronath Roy* v. *Musst. Heeramonee Burmoneah*, 12 M. I. A., at p. 91; *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, *ibid.* 523; *Raja Udaya Aditya Deb* v. *Jadub Lal Aditya Deb*, L. R. 8 I. A. 248; *Bhau Nanaji* v. *Sundrabai*, 11 B. H. C. R. 249; *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*, L. R. 15 I. A. 51; *Srimantu Raja Yarlegadda Mallikarjuna* v. *Durga*, L. R. 17 I. A. 134; *Zemindar of Merangi* v. *Raja Satrucharla*, L. R. 18 I. A. 45.

(*q*) *Baboo Gunesh Dutt* v. *M. Moheshur Singh et al.*, 6 M. I. A. 164; *Bhau Nanaji Utpat* v. *Sundrabai*, 11 Bom. H. C. R. 249, 269; *B. Beer Pertab Sahee* v. *M. Rajender Pertab Sahee*, 12 M. I. A. 1; *Chowdry Chintaman Singh* v. *Musst. Nowlukho Konwari*, L. R. 2 I. A. 263; *The Court of Wards* v. *R. Coomar Deo Nundun Singh et al.*, 16 C. W. R. 142 C. R.; *Ekradeswar Singh* v. *Bahwasin*, L. R. 41 I. A. 275.

(*r*) *Rao Bahadur Singh* v. *Mussts. Jawahir Kuar and Phul Kuar*, L. R. 11 I. A. 75; *Sonet* v. *Mirza*, L. R. 3 I. A. 92; *Ooday* v. *Jadub*, I. L. R. 8 Cal. 199,

impartibility of the estate in such a case is not enough to make the succession to it similar to that of a separate estate (*s*). Property may be joint though impartible (*t*). It may be impartible yet alienable (*v*) and liable for the father's debts (*w*) as assets by descent. "Though property be impartible, yet the nearest male member of the joint family inherits in preference to the daughters of the last holder, as admitted in the *Shivagunga Case* (*x*), though without effect there, as the estate was a separate acquisition (*y*). The family estate may comprise partible as well as impartible property, each following its own line of descent (*z*), and in such a case a partition may be made with reference to the latter, so that it becomes, as regards the other parceners, a separate estate in the hands of the senior co-sharer to whom it is allotted (*a*), though it remains still liable for the maintenance of the junior members (*b*). This decision may be referred either to a resignation by the other members of their rights for a consideration in the form of their several shares, or to an abandonment by mutual agreement of the special custom of descent (*c*), and to a partition accompanying it, which thenceforward makes the rights of the

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P.C.; *Lakshmi* v. *Durga*, L. R. 20 I. A. 9; *Narain* v. *Lokenath*, I. L. R. 7 Cal. 461.

(*s*) *S. R. Y. Venkayamah* v. *S. R. Y. Boochia Venkondora*, 13 M. I. A., at p. 339; *Rajah Rup Singh* v. *Rani Baisni*, L. R. 11 I. A. 149.

(*t*) As said by the Privy Council in *Tekaet Doorga Pershad Singh* v. *Tekaetnee Doorga Kooere*, L. R. 5 I. A., at pp. 152, 159. See *Pariasami* v. *Periasami*, *ibid.*, p. 61.

(*v*) *Rajah Udaya Aditya Deb* v. *Jadub Lal*, L. R. 8 I. A. 248; cf. Madras Act, II. of 1904, which lays down certain restrictions in respect of alienation, etc., of impartible estates.

(*w*) *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*, L. R. 9 I. A. 128.

(*x*) *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 M. I. A. 539.

(*y*) *Sheo Soondary* v. *Pirthee Singh*, L. R. 4 I. A. 147.

(*z*) *Rawut Urjunsing et al.* v. *Rawut Ghunsiam Singh*, 5 M. I. A. 169.

(*a*) *Tekaet Doorga Pershad Singh* v. *Takaetnee Doorga Kooere et al.*, 20 C. W. R. 155; S. C., L. R. 5 I. A., at p. 152.

(*b*) *Raja Yarlagadda Malikarjuna Parasada* v. *Durga Prosad*, L. R. 27 I. A. 151.

(*c*) "The custom is capable of attaching and of being destroyed." Privy Council in *Soorendronath Roy* v. *Musst. Heeramonee*, 12 M. I. A. 91. See also *Gopal Das* v. *Nurotam Singh*, 7 C. S. D. A. R. 195; *Rajkishen* v. *Ramjoy*, I. L. R. 1 Cal. 186; above, pp. 151—2.

sharers *inter se* those of owners of separate property (*d*). The intention, however, must be distinctly expressed in order to free the impartible estate from the established custom (*e*).

In *Bodhrav Hanmant* v. *Narsinga Rav* (*f*), the Privy Council held that an important inam was subject to the ordinary rules of partition. Where indeed the grant was originally made to support an office (*g*), Mr. Ellis said that it is not to be so distributed as to defeat that purpose. "Does not the law," he says, "that regards the grant of a corrody apply to these and similar perquisites? and has not the grantor, or he who pays, a right to see that they are appropriated accordingly to the original intention? . . . I have no doubt but it applies, and that similar official perquisites, though certainly heritable, are not divisible, nor ought they to descend by primogeniture. The most capable . . . should be selected . . . [and] enjoy the whole perquisites" (*h*). This principle is recognized by the Privy Council in *Ardreshappa bin Gadgiappa* v. *Guneshidappa* (*i*) so far as the emoluments may

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(*d*) In *Raja Bishnath Singh* v. *Ramchurn Mujmoadar*, B. S. D. A. R. for 1850, p. 20, it was held that an eldest brother could give his younger brothers equal rights as against himself by an acknowledgment, but that this did not exclude a question as to the validity of an adoption by one of the juniors according to the family law.

(*e*) See the case of *Chintamum* v. *Nowlukho*, cited below, I. L. R. 1 Cal., at pp. 161, 162.

(*f*) 6 M. I. A. 426. In *Girdharee Singh* v. *Koolahul Singh*, 2 M. I. A., at p. 35, a claim to a raj as impartible was held refuted by evidence of "a course of possession and enjoyment" opposed to its impartibility. An impartible raj is not necessarily inalienable, see above, p. 154, but this cannot, of course, be meant to imply that generally such an estate is alienable. Its alienable quality would be made use of to effect partition contrary to the law, or still more completely to destroy the interests meant to be guarded by impartibility. See above, p. 174, and Book I., Vyav., Chap. II., sec. 13, Q. 10, p. 434. A vritti or income receivable for religious services is partible property, and may be even mortgaged and sold in execution of a decree. It was held that the mortgagor's right having been decreed to be sold the question of its liability to this process could not be raised in execution, *Sadashiv Lakshman Lalit* v. *Jayantibai*, Bom. H. C. P. J. F. 1883, p. 27, referring to *Bechardas* v. *Gokha*, Bom. H. C. P. J. 1882, p. 379, and *Prannath Paurey* v. *Sri Mangula Debia*, 5 C. W. R. 176 C. R. Comp. *Ukoor Doss's Case*, *supra*, p. 185, note (*o*). For the mode of distribution, see Steele, p. 85. That religious grants are generally inalienable, see Steele, L. C. 206, 207, 237, 441, and above, p. 198. A devasthan never reverts to the Government, *ibid.* 235.

(*g*) See above, Book I., pp. 180, 184.

(*h*) 2 Str. H. L. 364.

(*i*) L. R. 7 I. A. 162.

be annexed by any law to the office (*k*). A saranjam is usually impartible. It is attended with an obligation to maintain the younger members of the family. A pension substituted for it has the same legal character (*l*).

In many cases, temple allowances are hereditary and divisible (*m*), though sometimes subject to special rules of descent (*n*), or divisible in enjoyment subject to the charge for management which is indivisible (*o*). Ancestral property made subject to a trust for an idol was pronounced partible subject to the trust (*p*). On the other hand, a vatan property, found to be impartible according to the family custom, was held not to have become partible by the cessation of the official functions with which it had formerly been connected (*q*). What determines the rights in partition as by descent in each case is the family custom, where, according to that custom as clearly proved, a divergence from the ordinary law has become established (*r*). Such a family custom allotting certain portions of a Zamindari to the junior members does not render savings and accumulations made by those members joint property (*s*).

A family cannot make a custom for itself in opposition to the general law of the country, according to *Baswantrav* v. *Mantappa* (*t*). But where the family is found to have been

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(*k*) *Ibid.* 167.

(*l*) *Ramchandar* v. *Sakharam*, I. L. R. 2 Bom. 346; above, pp. 180, 256. A Saranjam may originally have been partible or made so by family usage, *Madhavrav* v. *Atmaram*, I. L. R. 15 Bom. 519. Lands leased by the Government to the family are partible, *Dattatraya* v. *Mahadaji*, I. L. R. 16 Bom. 528. So are Babuana grants, *Lalitswar* v. *Bhabeswar*, I. L. R. 35 Cal. 823.

(*m*) 2 Str. H. L. 368.

(*n*) *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C. R. 249.

(*o*) 1 Str. H. L. 210.

(*p*) *Ram Coomar Pal* v. *Jogendranath Pal*, I. L. R. 4 Cal. 56.

(*q*) *Savitriava et al.* v. *Anandrav*, R. A. No. 24 of 1874, Bom. H. C. P. J. F. for 1875, p. 132. See *Timangravda* v. *Rangangavda*, Bom. H. C. P. J. 1878, p. 240.

(*r*) A document containing a statement of a family custom was construed extensively so as to include the whole class indicated by specification of particular instances of the nearest male collaterals as heirs to a Zamindar who should die childless, *Chowdry Chintamun Singh* v. *Musst. Nowlukho Konwari*, L. R. 2 I. A. 263.

(*s*) *C. Hurreehur Pershad Doss* v. *Gocoolannund Doss*, 17 C. W. R. 129; *Ekradeswar Singh* v. *Bahuasin*, L. R. 41 I. A. 275.

(*t*) 1 Bom. H. C. R. Appx. xlii.

governed as to its property by a custom which has been submitted to as compulsory, that custom is itself law (*v*), though it is extremely difficult to establish such a custom (*w*). It is more readily admitted where the custom is found to extend to a considerable class of the community. Thus in *Shidoji Rav* v. *Naikoji Rav* (*x*), the Court says, "We find a general usage amongst a large and important class of the community of dispensing with actual partition and providing for the maintenance of the family by special arrangements varying in different families, the general character of which, however, is the vesting of the family property principally in the representative of the elder branch, subject to the support of the other members" (*y*), and as to such a custom, that it "is one which, if clearly proved, should be allowed to displace the plaintiff's right to partition under the general law." The District Judge finding the custom proved for the particular family was to determine what provision by way of maintenance was to be made for the plaintiff, who had sued for a partition (*z*).

(*v*) *Sorendronath Roy* v. *Musst. Heeramonee*, 12 M. I. A. 91. Comp. *Abraham* v. *Abraham*, 9 M. I. A. 195, and *Timangravda* v. *Rangangavda*, Bom. H. C. P. J. 1878, p. 240; *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom., at pp. 562, 573.

(*w*) *Icharam* v. *Ganpatram*, S. A. No. 294 of 1871, Bom. H. C. P. J. F. for 1873, p. 169.

(*x*) 10 Bom. H. C. R. 228.

(*y*) See Book I., above, pp. 254, 256.

(*z*) Comp. Laboulaye, *op. cit.* 368. In cases of the kind here considered the law of descent is determined by the personal status of those concerned. The special rule does not adhere to the land itself independently of the hands in which it is held. Under the English Law a special quality as to descent is deemed inherent in some lands, or rather the proprietary relation to them. Thus a manor given first in frankalmoigne and afterwards by knight service was held to be still gavelkind. See Elt. Tenure of Kent, 263, 377. But this notion, though sometimes referred to in the Courts, is strange to the Hindu Law. (See *Pariasami* v. *Periasami*, L. R. 5 I. A., at p. 75, and the instances at Nort. L. C. 278, and comp. Col. Dig., Book II., Chap. IV., sec. 1, T. 15, Comm.) A Zamindari or Vatan once effectively aliened or even divided is freed from any special rule of descent. It is not *impartibilis ratione terrae*, as gavelkind established by custom before the Conquest made land in Kent, *partibilis ratione terrae*. See Bract. 374 *a*. In such instances as the *Hunsapore Case* (12 M. I. A. 1) and the *Shivagunga Case*, the fact that an estate was assigned to a branch of a family not entitled in the regular course of law was said not to change its previous impartible character (*Mutta Vaduganadha Tevar* v. *Dorasingha Tevar*, L. R. 8 I. A., at p. 116), but in both cases the new grantees from Government were of the proprietary family and subject to its custom as to any estate to

As regards hereditary offices and their emoluments in the Bombay Presidency (*a*), these are now regulated by positive enactments of the Legislature. See Bombay Act III. of 1874, by which a prohibition is imposed on Vatan property's leaving the family of the office-holders, and provisions are made for placing it under the control of the Collector. Subject to this, however, the right of the eldest member of a Patil family to officiate, as it is the usage of a large number of families, is regarded as "usage of the country," which by sec. 26 of Reg. 4 of 1827 our Courts are bound to recognize and enforce (*b*). In the case of Bhagdari and Narvadari holdings in Gujarath the Legislature has provided against subdivision or separation of the house from the holding (*c*), but without any rule as to inheritance or partition. These are left to the Hindu law and custom (*d*).

IV.—Liabilities on Inheritance.

§ 6. The liabilities or charges on the common property, distributable on division, include the following:

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which that custom extended. Such cases as these are to be distinguished from those like *Raja Nilmoney Singh* v. *Bukram Singh* (L. R. 9 I. A. 104), in which lands are held as a remuneration for service for the maintenance of which they have been conferred, or a grant has been taken at a reduced land-tax in consideration of service to be rendered. These may be impartible on account of their attendant condition of service, either wholly, or without the approval of the Government. They may be inalienable either absolutely, or in a qualified way allowing an alienation of part or for a life, or subject to particular fiscal conditions, or as to the persons of the alienees. These conditions and qualifications may be found in the case of vatans in Bombay. A jaghir or saranjam is usually impartible, and the succession is according to primogeniture; *Ramchandra Mantri* v. *Venkatrav Mantri*, I. L. R. 6 Bom. 598; above, pp. 175, 179.

(*a*) See above, Book I., p. 175.

(*b*) *Sanganbusapa* v. *Sangapa*, Bom. H. C. P. J. 1879, p. 257. Comp. *infra*, Book II., Vyav., Chap. III., sec. 4, Q. 3; and Book II., Vyav., Chap. II., sec. 1, Q. 5.

(*c*) See Bom. Act V. of 1862.

(*d*) *See Bhai Shanker* v. *The Collector of Kaira*, I. L. R. 5 Bom. 77; *Pranjivan Dayaram* v. *Bai Reva*, *ibid.* 482.

The customary law of the castes preserves many restrictions on the disposal of the patrimonial lands. See Steele, L. C., pp. 429, 432. Even after a partition in many castes the interest of the relatives is thought to prevent an alienation or incumbrance without their assent signified by attestation, *ibid.* In many the succession of a daughter is not admitted in competition with separated brothers and uncles, *ibid.* 424 ss.; as some of the Madras customs exclude even the widow, 2 Str. H. L. 163.

A. Debts (*e*), for which the coparceners at large are liable, must, in general, have been incurred before partition, by a father or other managing member of the family, for the common benefit (*f*).

B. Provision must be made for relations of the coparcener entitled to a portion or maintenance.

(*e*) Compound interest may be stipulated for and recovered under the Hindu law, *Ramchandra and others* v. *Lalsha*, Bom. H. C. P. J. 1883, p. 45; Col. Dig., Book I., T. 49 Comm.; Steele, L. C. 72. The rules of the Hindu law on this subject are much more reasonable than those of the Roman law, which in some measure still prevail in the English law. The maximum of interest recoverable on an ordinary loan is a sum equal to the principal; on loans of grain and other articles different limits are prescribed. See Steele, L. C., pp. 266 ss. When interest has accumulated to the amount of the principal, it is to be turned into principal by a new account, or by a fresh transaction, but to this there is no objection; Steele, L. C. 265; Vyav. May., Chap. V., sec. I.; Col. Dig., Book I., T. 59, 255 ss. As to the assignment of obligations, *ibid.* T. 49, and Book II., Chap. IV., T. 27. As to dealing with mortgaged property, Book I., T. 117; Book II., Chap. IV., T. 28; Vivada Chint. Trans. pp. 73, 76, 316. See now the Indian Contr. Act, IX. of 1872.

(*f*) May., Chap. IV., sec. 6, paras. 1, 2; Stokes's H. L. B. 72; Chap. V., sec. 4, para. 20; *ibid.* 124. The debt of a father is a charge generally, as far as his sons are concerned, though not incurred for the common benefit. Narada, Pt. I., Chap. III., paras. 5, 6. See *Suraj Bunsee Koer* v. *Sheo Prasad Sing*, L. R. 6 I. A. 88; and *Laljee Sahoy* v. *Fakeerchand*, I. L. R. 6 Cal. 135; *Narayanrav* v. *Balkrishna*, Bom. H. C. P. J. 1881, p. 293; *Muttayan Chetti* v. *Sivagiri Zamindar*, I. L. R. 3 Mad., at p. 381; Steele, L. C. 266; and above, pp. 164 ss. 592 ss. But the estate is not so hypothecated, without a special lien, for the father's debt, as to prevent the son or other heir disposing of it and giving a good title for valuable consideration, *Jamiyatram* v. *Parbhudas*, 9 Bom. H. C. R. 116; *Sheshigiri Shanbhok* v. *Gungoli Abboo Saiba*, S. A. No. 88 of 1873, Bom. H. C. P. J. F. for 1873, p. 31. In *Bheknarain Singh et al.* v. *Januk Singh*, I. L. R. 2 Cal. 438, 443, White, J., says: "The liability of a son for the debts of his deceased father under Hindu law appears to me to be a distinct question from the right of a father in his life-time to charge the interest of the infant sons in the joint ancestral immovable estate with the payment of a debt. . . . There seems to be no essential difference between the position of the father when dealing with those interests during the minority of his sons, and the position of a mother when dealing as guardian and manager of her infant son's estate." See *Narayan Acharya* v. *Narso Krishna et al.*, I. L. R. 1 Bom. 262, and the cases there referred to; the texts referred to above, p. 598, and pp. 75, 161. The funeral expenses of a deceased Hindu are a charge on the family property, *Sadashiv Bhasker* v. *Dhakubai*, I. L. R. 5 Bom. 451. A widow's subsistence is sometimes deemed by the Sastris a charge preferable to any other debt, as in the case at 2 Str. H. L. 280, but this opinion is not followed; see above, pp. 91, 94, 251. The widow's dower is preferred to the claim of the usurer by the 11th Art. of Magna Charta, see Stubbs, Docts. &c., p. 290.

A. *Debts* (*g*).—The Hindu Law lays down broadly that sons and grandsons shall discharge the obligations of their ancestors (*h*), except where they have been contracted for immoral purposes (*i*), and this duty is not altered by a partition amongst the sons. In the case of *Unnoda Soonduree Dassee* v. *Oodhubnath Roy* (*k*), three brothers had separated while a decree against their father remained unsatisfied. In execution the shares of two of the brothers were sold. It was held that the excess, beyond two-thirds of the amount of the decree, could be recovered by the two brothers from the share of the third, even though this had

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(*g*) A father's promises are looked on as binding unless the performance of them would prevent the fulfilment of some still more sacred duty. His dying directions as to charities within reasonable limits must be obeyed. These rank as testamentary dispositions. See Steele, L. C., pp. 404, 429. But the Courts will not enforce either of these obligations except subject to the conditions of the Statute law where that is in force. See above, pp. 203, 204, 219; Steele, L. C. 178, 233, 238.

(*h*) Vishnu, Tr. p. 45; May., Chap. V., sec. 4, para. 12; Stokes's H. L. B. 122; *Umrootram Byragee* v. *Narayandas Ruseekdas*, 2 Borr. 223; *Ram Narain Lal* v. *Bhawani Prasad*, I. L. R. 3 All. 444, 445; *Laljee Sahoy* v. *Fakeerchand* I. L. R. 6 Cal. 135; (*Mitakshara Law*), 1 Str. H. L. 167; 2 *ibid.* 274, 277, 477; Col. on Obligations, Chap. II. 51; Smriti Chandrika, Chap. II., sec. 2, paras. 20, 24; Col. Dig., Book I., T. 167; Steele, L. C. 265, 266, 409.

It is assumed here that the father's "kriya" or funeral ceremonies have been performed or provided for. For these all the sons are liable, though their rights are not conditional, Steele, L. C., pp. 226, 414 ss.; and they should act together, see above, pp. 563, 564; Steele, L. C. 404, 413. The obligation of providing for the father's debts is limited by the qualification "at least for those incurred in necessary expenses of the family," Steele, L. C., pp. 57, 217; but this has been enlarged by the Courts. See above, pp. 75, 155, 204, 208, 582, 587, 594.

If valid incumbrances have been created by the father as the manager, these will, of course, form a deduction from the estate to be distributed. See above, pp. 568, 590, 592 ss. In the case of mortgages, which are usually accompanied by possession, the mortgaged portion is frequently preserved for future partition. Otherwise it is allotted at a valuation of the equity of redemption to the share of one of the parceners. See above, sec. 4 E; comp. Steele, L. C., p. 218. The right of the managing member to mortgage and even to sell the estate of the family to relieve its difficulties is widely admitted by the customary law. See Steele, L. C., p. 398. Hence the presumption in favour of his transactions. In Ev. Act, I. of 1872, secs. 114, 115.

(*i*) May., *loc. cit.*, para. 15; Stokes's H. L. B. 122. "The pious obligation of a son to pay his father's debts is confined to debts contracted for moral purposes." *Jettyapa* v. *Laximaya*, Bom. H. C. P. J. 1883, p. 87. See above, pp. 590, 591, 595, 597; *Sripat Singh Dugar* v. *Maharajah Sir Prodyot Kumar Tagore*, L. R. 44 I. A. 1.

(*k*) 11 C. W. R. 125 C. R.

passed to a stranger, by a sale made before the execution was levied (*l*). It may be doubted perhaps whether this decision and that referred to in note (*d*) at p. 585 are reconcilable in principle (*m*). In the Bombay Presidency, the liability has been limited by Bombay Act VII. of 1866, under which an heir is responsible only to the extent of the assets received by him (*n*); and his property cannot perhaps be aliened or encumbered by the father, except for good reasons into which the encumbrancer is bound to inquire (*o*). The tendency of the decisions, however, has been to extend the father's power of disposal and incumbrance as against his sons (*p*).

In the case of a united family consisting only of brothers or collaterals, it has been laid down, that the presumption usually arises of a debt incurred by a managing member being for the benefit of the family (*q*), but that in the case of a minor coparcener's interests being affected, the creditor, seeking to enforce the liability, must prove that it was *bonâ fide* incurred by the manager or at least that there were good grounds for

(*l*) See Col. Dig., Book I., T. 182.

(*m*) The law as to a single coparcener's alienation, and a creditor's sale in execution, are discussed above, pp. 587 ss. See *Deendyal Lall* v. *Jugdeep Narain Singh*, L. R. 4 I. A. 247; *Suraj Bunsi Koer* v. *Sheo Prasad Singh*, L. R. 6 I. A. 88, 101; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A. 181, 195; *Babaji Sakhoji* v. *Ramshet et al.*, 2 Bom. H. C. R. 23. The decisions have been influenced by suspected collusion, which, however, is not to be taken as having been a ground of decision in *Girdharilal's Case*, as said by the Judicial Committee in *Muttayan Chettiar's Case*, L. R. 9 I. A. 128; *Balmokund et al.* v. *Jhoona Lall*, N. W. P. S. D. A. R. for 1857, page 14; *Musst. Kooldeep Koer et al.* v. *Runjeet Singh et al.*, 24 C. W. R. 231; *Sheo Pershad Singh et al.* v. *Musst. Soorjbunsee Koer*, *ibid.* 281; *Burton Singh* v. *Ram Purmessur Singh et al.*, *ibid.* 364.

(*n*) See above, pp. 80, 165. *Lallu* v. *Motiram*, I. L. R. 13 Bom. 65. Decree to be given against the son, though it could not be enforced for want of assets in his hands.

(*o*) *See Narain Singh* v. *Pertum Singh et al.*, 11 Beng. L. R. 397; S. C., 20 C. W. R. 192; *Modhoo Dyal Singh* v. *Goolbar Singh et al.*, 9 *ibid.* 511 C. R.; *Brojo Kishore Gujendar* v. *Huree Kishen Doss et al.*, 10 *ibid.* 58 C. R., as compared with *Kanto Lall et al.* v. *Girdhari Lall et al.*, 9 C. W. R. 471 C. R., reversed in P. C., L. R. 1 I. A. 321; *Hari* v. *Lakshman*, I. L. R. 5 Bom. 614, 618. Above, pp. 572 ss. *Sripat Singh Dugar* v. *Maharajah Sir Prodyot Kumar Tagore*, L. R. 44 I. A. 1.

(*p*) See above, pp. 76, 166, 204, 599.

(*q*) *Babaji* v. *Krishnaji*, I. L. R. 2 Bom. 666; *Vrijbhukandas* v. *Kirparam*, Bom. H. C. P. J. 1879, p. 263.

supposing it to have so been incurred (*r*). Under the Bombay Act above quoted, sec. 5, the liability of a coparcener, as to debts contracted before he was twenty-one years of age, is limited to the amount of the portion of the common property received by him. Even when the other coparceners are adults, charges incurred by the manager are binding, except as against him, only when incurred for the needs of the united family, or with the assent, express or implied, of its members (*s*).

For a debt incurred by any member of the family under the pressure of distress, all members are liable (*t*), and the property even after partition, but not for a debt incurred needlessly or for purposes not constituting a duty, which, as a member of the family, the debtor was bound to discharge under the circum-

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(*r*) See above, pp. 568, 578, 590, 592. But in *Chamaili Kuar* v. *Ram Prasad*, I. L. R. 2 All. 267, good faith was held not to protect a purchaser of property sold for immoral purposes even by a father.

(*s*) 1 Str. H. L. 199; 2 *ibid.* 344, 434, 457; Col. Dig., Book I., Chap. V., T. 180 ss.; Book II., Chap. IV., T. 54, Comm. *sub fin.;* above, p. 590; *C. Volum Comara Vencatachella* v. *R. Rungasawmy*, 8 M. I. A., at p. 323; *Miller* v. *Ranganath*, I. L. R. 12 Cal. 389, 399; *Sheo* v. *Jaddo Kunwar*, L. R. 41 I. A. 216; *Doulat Ram's Case*, L. R. 14 I. A. 187; *Hari Vithal* v. *Jairam*, I. L. R. 14 Bom. 597. A member defrauded by the contract of a manager with a third party cognizant of the fraud may have the contract rescinded, *Ravji Janardan* v. *Gangadharbhat*, I. L. R. 4 Bom. 29, though generally bound by his dealings and under circumstances by decrees against him, *Bhimasha* v. *Ramchandrasha*, Bom. H. C. P. J. F. for 1878, p. 286; *Annaya* v. *Hoskeri Ramappa*, Bom. H. C. P. J. F. for 1875, p. 75; *Upooroop Tewary* v. *Lalla Bandhjee*, I. L. R. 6 Cal. at p. 753 (see above, pp. 590 ss.; Steele, L .C. 209.) At Calcutta it seems to have been intimated that the question of the propriety of the alienation arises only when infants' shares have been disposed of, and as to their shares, since as regards those of adult members their assent is indispensable, *Kameshwar Pershad* v. *Run Bahadur Singh*, I. L. R. 6 Cal. 843; and in all cases due inquiry must be made by a purchaser or incumbrancer of the family property. For Bombay the general liability for a manager's acts is asserted in *Samalbhai Nathabhai* v. *Someshvar Mangal Harkisan*, I. L. R. 5 Bom. 39. The rights of a decree-holder for the father's debts were preferred to those of a decree-holder for the debts of the owner himself, in *Gunga Narain* v. *Umesh Chunder Bose et al.*, C. W. R. for 1864, p. 277.

(*t*) May., Chap. V., sec. 4, para. 20; Stokes's H. L. B. 154; Col. Dig., Book V., Chap. VI., T. 373, Comm. *ad. fin.* See also under the three preceding texts; Book I., Chap. V., T. 181, 193, 194; and 1 Str. H. L. 276. See also *Mahada* v. *Narain Mahadeo*, 3 Morris, 346; *Sadabart Prasad Sahu* v. *Foolbash Koer et al.*, 3 B. L. R. 31 F. B. R.; *Mahabeer Persad* v. *Ramyah Singh et al.*, 12 B. L. R. 90; and above, p. 588. On the same principle a mortgage or sale of the common estate by an ordinary member, if made to meet some pressing family exigency, is generally recognized as valid by the customary law, see Steele, L. C., pp. 54, 210, 399.

stances (*v*). If a member of the family owes to the estate a debt barred by limitation this may still be made a deduction from his share in the gross accumulations (*w*).

§ 6 B. *Provisions for relations, &c.*—Subject to provision for the debts for which the joint estate is liable (*x*), certain relations, though not themselves entitled to definite aliquot shares of the common property, even when a partition is made, are yet entitled, while the family is united, to maintenance or provision by way of marriage portion, and this right continues to subsist, notwithstanding an agreement for partition amongst the co-sharers (*y*). To this class belong—

1. All persons by connexion entitled but by some defect disqualified from inheriting, their wives, daughters, and disqualified sons (*z*).
2. Female relations not entitled to a specific share.

(*v*) See above, pp. 161, 164, 166.

(*w*) *Lokenath Mullick* v. *Odoychurn Mullick*, I. L. R. 7 Cal. 644.

(*x*) *Lakshman Ramchandra* v. *Satyabhamabai*, I. L. R. 2 Bom. 494; *Damodar* v. *Bai Meva*, Bom. H. C. P. J. 1882, p. 398.

(*y*) As to the person disqualified "if there happen to be no property, his relatives must still afford him maintenance," Borr. Collection, Book F. *sub init.* Broach Brahmans. So amongst Sonis, *ibid.* Sheet 22; Salvee, Sheet 43. "Sons and others, who by reason of infirmity, &c., are disqualified from taking the share in an inheritance, which would otherwise come to them, are directed to be maintained by those to whom their shares thus go over, and a direction of this kind, given by the lawgiver, when prescribing the mode and condition of inheriting, is, I think, rightly construed as amounting to the creation of a charge upon the inheritance." Phear, J., giving the judgment of himself, Jackson, and Hobhouse, JJ., in *Khetramani Dossee* v. *Kasheenath Dos*, at 10 C. W. R. 97 F. B. S. C., 2 B. L. R., A. C. J., at p. 52. Their right, however, is simply one of maintenance. See the Smriti Chandrika, Chap. V., para. 20. The same term "bhartvyam" is used by Yajnavalkya to signify their claim and the claim of their wives, and the same verb "bharane" is used to express the right to support of a deceased coparcener's widow in Narada, Pt. II., Chap. XIII., para. 28. See as to a widow's and mother's right 2 Str. H. L. 292, 294; above, pp. 163, 227, 241, 250. If the father is superseded as manager on account of misconduct or incompetence, his maintenance must be provided for by the managing member. This remains a charge on the property, for which, like the mother's subsistence and the funeral expenses of both the sons, are bound to make a reserve in any subsequent partition before the necessity has passed away; Steele, L. C., pp. 208, 404, 405, 413.

Should the sons or other near relatives fail to perform the funeral ceremonies of the deceased, they may be put out of caste. But the non-performance does not destroy the right of inheritance, nor does performance by a more distant relative give him a preference over a nearer one; Steele, L. C., pp. 413 ss.

(*z*) See Digest of Vyavasthas, Chap. VI., sec. 3 *b*, Q. 3, above, pp. 551.

§ 6 B. 1. Regarding the former, *see* Book I., 141, 241, and above, p. 689, note (*y*). The Smriti Chandrika, Chap. V., paras. 24, 25, says that the obligation of support is avoided by not taking the disqualified person's share (*a*), but as to this see above, pp. 272, 242. In order to create a new title in favour of a disqualified person by recognition of his right to succeed to his share, a clear intention to waive the rights accruing from such incapacity must be proved and will not be inferred from acts which may have been done out of kindness and affection (*b*). It will have been seen that the wives and widows of members equally with the members themselves who could take no share in the common estate are held entitled to maintenance by the co-members in virtue of the membership of such women in their family of marriage (*c*). This illustrates the statement in Book I., above, p. 251.

§ 6 B. 2. Female relations, not entitled to a specific share, but to maintenance, are widows of predeceased sons and other

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For the cases of exclusion from sharing the patrimony under the customary law of particular castes, see Steele, L. C., pp. 224, 411. The many exceptions admitted to the harsh rules of exclusion mark a gradual abandonment of those rules of the archaic law which can least be reconciled with the dictates of natural sympathy. Comp. Steele, L. C. 234, 235. That the continuation of the family rites and the inheritance were in ancient law regarded as essentially connected, see Manu, IX., 142, and the Commentary; Vyav. May., Chap. IV., sec. 5, paras. 21, 22; Stokes's H. L. B. 65; sec. 11, para. 8; Stokes's H. L. B. 109; Brihaspati declares the vicious son liable to exclusion, since the patrimony "is declared to belong to those kinsmen who offer funeral oblations to the deceased and are virtuous." It is, however, an inversion of the proper order of ideas to conceive the right to sacrifice to a deceased as a source of the right to succeed to his estate. See above, p. 689, note (*y*); Steele, L. C. 226. The right to succeed resting on consanguinity, see above, pp. 59, 62, takes with it the duty of sacrifice with a more or less definite condition of defeasance in the event of failure or incapacity to perform the duty, but the duty subsists though there be no property at all (Vishnu XV. 43), and the right arises to the heir immediately on the death of the owner, not mediately, through the celebration of the Sraddhs or the right to celebrate them, except perhaps where a defeasance has occurred or the heirship has been renounced by the person entitled.

(*a*) Brethren who have retired from the world take no share. Eunuchs and madmen excluded must be provided with maintenance; Vasishtha, Chap. XVII., paras. 27, 28. So also idiots, cripples, and those afflicted with apparently incurable and disabling disease; Narada, Pt. II., Chap. XIII., para. 22.

(*b*) *Lala Muddun Gopal* v. *Khikhinda Koer*, L. R. 18 I. A. 9.

(*c*) Mit., Chap. II., sec. 10, para. 14. Failing the husband's family, a widow's brothers support her; Steele, L. C. 215.

descendants (unseparated) of the common ancestor (*d*), and daughters of such persons, in case of their having left no sons (*e*). Such daughters are also entitled to a marriage portion (*f*). This last rule regarding daughters, though not given explicitly for undivided coparceners by the Hindu lawyers, may be deduced from the injunction given to reunited coparceners at May., Chap. IV., sec. 9, para. 22 (*g*), Mit., Chap. II., sec. I., pl. 20 (*h*), and from that given to the relations of persons disabled from inheriting, to maintain and to marry the daughters of such persons, Mit., Chap. II., sec. 10, para. 12 (*i*). Even concubines are entitled to main-

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(*d*) The disposal of a widow is one of the duties cast on the nearest relative of her deceased husband. (Vasishtha, XVII. 56.) Narada says he may appoint her to a kinsman (viniyog). In the Vyav. May., Chap. IV., sec. IV., paras. 41, 44, and the Viramitrodaya (Transl., p. 105 ss.) the begetting of a son by this agency (a Kshetraja) is provided for as though it still formed part of the jural system. This can hardly have been the case, but the Mitakshara gives him the second place amongst the subsidiary sons, the appointed daughter's son (putrika-putra) being assigned the first.

The interest of the brethren in their brother's wife under the ancient law has been referred to above, p. 394 ss.

(*e*) The daughter of a deceased coparcener must be maintained. See above, p. 469; May., Chap. IV., sec. 8, para. 6; Stokes's H. L. B. 85; *ibid.*, sec. 9, para. 22; Stokes's H. L. B. 97; Mit., Chap. II., sec. 1, paras. 7 and 20; Stokes's H. L. B. 429, 433; *Jykowur et al.* v. *Musst. Bhaotee*, N. W. P. Sel. Ca. for 1863, p. 613. See Narada, Pt. II., Chap. XIII., and as cited by the Viramitrodaya, Transl., p. 255; Digest of Vyavasthas, Chap. II., sec. 3, Q. 14, p. 384. See above, *ibid.*, Chap. II., sec. 1, Q. 17, p. 345; *ibid.*, Chap. II., sec. 6 A, Q. 27, p. 386; *ibid.*, Chap. II., sec. 7, Q. 10, p. 411. In some castes provision has to be made by a reserve for an indigent widowed sister residing with the family; Steele, L. C., p. 405. Comp. above, pp. 227, 234, 239.

(*f*) Steele, L. C., 233, 234.

(*g*) Stokes's H. L. B., p. 97.

(*h*) Stokes's H. L. B., p. 433.

(*i*) Stokes's H. L. B., p. 457. The marriage expenses of boys and girls of the family are to be provided for by a reserve for the purpose in a partition, Steele, L. C., pp. 404, 422; see Narada, Pt. II., Chap. XIII., para. 33. A present made by a deceased father is excluded from partition, see above, p. 207, and comp. Steele, L. C., p. 424, Narada, Pt. II., Chap. XIII., para. 6.

In the case of *Laroo* v. *Manickchund Shajee*, at 1 Borr. 461, there being a son initiated and one uninitiated, by different mothers, and a daughter, it was held that the initiation of the son should take place at the cost of the estate, that the daughter should have a portion of $\frac{1}{4}$ of $\frac{1}{3}=\frac{1}{12}$ of the property, and that the remainder should be evenly divided between the half-brothers, each of whom was to maintain his own mother, Mit., Chap. I., sec. 7, pl. 3, 4, 5, 7; Stokes's H. L. B. 398-9.

The property for partition was in one case pronounced subject to the following charges :

tenance out of an hereditary pension (*k*). A widowed sister, left destitute by her husband, must be provided for by the widows of the deceased in a distribution of his property (*l*).

The rule that all widows of predeceased coparceners, though not entitled to a share on partition, have a claim to maintenance as against the estate (*m*), which is supported by the analogy of the rules regarding wives of persons disqualified from inheriting (*n*), has been laid down by Sir R. Couch, C.J., in *Rama-*

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a. Debts due by the family.
b. Bad debts due to the family included in the aggregate assets.
c. Marriage expenses of unmarried brothers and sisters.
d. Maintenance of female members :
(1) Aunt of parties.
(2) Mother of plaintiff.
(3) Sisters, if unmarried.

A deduction on account of a Mandir, as after separation the plaintiff would not be interested in it, was disallowed, *Damodarbhat* v. *Uttamram*, Bom. H. C. P. J. F. for 1878, p. 231.

(*k*) 2 Str. H. L. 32; above, p. 164.

(*l*) *Ibid.* 83, 90.

(*m*) If there be joint estate sufficient the widow of a deceased coparcener is undoubtedly entitled to maintenance, *Savitribai* v. *Laxmibai*, I. L. R. 2 Bom. 573.

The widow of a predeceased son (undivided) is entitled to maintenance from his father and brothers out of the joint ancestral estate, *Musst. Lalti Kuar* v. *Ganga Bishan et al.*, 7 N. W. P. 261 F. B. The possession of jewels, &c., suited to her station and not productive of income, does not affect a widow's claim to maintenance against her father-in-law. Her productive property should be taken into account, *Shib Dayee* v. *Doorga Pershad*, 4 N. W. P. 73.

The Smriti Chandrika, Chap. XI., sec. 1, pl. 34, 35, fully recognizes the right to maintenance, or by way of compensation to an allotment for life of a share of the undivided property. It assigns a higher right to the Patni, paras. 37, 38.

"The maintenance of *Net Konwar*, the widow of *Muddun Mohun*, was a charge upon the inheritance, which came from *Muddun Mohun*" (in the hands of his son's widow), *per* Sir B. Peacock, in *Baijun Doobey* v. *Brij Bhookun Lall Awasti*, at L. R. 2 I. A. 279.

As to the recognition of the duty by sharers in the mirasi villages of the N. W. P., see Fortescue's Report on Delhi, dated 28th April, 1820, III. R. & J. Sel., at p. 404.

(*n*) Mit., Chap. II., sec. 10, paras. 14, 15; Stokes's H. L. B. 457-8. In *Ujjal Mani Dasi* v. *Jaygopal*, 4 C. S. D. R. 491, the Pundit said that a predeceased son's widow was entitled to maintenance proportionate to the father's estate. In *Rai Sham Ballabh* v. *Prankishan*, 3 C. S. D. R. 33, the widow of a predeceased son was held after the father's decease entitled to no charge but to food and raiment only; to be received in her father-in-law's house, *Ramsoondri Debra* v. *Ramdhun Bhuttacharjee*, 4 C. S. D. A. R. 796. See further

chandra Dikshit v. *Savitribai* (*o*). The question of a widow's right to maintenance is discussed at length in Book I., sec. X., p. 225 (*p*), and the rights as they subsist against the family are those which the heirs must satisfy when they propose to divide the common estate. In Madras a daughter-in-law was held entitled to maintenance (*q*) as a charge on ancestral property held by her deceased husband's father, and free from the condition of residing with him. A Hindu widow's maintenance was pronounced a charge on the estate in any hands, in *Mussamut Khukroo* v. *Joormuk Lall* (*r*). In *Rango Venayek* v.

Khetramani Dasi v. *Kashinath Das*, 2 B. L. R. 55 A. C. J. Sir L. Peel says, in *Judeemani Dasi* v. *Kheytra Mohun Shil*, Vyav. Darp. 384 : " Strange . . . treats the right to maintenance as a charge on the property in the hands of the heir, and it certainly has always been so considered in this Court." He considers the duty to reside with the husband's family merely a moral one; but adds, " We shall award Rs. 10 a month, and the back maintenance must date only from the date of the demand. We might in a proper case say there shall be no back maintenance, and further maintenance should be enjoined only on the condition of residence with the late husband's family. . . ." See *Srinivasammal* v. *Vijayammal*, 2 Mad. H. C. R. 37; *Ramchandra Dikshit* v. *Savitribai*, 4 Bom. H. C. R. 73 A. C. J. In *Musst. Bhilu* v. *Phul Chand*, 3 B. S. D. A. R. 223, a surviving brother was compelled to afford maintenance to his deceased brother's widow, and in a similar case a widow was told that she ought to have sought maintenance and not a share. *Musst. Himulta Chowdraya* v. *Musst. Pudoo Munee Chowdraya*, 4 B. S. D. A. R. 19.

(*o*) 4 Bom. H. C. R. 73 A. C. J. The learned Judge, however, on a subsequent occasion, refused to recognize the authority of this case. See *S. M. Nistarini Dasi* v. *Makhanlal Dut et al.*, 9 B. L. R. 27. He says, " The question there was, as to whether one brother could be sued alone, and it was held that he could." Still the brother appears to have been sued as holding part of the family property, not as liable apart from that circumstance. In *Lakhsman Ramchandra et al.* v. *Satyabhamabai*, I. L. R. 2 Bom. 494, it has been held that the claim is against the estate in the hands of surviving coparceners, and that its non-liability in the hands of an alienee depends on the apparent necessity or propriety of the sale and the absence of fraud on the widow. See also *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai*, I. L. R. 1 Cal. 365; *Sonda Miney Dossee* v. *Jogest Chunder Dutt*, *ibid.* 2 Cal. 262; above, pp. 239, 241, 250.

(*p*) Above, p. 238 ss.

(*q*) *Visalatchi Ammal* v. *Annasamy Sastry*, 5 M. H. C. R. 150.

(*r*) 15 C. W. R. 263. A person entitled by a decree to maintenance out of an estate may apparently enforce it as a charge on the property into whatever hands it goes. See *S. Baghabati Dasi* v. *Kanailal Mitter et al.*, 8 B. L. R. 225; *Koomaree Debia* v. *Roy Luchmeeput Singh*, 23 C. W. R. 33. See *Heera Lall* v. *Musst. Kousillah*, 2 Agra H. C. R. 42. In a partition enforced by a creditor in order to make the father's share available for payment of his claim, the share

Yamunabai (*s*) it was held that a widow of a coparcener in Bombay, though entitled to maintenance, cannot generally claim a separate maintenance. So also the Sastris, above, pp. 348, Q. 12, and 354, Q. 25, and in *Kashee Chander's Case* referred to in 3 Mor. Dig. 178 (*t*) but in *Kasturbai* v. *Shivajiram* (*v*) it is said, " Where there is family property available for maintenance it lies upon the parties resisting the claim to a separate maintenance to show that the circumstances are such as to disentitle the widow thereto " (*w*).

This doctrine must now be regarded as that of the Judicial Committee, which has declared that a Hindu widow is not bound to residence in her husband's family (*x*). The cases, therefore, decide that a coparcener's widow *is* entitled to maintenance (*y*), and *is not* bound to residence. In a case of actual partition it is generally necessary to provide for the widows by separate allotments or charges, both in order to secure their maintenance and as a necessary element of an exact distribution of the estate and its burdens amongst the coparceners (*z*). In Bengal the liability

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of the wife should be provided for, *Babu Deendayal Lal* v. *Babu Jugdeep Narain Singh*, L. R. 4 I. A. 247. Arrears may be awarded as well as future payments, *Raja Pirthee Singh* v. *Rani Rajkooer*, 12 B. L. R. 238.

(*s*) I. L. R. 3 Bom. 44. See above, p. 75.

(*t*) In *Shiva Sundari Dasi's Case* (Vyav. Darp. 381), Sir L. Peel held that the widow of a predeceased son was entitled to maintenance as against the father-in-law and brothers-in-law though she had quitted the family house at her own mere pleasure. This is quoted with approval in *Raja Pathan Singh's Case*, L. R. S. I. A., at p. 247. So *Koodee Monee Dabea* v. *Tarachand Chuckerbutty*, 2 C. W. R. 134. But where father and son had been separated it was held that the son's widow was not entitled to maintenance, *Rujjomoney Dossee* v. *Shibchunder Mullick*, 2 Hyde 103; *Parvati* v. *Kisansing*, I. L. R. 6 Bom. 567. See above, p. 229 ss.

A widowed daughter or sister after being supported by a man in his life must, in parts of the Panjab, be supported by his heirs after his death, Panj. Cust. Law, Vol. II., p. 180.

(*v*) I. L. R. 3 Bom. 372.

(*w*) See above, p. 253.

(*x*) See above, p. 251 ss.

(*y*) See above, p. 345, Q. 17; p. 386, Q. 27; p. 411, Q. 10.

(*z*) *In the case of Kalu* v. *Koshibai*, Bom. H. C. P. J. 1882, p. 420; S. C. I. L. R. 7 Bom. 127, a claim was made by a son's widow against her father-in-law to maintenance for herself and her children. It was held that neither the widow nor the children were entitled to subsistence, the father-in-law's property being self-acquired. As to the former the Court relied on the case of *Savitribai* v. *Laxmibai*, I. L. R. 2 Bom. 574. If the reasons given in sec. 10 of Book I. are valid the claim of a son's widow in a united family is

of the ancestral estate to support a widowed daughter-in-law has

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not, according to the Hindu Law, dependent on the existence of joint family property : it is founded on the family relation, and the value of the property is significant only as a means of determining the proper amount of style of maintenance. The judgment of Nanabhai Haridas, J., in *Udaram* v. *Sonkabai* expresses the view of the Hindu authorities more correctly than the recent one in which he concurred with Sir C. Sargent, C.J.

The Mit. in the chapter to be presently referred to insists most strongly on a man's duty to support all members of his family, and forbids his parting with even his self-acquired property so as to impair his ability to discharge the duty. How far the duty extends is not defined, as far probably as the united family, which seldom comprises relatives more remote than first cousins, and can be broken up at will. It may safely be said to reach as far as a son's family, seeing that the precepts expressly include grandchildren, and the connexion is so strong that the son and the grandson are the first heirs, and must by Hindu law pay their ancestors' debts irrespective of family estate. See above, pp. 263, 264.

The Hindu girl has no voice in choosing her husband. She has no claim on her family of birth so long as her family of marriage can sustain her. See Narada, Pt. II., Chap. XIII., paras. 27-29; above, p. 75. Her already pitiable lot as a widow must become in many cases desperate if she is reduced to homelessness and starvation in the face of the strongest precepts, hortatory or imperative, of her national law. See above, pp 225, 239. In denying the claim of the grandchildren the Court refers to *Savitribai's Case* as expressing the opinion of three Judges that the direction to support a child is imperative. But the legal obligation does not extend, it is said, beyond the son. For this a passage is cited from Strange's Manual, sec. 209, purporting to be an extract from the Mit., "On the Retraction of Gifts," but which is not to be found there. That section is a commentary on Yajnavalkya, Book II., sl. 175, the sense of which is that a man may bestow his own in so far as he does not thereby injure the family, but never his whole property while his posterity survive. Vijnanesvara expounds "svam" in the Smriti as meaning "atmyam" (=specially his own, or personal property, as contrasted with the common estate). He divides things with reference to gift into four classes, alienable and inalienable, and (the usual forms of alienation having been gone through) into alienated and unalienated. In distinguishing the first two classes he repeats that of a man's (proprium) self-acquired property only so much is alienable as exceeds the family's needs. As a ground for the limitation he insists on the paramount right of the family to support. To establish this he quotes Manu's text : "Aged parents, an honourable wife, an infant child, must be maintained even through a hundred trespasses." (Comp. Manu VIII. 389.) Presently afterwards he incidentally quotes Narada (see Transl. p. 59) to the effect that a man having issue must not alienate his whole property. Lastly he construes the text as forbidding the alienation of the whole property, however completely one's own, that is though self-acquired, while issue (son or grandson or the like "putra-pautradi") survive. Thus the obligation imposed by Manu, so far from being treated as exceptional or as limited to the literal sense of the precept, as Mr. Strange must have thought, is made an example of the duty to

been asserted (*a*) and denied. The actual decision in the latter case did not necessarily involve an absolute negation of the right as it was limited to a statement that " as long as she elects to live with her own father she has no legal right to be maintained by her father-in-law " (*b*), a rule quite in accordance with the native authorities (*c*) and the customary law of Bombay; but it was said that " a daughter-in-law has no legal right to be maintained whether she lives with her father-in-law or not." This is opposed to the Hindu authorities (*d*) and to the custom of the Bombay presidency. Where there was ancestral property it is opposed in its result to the recent Bombay decisions; but it agrees with them in principle, and has been relied on in them as an authority (*e*). If the right of the widow of a son, or other member of a united family, depends altogether on her deceased husband's having been, not a co-member of an undivided family, but a joint owner of property with the surviving members against whom the widow's claim is directed, then as the son in Bengal does not in any practical sense become a co-owner with his father by birth, he cannot, on his predecease, leave anything out of which his widow can claim maintenance. That this is not the real basis of the widow's right has been shown in Book I. (*f*), but

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the family generally. The precept that he who has begotten a son and performed his tonsure shall provide for his sustenance is relied on for the rule that the alienation of his (proprium or personal, *i.e.*) self-acquired property is subject to restrictions so long as posterity exist. The section of the Mitakshara is translated in the Appendix. It is in accordance with the chief Hindu authorities that Jagannatha says : " If the person entitled to subsistence be not excessively vicious and the householder being mad give away his estate the donation is void," Col. Dig., Book II., Chap. IV., Text XV. Comm. See also Steele, L. C. 68. If the family of an outcast son can claim maintenance it seems that the right subsists equally where the son has died. See Col. Dig., Book V., T. 334, and comp. Virada Chintamani, Trans., p. 291.

(*a*) *Musst. Heera Kooeree* v. *Ajoodhya Pershad*, 24 C. W. R. 475.

(*b*) *Khethu Monee Dossee* v. *Kasheenath Doss*, 10 C. W. R. 89 F. B.

(*c*) See Vyav. May., Chap. IV., sec. 8, para. 7; Stokes's H. L. B. 85; Narada, Dayabhaga, paras. 28, 29, Transl., p. 98; above, pp. 227, 247 ss.

(*d*) Above, pp. 227, 247, 249, 254, 386, 411. The Viramitrodaya, in arriving at the conclusion that women are generally incompetent to inherit, says, " The daughter-in-law and the like are entitled to maintenance only." See Transl., p. 244.

(*e*) See *Savitribai* v. *Laxmibai*, I. L. R. 2 Bom., at p. 617.

(*f*) Above, pp. 233, 239 ss. Comp. Col. Dig., Book II., Chap. IV., T. 28 Comm. *in med.* on the mother's right.

it seems unlikely now that the Hindu theory should reassert itself against that by which it has been replaced.

Subject to any qualifications which the recent decisions have introduced, it may be said that the daughter-in-law's right, like every coparcener's widow's right, to maintenance has always been recognized in the Bombay presidency (*g*). In the case of *Ram-koonwur* v. *Ummur et al.* (*h*), a daughter-in-law and her daughter were pronounced entitled to maintenance by the stepmother-in-law, who had succeeded to the father-in-law's property. The mother-in-law was pronounced incompetent to dispose of the immovable property. At 2 Macn. H. L. 111 it is similarly laid down that a widowed daughter-in-law is entitled to board and residence with her mother-in-law, but not to an allowance if she choose to live apart (*i*). The latter part of this rule may now probably be held superseded by the decisions, except perhaps where it can be maintained as a caste law.

Where a separate maintenance has been awarded, it may be increased or diminished upon proper cause shown (*k*). The order may be made subject to variation (*l*). Arrears may be awarded (*m*)

(*g*) See above, pp. 239, ss. 411; 1 Str. H. L. 124, 172, 244; 2 *ibid.* 412, 235, 233, where Colebrooke (referring to Mit., Chap. II., sec. 1 and 2, Stokes's H. L. B. 364-380) and Sutherland recognize the daughter-in-law's right in a case wherein the deceased son had no separate property. At page 297, Colebrooke, referring to Mit., Chap. II., sec. 1, p. 7 (Stokes's H. L. B. 429), says that even half-brothers of a widow's deceased husband are bound to maintain her. See the case of *Savitribai* v. *Laximibai*, I. L. R. 2 Bom. 573, discussed above, pp. 235 ss. In *Apaji Chintaman* v. *Gangabai*, Bom. H. C. P. J. 1878, p. 127, a widow's claim against her brother-in-law to a pecuniary allowance and the expenses of a pilgrimage was rejected. See *Ambawow* v. *Rutton Krishna et al.*, Bom. Sel. Ca., p. 150. The decision in *Chandrabhagabai* v. *Kasinath*, above, p. 234, is supported by 1 Str. H. L. 172, but cannot be thought consistent with the more recent decisions. As to the measure of maintenance of a predeceased coparcener's wife see 2 Str. H. L. 291, 294, 199; *Satyabhamabai* v. *Lakshman Ramchandra*, Bom. H. C. P. J. 1880, p. 62. Some of the elements in determining what is a suitable maintenance for a Hindu widow out of her deceased husband's estate were considered in *Sreemutty Nittokissoree Dossee* v. *Jogendro Nauth Mullick*, L. R. 5 I. A. 55.

(*h*) 1 Borr. 458.

(*i*) See also Digest of Vyavasthas, Chap. I., sec. 2, Q. 23, 24, p. 336; Chap. II., sec. 1, Q. 6, 17; sec. 3, Q. 9; sec. 6A, Q. 27, 28; sec. 7, Q. 10; 2 Str. H. L. 235.

(*k*) See *Sreeram Buttacharjee et al.* v. *Puddomokee Debia*, 9 C. W. R. 152 C. R.; *Ram Kullee Koer* v. *Court of Wards*, 18 C. W. R. 478; *Rukka Bai* v. *Gonda Bai*, I. L. R. 1 All. 594. Above, p. 253.

(*l*) Above, p. 257; *Nubo Gopal Roy* v. *S. Amrit Moyee Dossee*, 24 W. R.

contrary to the opinion of the Sastri (*n*), who thought the widow entitled only to maintenance from day to day. The case of *Saruswutee Baee* v. *Kesow Bhut* (*o*), taking the Sastri's view, is counterbalanced by that of *Sakvarbai* v. *Bhavanji Raje* (*p*) which regards the point as unsettled. A widow's right to maintenance cannot be sold in execution of a decree or otherwise transferred (*q*). It is a proper course to make an investment in order to secure the maintenance (*r*). Limitation barring a claim for maintenance runs only from the time when maintenance was refused or the right denied (*s*).

V.—Rights and Duties arising on Partition.

§ 7. The rights and duties of the coparceners towards each other, arising upon partition, relate to

A. The determination of the shares to which the sharers are severally entitled.

B. The distribution of the common liabilities:
1. Of debts. 2. Of other liabilities.

428, and cases under (*a*), and *Ramchandra Vishnu* v. *Sagunbai*, Bom. H. C. P. J. 1879, p. 450. A Court is not justified in reducing, as a punishment for a vexatious defence to a suit, the amount of maintenance which it would otherwise have awarded, *Sreemutty Nittokissoree Dossee* v. *Jogendro Nauth Mullick*, L. R. 5 I. A. 55. See *Moniram Kolita* v. *Kerry Kolitany*, above, p. 249. Where maintenance was withheld the Sastris have in several instances recognized a right in the widow of a kind of *pignoris capio* to seize a part of the estate for her support. Comp. the cases under sec. 3A, above, p. 606, note (*w*).

(*m*) *Venkopadhyaya* v. *Kavari Hengusu*, 2 M. H. C. R. 36.

(*n*) *Ramachendra Poy* v. *Luxoomy Boyee*, M. S. D. A. R. for 1858, p. 236.

(*o*) 1 Morr. 247.

(*p*) 1 Bom. H. C. R. 194.

(*q*) *Bhyrub Chunder* v. *Nubo Chunder*, 5 W. R. 112; *Ramabai* v. *Ganesh Dhonddev*, Bom. H. C. P. J. 1876, p. 188. See above, pp. 247, 288.

(*r*) Above, pp. 75, 163. As to a concubine's right to maintenance out of a family pension, see 2 Str. H. L. 32. But where a Saranjamdar had made a grant of land to a lady it was held that she could not retain it against the will of his descendant, as the Government had, in bestowing the Saranjam, intended it, as they declared, as a "provision for an ancient house" inalienable from the family, *Jamna Sani* v. *Lakshmanrav*, Bom. H. C. P. J. 1881, p. 6.

(*s*) *Timmappa Bhat* v. *Parmeshriamma*, 5 Bom. H. C. R. 130 A. C. J.; *Narayanrao Ramchandra* v. *Ramabai*, L. R. 6 I. A. 114; *Ramchandra Dikshit* v. *Savitribai*, 4 Bom. H. C. R. 73 A. C. J.; Act IX. of 1908, Sched. I. 129. See above, pp. 252, 253.

A. With respect to the determination of the shares for actual enjoyment, this has regard only to the property as it actually subsists without allowances for previous inequalities of expenditure (*t*). In the case of an enforced partition complete accounts must be taken (*v*). Securities are to be given up to the Court, and

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(*t*) See above, "SEPARATION;" Col. Dig., Book V., Chap. VI., T. 377, 378; *Chuckun Lall Singh* v. *Poran Chander Singh*, 9 C. W. R. 483 C. R., where, however, what is said as to a manager's accountability to a minor coparcener, is opposed to Col. Dig., Book V., T. 136, and Viram. Tr., pp. 41, 247. At 5 B. L. R. 347 (*Abhaychandra Roy Chowdry* v. *Pyarimohan Guho et al.*) also it is said that a manager is liable to render an account to the other members of the joint family; but this is to be taken only in a qualified sense, at least in Bombay. See also the case of *Ranganmani Dasi* v. *Kasinath Dutt et al.*, 3 Beng. L. R. 1 O. C. J. As to charges that may be thrown solely on the manager's share, see 2 Str. H. L. 339-345. See also the case of *Appovier* v. *Rama Suba Iyen et al.*, 11 M. I. A., at p. 89; *Joitaram Bechur* v. *Bai Ganga*, 8 Bom. H. C. R. 228 A. C. J.; *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; Dayakrama-Sangraha, Chap. VII., para. 29; Stokes's H. L. B. 512. A liability does not arise to account for assets until they are realized, *Lakshman Dada Naik* v. *Ramchandra D. N.*, I. L. R. 1 Bom. 561. If only one member separates there is merely a computation and a severance of his share, Steele, L. C. 214. The customary law in most castes is very jealous of a single parcener's right to acquisitions made by himself, especially as to immovable property. Traditional sentiment, unreasonable as it is, connects such property at once with the whole family, see Steele, L. C., 401. All that has been gained by individual parceners, therefore, is generally an accession to the estate to be divided, (see above, p. 725 ss.) though the Smritis, as Vasishtha, Chap. XVII., para. 26, recognize the acquirer's right to a double share, or as Gaut., Chap. XXVIII., para. 27, to the whole gain of learning. Where a business was carried on in a son's name it was still presumed to be joint property, *Narayan Jivaji* v. *Anaji Konerrao*, Bom. H. C. P. J. 1883, p. 91.

(*v*) Three sons out of six sued for partition of an estate wrongly maintained to be impartible. They were awarded their moiety and three years' arrears on an account of income and of expenditure for the benefit of the joint family, *Rajah Venkata Kanna Row* v. *Rajah Rajagopala Appa Row Bahadur*, L. R. 9 I. A. 125.

Here, the claim having been wrongly resisted, the relief to the plaintiffs was substantially put on the same footing as if that had been done which ought to have been done. *Damodar* v. *Uttamram*, I. L. R. 17 Bom. 271; *Bala* v. *Muthu*, I. L. R. 32 Mad. 271. Under the Dayabhaga an account must be rendered by the managing member of the joint family, *Obhoy* v. *Pearey Mohun*, 13 W. R. 75, F. B. According to the Mitakshara it cannot be claimed from a member for past transactions, and it has been so laid down both by the Bombay and the Madras High Courts, *Narayan* v. *Nathaji*, I. L. R. 28 Bom. 201, 208; *Bala* v. *Muthu*, I. L. R. 32 Mad. 271. The liability to render an account is, however, based upon the interference with the enjoyment of copar-

if necessary a receiver and manager is to be appointed (*w*). All the coparceners must be before the Court (*x*). (Katyayana says) "The unequal consumption of unseparated kinsmen shall not be removed (= rectified). The purport is that unequal consumption cannot be prevented as it is unavoidable" (*y*). This is the view expressed by Sir C. Turner, C.J., in Madras (*z*), and by Melvill, J., in *Konerav* v. *Gurrav* (*a*), in which case there had been not only joint enjoyment but a separate enjoyment of portions by different members but in the exercise of the common right. The Supreme Court of Bengal throw out an opinion (not deciding the point) in *S. Soorjeemoney Dossee* v. *Deenobundoo Mullick* (*b*), that inequalities of expenditure are commonly in the present day taken into account on a partition, and that, according to Col. Dig., Book V., T. 373, a co-sharer is liable for sums expended on personal enjoyment, not for the benefit of the family (*c*). The question is discussed at some length in the case of *Meghasham* v. *Vithalrao* (*d*), from the judgment of which, as it is not reported, the following extract may be given:

"As to the next two objections, the object in taking accounts with a view to partition of an estate must, in the absence of fraud or gross misconduct, be simply to ascertain the existing nature and value of the property. The Hindu Law does not subject each and every member of a united family to an account of the portions taken by him from the common stock, and make him liable to

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cenary rights by a coparcener; but when the enjoyment of the rights is joint, as it is under normal conditions, a claim for account for past transactions cannot be sustained.

(*w*) *Rangrav Subrav* v. *Venkatrov Vithalrav*, P. J. 1878, p. 184.

(*x*) *Rakhmaji* v. *Tatia Ranuji*, P. J. 1878, p. 188.

(*y*) Viram., p. 245, 247, which also pronounces a co-sharer answerable for positive fraud.

(*z*) *Ponnappa Pillai* v. *Pappuvayyangar*, I. L. R. 4 Mad., at pp. 59, 60; *Krishna* v. *Subbanna*, I. L. R. 7 Mad. 564.

(*a*) I. L. R. 5 Bom. 589.

(*b*) 6 M. I. A. 540.

(*c*) "A coparcener is not, as a rule, entitled to an account against another in respect of payments made by the former." Hence the Court inferred that one could not sue another in union for contribution towards land tax paid by the former, *Nanabhai Valabhdas* v. *Nathabhai Haribhai*, Bom. H. C. P. J. 1880, p. 154.

The position of the coparceners may in this respect be compared to that of a husband and wife liable to each other for positive fraud, but not for ordinary inequalities of expenditure.

(*d*) S. A. No. 148 of 1871, decided 14th September, 1871, Bom. H. C. P. J. F. for 1871.

restore all that he has taken in excess of his proper proportional share. So long as the family subsists undivided, it is regarded by the law rather as an integral unit in the community than as an aggregation of members, with reciprocal duties and rights admitting of precise arithmetical definition, and completely enforceable by the state. This, which was a common and prevailing conception in the earlier ages of the world, as Sir H. S. Maine has shown in his Ancient Law, pages 134, 183, is supported as to the Hindu community by many texts of recognized authority. Katyayana, quoted by Jagannatha in his Digest, Book V., Chap. III., T. 136, says 'Let not a co-heir be obliged to make good what he expended before partition.' There is even added this precept, 'Effects which a kinsman has embezzled, let not a co-heir use violence (compulsion) to make him restore.' So intimate down to the period of partition is the union of the family that protection otherwise than by remonstrance against unauthorized individual appropriations, is hardly thought compatible with it. Even in Bengal, where the power of each member of a united family to deal with his own share of the property has long been recognized, traces of the earlier and more general system are still very easily discovered; Jimuta Vahana (Dayabhaga, Chap. XIII., Stokes's H. L. B. 355-360), treating of this very subject of embezzlement or unauthorized appropriation, denies to it a strictly criminal character like theft; for he says, in accordance with the law of the Benares and Western Schools, though not with his own previous precepts, 'previous to partition a discriminative (several) property referable to particular persons relatively to particular things is not perceived.' A similar principle underlies the reasoning of Jagannatha in his Commentary on Texts 136 and 378 of Book V. of Colebrooke's Digest, and it is to be observed that the ancient texts are much more curt and decisive in their original form than as toned down by the glosses of more recent commentators. The position and responsibilities of the Karta or manager do not at present differ materially from those of any other member of the family. He holds a precarious office from which he may at any moment be deposed by the general wish of the family. He is not a trustee required as in ordinary cases of trusteeship to keep accounts of his own expenditure, or of that of the other members, or of supplies taken out of the common stock (*e*). The remedy for his misconduct is his deposition, or a

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(*e*) In the case, however, of *Doorga Persad* v. *Kesho Persad Singh*, L. R. 9 I. A. 27, it was contended that Shev. Nandan Persad, the elder uncle of two infants, had represented them sufficiently in a suit as defendant, he being their co-proprietor and manager of the estate, and having been retained as their guardian on the record when their mother's name as guardian was struck out. The Judicial Committee say that "the manager . . . is not the guardian of infant co-proprietors . . . for the purpose of defending suits against them in respect of money advanced with reference to the estate." Reference is then made to Act XL. of 1858, corresponding generally to Act XX. of 1864. This says: "The care of the persons of . . . minors . . . and the charge of their property shall be subject to the jurisdiction of the Civil Courts"; and again, "Every person who shall claim a right to have charge of property in trust for a minor under a will or deed or by reason of nearness of kin or otherwise may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which

partition of property in which, as will be seen, an adequate account can in general be taken.

"As regards a minor this remedy is not to the full extent available. He cannot himself join in deposing a Karta or make a claim for a partition. It is not reasonable that he should suffer by the mere misfortune of his possessing no friend so interested in his welfare as to bring a suit in his name for a partition. The Hindu Law appeals as emphatically (Col. Dig., Book II., Chap. IV., T. 17) as the English to reason, the reason of the law (Coke, I. Inst. I. II. S. 138), and the misappropriation, which a minor is powerless to check at the time, he may yet claim to have remedied as soon as he is *sui juris*. Gross and

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he claims the charge until he shall have obtained such certificate." On this it is said, "No certificate was obtained by Shev Nandan Persad, and although it is stated that he was guardian of the infants, he clearly was not the legal guardian, and had no right to defend the suit in their name. The decree in the suit therefore was not binding on the infants." Yet as the debt had originally been that of their father they were held responsible for one-sixth, which it seems was the share assumed by some one on account of the infants in a partition (comp. p. 613, *supra*). It does not seem that Sheo Nundan really sought or held charge of joint property in trust for the minors. As senior member of a united family, he would be their joint tenant if an English Law term is appropriate, holding every part of the property as his own (*per mie et per tout*) accountable in no other way than as the Hindu Law makes a managing member of a family accountable for gross malversation. As manager he could, according to most of the decisions, represent the aggregate interests of the family in the Civil Court (see above, p. 573). The family, however, had manifestly become divided when the nephews by their suit sought exoneration from liability. This division may have occurred before the suit against Shev Nandan and the nephews. In that case they might remain co-proprietors with Shev Nandan as manager, and still hold separate interests like tenants in common under the English Law. Such separate interests could not be taken charge of without breaking up the integrity of the estate essential to the united family. In the beginning of the report, however, the uncle and nephews are described as members of a joint Hindu family. If in such a case the joint right of infant members along with the manager is a property which can be taken charge of by way of trust, and must be so taken for proceedings at law, the manager is necessarily deposed from the place assigned to him by the Hindu Law. The distinction of rights is in fact incompatible with a continuance of the joint family as shown in *Appovier's Case*, see above, pp. 646, 649.

On the point whether the decree obtained by the creditor could bind the infants without their having been represented by a guardian, their Lordships say: "It is not necessary now to inquire, because the Courts below went into the question of whether the bond was given for a debt for which the infants were liable, and held that it was not." But the High Court had decreed that the infants were liable and must pay the share of the debt apportioned to them. This, according to the view taken in the Judicial Committee, was opposed to the principle laid down in *Deen Dayal's* and *Suraj Bunsee Koer's Cases*, but the decree of the High Court was affirmed. The case thus presents difficulties and has perhaps been imperfectly reported.

reckless waste, as well as downright fraud, which an adult coparcener would have guarded against by insisting on partition, forms a proper ground of action on the part of one who could not at the time adopt that remedy. Yet mere ordinary extravagance does not entitle a minor on attaining his majority to an account of sums expended, and a compensation for those in excess of the Karta's proportional share, for which the texts of the Hindu Law make no provision, and which would be plainly opposed to its fundamental principle of the integrity of a family united in sacra (Maine A. L. 192) and in interests. If such an account could be exacted indeed, the birth of a son would immediately impose on his father the necessity of recording every item of income and expenditure. The adult member of a family, who sees a way opening by which he may attain opulence, cannot easily free himself from the embarrassment of minor members entitled to share his gains, and the same closeness of connexion, which thus makes them sharers of his gains (*f*), makes them sharers also in the losses occasioned by his indiscretions, so long as these do not proceed to an outrageous length.

"It must, therefore, in a suit, brought by a Hindu on attaining his majority, for partition against the other member or members of his family, always be a matter very much within the discretion of the Court to determine whether all just and reasonable bounds of expenditure have been so exceeded that the member sued may properly be made responsible for the excess. The social position of the parties, the recognized customs of their class, and many other circumstances may be taken into account; and the presumption, in the absence of evidence, is always that the estate simply as it subsists at the moment of the suit is that of which the claimant can demand his proper aliquot part (*g*). For the event of fraud distinct provisions are made. The Vyavahara Mayukha (*h*) lays down what is to be found in many other works, that the brother, who by concealing the extent of the property defrauds co-heirs, shall be punished by the King; and property whether purposely concealed or accidentally omitted from the partition is everywhere recognized as a proper subject on its discovery for a further distribution on the same principle as the former one.

"As to the determination of what the subsisting estate really is, what the

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(*f*) Though the cleverest of a family take the management from an inefficient senior, and make gains, he is not therefore entitled to a larger share than his brethren in partition; Steele, L. C. 397. But he is entitled to a recoupment of losses sustained or of debts paid out of his separate property on the joint account; Steele, L. C. 213, 214.

(*g*) See the remarks of Jagannatha in Col. Dig., Book V., T. 374; *Venkatest* v. *Ganpaya*, Bom. H. C. P. J. 1876, p. 110; *Ridhakarna* v. *Lakhmichand and others*, P. J. 1878, p. 238; *Konerrav* v. *Gurrav*, I. L. R. 5 Bom. 589. In the case of *Appa Rav* v. *The Court of Wards*, I. L. R. 5 Mad. 236, the same principle was acted on by the Privy Council. The plaintiffs were awarded as against the defendants their moiety of a Zamindari and of the mesne profits from the time of their dispossession, but subject as to the profits to the statutory limitation of three years before the institution of the suit. The moiety of the estate would necessarily, in the absence of a special direction, be a moiety of it as it existed at the time of the plaintiffs' ouster.

(*h*) Chap. IV., sec. 7, para. 24; Stokes's H. L. B. 79.

Hindu Law prescribes as a test in doubtful cases is an application of the Kosha ordeal (*i*). We have got beyond that stage of progress in which so rude a method of investigation can any longer be effectual, as once sometimes it was, by its operation on the conscience of the person exposed to it. The more practical method of an enquiry into facts as they can be proved by testimony must be pursued, as that which, however imperfect, is the one that can be applied with the best hope of success. This resolves itself virtually in a case like the present into the preparation of an account on the principles already laid down of the existing property and of those further sums, if any, for which the person sued may properly be made answerable" (*k*).

The partition is regulated by the nature of the property, as (1) divisible, or (2) naturally indivisible. In the former case the partition proceeds regularly by a distribution in specie of portions amongst the sharers. The amount of the portions varies according to the status of the sharer in the family, and, in some cases, according to the nature of the property.

We have to distinguish

b. The partition between brothers and collaterals undivided.
descendants.

(1) Of ancestral property.

(2) Of self-acquired property.

b. The partition between brothers and collaterals undivided.

c. Between coparceners reunited.

A. 1. *a*. (1) *Partition between ancestor and his first three descendants*.—On a partition between an ancestor and his descendants to three generations of ancestral property, the shares are equal (*l*). As between the ancestor and each of his sons or the issue of each, and between the several sons or the representatives of each (*m*).

(2) On a partition of self-acquired property made spontaneously by the head of the family, he may reserve for himself a double

(*i*) Vyav. May., Chap. IV., sec. 6, para. 3 (Manu, cited Col. Dig., Book V., T. 374); Stokes's H. L. B. 73.

(*k*) See also below, Digest of Vyavasthas, Chap. II., sec. 1, Q. 9; Chap. III., sec. 2, Q. 4, Remarks; Steele, Law of Caste, 53, 208.

(*l*) Mit., Chap. I., sec. 5, para. 8; Stokes's H. L. B. 393; Narada, Pt. II., Chap. XIII., sl. 12. Traces of the ancient rule giving a larger share to the eldest son are still to be found. See Book II., Vyav., Chap. I., sec. 2, Q. 2, Rem.; Steele, L. C. 210, 218.

(*m*) In a few castes the sons share according to a patnibhag, see above, pp. 273, 399, but in the great majority they take equally, Steele, L. C., pp. 419, 420.

share (*n*). But not if the partition be enforced by the descendants. This follows from the text which states that "if the father makes a partition *by his own* desire, he receives a double share" (*o*), and is also particularly stated in the Viramitrodaya (*p*). The descendants take equal shares *per stirpes* (*q*); unequal partition by deduction formerly recognized is not admitted in the present (Kali) age. Under the ordinary law, a father is not at liberty to dispose of his property in favour of one son to the prejudice of the others, either by way of gift *inter vivos* or by way of bequest (*r*). As the Hindu Law, however, admits the father's right of disposal over self-acquired movables, there would be no objection to his making an unequal distribution of this portion of his property amongst his sons (*s*). The Bombay High Court has ruled (*t*) that "a father united with his son has full power to alienate self-

(*n*) Mit., Chap. I., sec. 5, para. 7; Stokes's H. L. B. 392; May., Chap. IV., sec. 4, para. 12; Stokes's H. L. B. 50. See Col. Dig., Book V., T. 388, Comm. *ad fin.* The limited power of a father over his patrimony and even over his own acquisitions may be looked on as the general rule in jurisprudence, wherever the family has risen to importance. In France and the countries which have adopted the French Code, the portion of which a father can dispose in his estate is limited to his aliquot part, counting himself and his children together. Thus with three sons he can by gift or by will alien only one-fourth of his property. To a wife, however, he may give one-fourth in full ownership, and the usufruct of one-fourth more, provided that if he were a widower with children when he married her she cannot have more than the smallest portion given to a child. the continental jurists of Europe, at least as subtle and inconclusive as any the widow's capacity as a beneficiary is or is not, where there is but one child, less extensive than that of a stranger, have given rise to discussions amongst the Continental jurists of Europe, at least as subtle and inconclusive as any with which Jagannatha and his precursors in India have been reproached.

(*o*) That this is the law only as to self-acquired property is stated in *Badri Roy* v. *Bhagwat Narain Dobey*, I. L. R. 8 Cal., at p. 653.

(*p*) Tr., p. 63, 65.

(*q*) *Debi Parshad* v. *Thakur Dial*, I. L. R. 1 All., at p. 113.

(*r*) *Bhujangrav* v. *Malojirav*, 5 Bom. H. C. R. 161, A. C. J.; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 1 Bom. 561; S. C. in App. L. R. 7 I. A. 181; Col. Dig., Book V., Chap. I., T. 27, 28; and *infra*, Book II., Vyav., Chap. I., sec. 2, Q. 2 and 5; Mit., Chap. I., sec. 3, para. 4, Stokes's H. L. B. 382; May., Chap. IV., sec. 4, para. 11, *ibid.* 50.

(*s*) Mit., Chap. I., sec. 1, para. 27, Stokes's H. L. B. 375; May., Chap. IV., sec. 1, para. 5, *ibid.* 43. A testamentary bequest cannot be made so as to cause an unequal division of ancestral movables, *Manakchand* v. *Nathu Purshotam*, Bom. H. C. P. J. 1878, p. 204.

(*t*) *Gangabai* v. *Vamanaji*, 2 Bom. H. C. R. 304.

acquired land," which implies a complete power of disposal (*v*), and so has the Privy Council in *Rao Balwant Singh* v. *Rani Kishori* (*w*). According to this principle, the head of a family would be equally unfettered in the distribution of his immovable as of his movable self-acquired property (*x*).

(*v*) See also *Muddun Gopal Thakoor et al.* v. *Ram Buksh Pandey et al.*, 6 C. W. R. 71 C. R.; *Bawa Misser et al.* v. *Rajah Bishen Prokash Narain Singh*, 10 *ibid.* 287 C. R.; *Gunganath* v. *Joalanath et al.*, N. W. P. S. D. A. R. for 1859, p. 63; and below, Book II., Vyav., Chap. I., sec. 2, Q. 2-8, Rem.; and sec. 3, Q. 1, Rem. An unequal distribution of acquired property by the father is in some degree generally recognized by caste custom, subject only to the claims of the family to maintenance, and to protection against mere caprice. Steele, L. C., pp. 58, 62, 216, 408.

(*w*) L. R. 26 I. A. 54.

(*x*) But see also 1 Str. H. L. 20, 21; 2 *ibid.* 9, 11, 13, 439; and Col. Dig., Book II., Chap. IV., sec. 1, T. 13, 14.

As to what is included in immovable property according to the Hindu Law, see Smriti Chandrika, Chap. VIII., para. 18, and note; Chap. XI., sec. 1, paras. 44-48; *Jamiyatram* v. *Parbhudas*, 9 Bom. H. C. R. 116; *Maharana Fatesanji* v. *Desai Kalyanraya*, 10 *ibid.* 189 P. C.; *Raiji Manor* v. *Desai Kallianrai*, 6 *ibid.* 56 A. C. J.; *The Government of Bombay* v. *G. Shreegirdharlalji*, 9 *ibid.* 222; *Balvantrao* v. *Purshotam et al.*, 9 *ibid.* 99; *Krishnabhat* v. *Kapabhat et al.*, 6 *ibid.* 137 A. C. J.; *Bharatsangjee* v. *Navanidharaya*, 1 *ibid.* 186; *Sangapa* v. *Sanganbasapa*, R. A. No. 40 of 1875, Bom. H. C. P. J. F. for 1876, p. 214; *Shivagavda* v. *Dharangavda et al.*, R. A. No. 7 of 1875, *ibid.* for 1875, p. 144; *Sitaram Govind* v. *The Collector of Tanna*, S. A. No. 193 of 1874, *ibid.* for 1875, p. 141; *The Collector of Thana* v. *Hari Sitaram*, I. L. R. 6 Bom. 546. According to these decisions a hak or right appendant to an hereditary office or to membership of a group of village Mahars is immovable property within the meaning of the Limitation Acts, and is not personal property within the meaning of sec. 6 of Act XI. of 1865 (the Small Cause Court Act for the Mofussil). Consequently the Small Cause Courts have not jurisdiction in such cases even over claims for definite sums sued for as arrears. The contrary view, suggested by *Hanmantrav Sadashiv* v. *Keru*, Bom. H. C. P. J. 1875, p. 291, and *Naru Pira* v. *Naro Shidheshvar*, I. L. R. 3 Bom. 28, cannot safely be followed. The rulings have been embodied in Act IX. of 1908, sec. I., art. 132, which says that Malikana and Haks are for limitation to be deemed charges on immovable property.

Tithes under the English statute law are hereditaments, and a rent was regarded in early times as an estate subject to the "assise" for possession; but all things of value not being land or interests in land (and some interests in land) are by the English Law "personal property," a term by no means identical with movable property (see *Freke* v. *Lord Carbery*, L. R. 16 Eq. Ca. 461), and peculiar to the English Law, in the sense in which that law uses it. See Butler's note to Co. Lit. 191*a*, sec. II. 2. A royal grant of an annuity, therefore, would be "nibandha" according to Hindu Law, but according to the English Law it would, unless issuing from land, be a merely personal inheritance. See

An adopted son receives a fourth part of a share, if legitimate

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Co. Lit. 20*a*, and Hargrave's note. In *The Government of Bombay* v. *Desai Kallianrai Hakoomatrai*, 14 M. I. A., at p. 563, the Judicial Committee say of a Palanquin allowance : "They are by no means satisfied that the allowance, though payable out of the Government revenue of a particular Pergunna, can properly be said to be 'immovable property,' within the meaning of the clause in question. It did not constitute a charge which could be enforced against the land, or, since the year 1808, against the revenues of the land prior to the claim of Government. The utmost right of Dowlutrai after 1808, or his descendants, was to receive, after the perception of the revenues by Government, a certain annual sum of money out of the Collector's Treasury." In the case of *The Collector of Thana* v. *Hari Sitaram*, I. L. R. 6 Bom. 546, a full Bench on appeal from a decision in which the judgment of Sir C. Sargent, J., had prevailed against that of Melvill, J., upheld the former. In the judgment delivered by Sir M. Westropp, C.J., it is laid down that a grant to a temple of an annuity in cash and grain payable out of the extra assessments of particular divisions of a district is a charge on the districts, because the assessment is so. It is, therefore, as a charge on immovable property, itself immovable property. This seems open to the logical objection that "charge" is used in a double sense. As a real right a charge being an interest in land is immovable property, as a tax it is not. (See *Ashton* v. *Lord Langdale*, 4 De G. and Sm. 402, compared with *Attree* v. *Hawe*, L. R. 9 C. D. 337, and *Jervis* v. *Lawrence*, W. N. for 1882, p. 157. A charge confers a right to realization by sale of that on which it is imposed. See Fisher, Mortg., sec. 8; Transf. of Prop. Act, IV. of 1882, sec. 100.) Again it is said that "a grant by a Hindu sovereign to a Hindu temple, which can only be held by the managers of the temple, is immovable property, *i.e.*, "nibandha." This seems to assume the point in issue. If not, then the question is whether "nibandha" is necessarily immovable property, and to say that because some or even all immovable property is nibandha, all nibandha is immovable, is not a permissible conversion. "The question [is] whether the subject of the suit is in the nature of immovable property (see above, p. 223) or of an interest in immovable property, and if its nature and quality can be only determined by Hindu Law and usage, the Hindu Law may properly be invoked for that purpose." But the "nature and quality" of a temple grant having been thus determined, the question of whether it falls within the class of "immovable property" is one of English construction, *i.e.*, do its characteristics as ascertained (not the mere Hindu name by which it may be called) place the object within or without the comprehension of "immovable property"? This includes fixed objects and such incorporeal rights exercisable in immediate relation to them as the local law on that account recognizes as immovable. The latter are *jura in re* carved out of the full ownership of the object of property. See Story, Confl. of Laws, sec. 447; *Freke* v. *Lord Carbery*, L. R. 16 E. C. 461. A temple allowance payable by officials out of a tax levied by them, even a land-tax, does "not constitute a charge . . . against the land," and therefore according to the Judicial Committee in *Desai Kalianrai's Case*, 14 M. I. A. 551, cannot certainly be said "though payable out of the Government revenue of a particular parganna" . . . to be "immovable property." (*Ibid.*) The opinion then may perhaps be hazarded that where the Hindu law

sons of the body have been born after his adoption (*y*). The illegitimate son of a Sudra may also receive a share at the father's choice (*z*); but those excluded from a share are entitled to main-

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in a matter explicable by it alone shows a particular right to be a *jus in re* (a real right as it is called) it is not immovable property even though it should be nibandha according to the Hindu Law, as *ex. gr.* in case of a nemnuk (periodical payment) from the Government treasury. This agrees with the definition given in the General Clauses Act, I. of 1868, and in the Registration Act, III. of 1877. In the Limitation Acts subsequent to Act XIV. of 1859 (Acts IX. of 1871, XV. of 1877), "immovable" must necessarily be construed according to the definition given in Act I. of 1868, sec. 2. See also Wilks's Mysore, Vol. I., p. 126.

As to the English law respecting annuities, stocks and shares which are generally personal property, see Wms. Exec., Pt. II., Book III., Chap. I., sec. 2. How these, when held by Hindus, would be regarded now that "immovable" and "non-personal" or "real" have been identified with "nibandha" (=productive of a permanent income) may be a question of some difficulty. Shares in the Government Banks, it is expressly enacted by Act XI. of 1876, sec. 19, shall be "movable property," and by sec. 22 the Banks are free to ignore trusts to which the shares are subject except for the purpose of excluding the Banks' own claims for debts due to them from the registered shareholders. The Indian Companies Act, VI. of 1882, sec. 44, provides similarly in the case of all Companies under the Act, that the shares shall not be "real estate or immovable property." Annuities under the Indian Loan Act, 22 & 23 Vict. cap. 39, sec. 8, are declared to be personal property. Government loan notes, registered or enfaced for payment in London, are as assets of holder deceased declared personal property by Stat. 23 & 24 Vict., cap. V., sec. 1. In other cases the particular provisions of the constituting Statutes must be looked to, in order to determine the nature of the property, and then in the case of Hindus the Hindu Law will govern the relations of the representatives or co-owners of the deceased owner *inter se*. The property will, in the first instance, usually vest in the executor or administrator under Act V. of 1881, sec. 4.

A pension, in the proper sense of a stipend proceeding from the bounty of the Government, is protected against attachment by the Pensions Act, XXIII. of 1871, sec. 11, but a grant of money or land revenue, such as a "Toda Giras" Hak, is not exempt, though under the same Act it cannot be made the immediate object of a suit cognizable by the Civil Court, *Secretary of State for India* v. *Khemchand Jeychand*, I. L. R. 4 Bom. 432; *Syed Mahomed Isaack Mushyack* v. *Azeezoon Nissa Begam*, I. L. R. 4 Mad. 341; *Radhabai* v. *Ragho*, Bom. H. C. P. J. F. for 1878, p. 292.

(*y*) Mit., Chap. I., sec. 11, para. 24, Stokes's H. L. B. 420; May., Chap. IV., sec. 5, para. 17, *ibid.* 63.

(*z*) Mit., Chap. I., sec. 2, paras. 1 and 2, Stokes's H. L. B. 426; May., Chap. IV., sec. 4, para. 32, *ibid.* 55; 2 Str. H. L. 70. In the higher castes he is entitled only to maintenance, *ibid.* 71. *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver*, 13 M. I. A. 141. The statement of the Pandits in the same case as to managers between persons of different castes being unlawful except when sanctioned by the customary law of the castes, expresses the Hindu

tenance (*a*). On a partition being made by a father, head of a family, his wives receive each a son's share (*b*), in case they had received no Stridhana. If they had received Stridhana, they obtain half a share, *i.e.*, so much as, together with their Stridhana, will make up a son's share.

A son born to the father after partition inherits his wealth either solely or in common with sons who have become reunited with him (*c*). The already severed sons are disregarded in a further partition between the father and sons in union with him.

The share allotted to a wife or sister in partition becomes Stridhana heritable by her sons only in default of daughters (*d*), or

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Law as received in Western India; Steele, L. C. 29, 163, 166. But a woman, being of a somewhat higher caste, is received into her husband's, *ibid.* See above, pp. 78, 192, 254.

(*a*) 2 Str. H. L. 68. *Rajah Parichat* v. *Zalim Singh*, L. R. 4 I. A. 159. As to succession see *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanand Mansingh*, L. R. 17 I. A. 128.

(*b*) Mit., Chap. I., sec. 2, paras. 8 and 9; Stokes's H. L. B. 379; May., Chap. IV., sec. 4, para. 15, *ibid.* 51; and compare the Dayakrama Sangraha, Chap. VI., para. 22; *ibid.* 512; and Smriti Chandrika, Chap. II., sec. 1, para. 39. The mother gets a son's share in every partition, *Lalljeet Singh* v. *Raj Coomar Singh*, 20 C. W. R. 336, and the other cases cited and followed in *Sumrun Thakoor* v. *Chunder Mun Misser*, I. L. R. 8 Cal. 17. A stepmother must live with her stepson to be entitled to maintenance, p. 341, Q. 6; but see also Book I., sec. X. The Smriti Chandrika, Chap. XI., sec. 1, para. 34, as quoted by the Viram., Transl., p. 136, regards the widow of an undivided parcener as taking a portion of the common property for her maintenance only when the father-in-law, &c., are unable for some cause to protect her, as Narada gives them guardianship with full power of control accompanying their liability for maintenance, Viram., Transl., p. 138. Her right is intransferable, see above, pp. 247, 288.

(*c*) Mit., Chap. I., sec. VI., paras. 1, 4; *Nawal Singh* v. *Bhagwan Singh*, I. L. R. 4 All. 427; *Ganpat Venkatesh* v. *Gopalrao*, I. L. R. 23 Bom. 636; *Shivajirao* v. *Vasandrao*, I. L. R. 33 Bom. 267.

(*d*) Above, pp. 284, 293; Mit., Chap. I., sec. VI., para. 2; *Chhidu* v. *Naubat*, I. L. R. 24 All. 67; *Sri Pal* v. *Suraj*, *ibid.* 82; *Lakshman* v. *Satyabhamabai*, I. L. R. 2 Bom. 494, 504; *Damoderdas* v. *Uttamram*, I. L. R. 17 Bom. 271, 286; *Damoodur* v. *Senabutty*, I. L. R. 8 Cal. 537. In Madras wives, widows, and mothers are not entitled to a share, but only to maintenance, *Venkatammal* v. *Andyappa*, I. L. R. 6 Mad. 130; *per Curiam*, I. L. R. 8 Mad. 123. According to the Bengal and the Benares Schools and in Madras a property inherited by a woman from a male or a female is not her stridhan. In Bombay this rule is confined to those women who enter the family by marriage and in Mithila to a widow who inherits movables absolutely. This subject has already been dealt with in the preceding pages.

according to the Mayukha in preference to daughters (*e*). This rule is inconsistent with any intention to make property derived by a woman from her husband "revert" to his family on her death. Vijnanesvara recognizes inheritance and partition equally as means by which a woman acquires property, and gives a single set of rules for the devolution of this property, all of which he calls Stridhana (*f*).

§ 7 A. 1. *b*. *Partition between brothers or collaterals.*—On a partition between brothers the shares are distributed equally; on partition amongst collaterals, *per stirpes* (*g*). As to the extent of

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(*e*) Vyav. May., Chap. IV., sec. II., sec. X., paras. 25, 26; comp. p. 313, note (*e*), above.

(*f*) See Mit., Chap. II., sec. XI., paras. 1, 2, 3, 8 ss. on which sec. VI., para. 2, serves as a comment. But for the prevailing doctrine see also above, p. 318, and comp. p. 713 below.

The widow's power of dealing with property inherited from her husband or given or bequeathed to her by him has been discussed by Scott, J., in a terse and comprehensive judgment which applies equally to a share taken in partition. The conclusion arrived at by the learned Judge was that according to the law of Western India, the widow may dispose at pleasure of movable property thus taken by her while subject to restrictions as to immovables for the preservation of the estate, *Damodar Madhavji* v. *Thakar Parmanandas* Jivandas, 13th February, 1883; S. C. I. L. R. 7 Bom. 155; citing the cases of *Bhagwandeen Doobey*, 11 M. I. A. , at p. 573; *Rajender Narain* v. *Bija Gobind Singh*, 2 M. I. A. 181; *Bechar Bhagvan* v. *Bai Lukshmee*, 1 Bom. H. C. R. 56; *Pranjivandas Toolseydas* v. *Devkuvarbai*, 1 Bom. H. C. R., at p. 133; *Balvantrao T. Bapuji* v. *Purshotam*, 9 Bom. H. C. R., at p. 111; *Koonjbehari Dhur* v. *Premchand Dutt*, I. L. R. 5 Cal. 685; *Venkat Ramraw* v. *Venkat Suriyarav*, I. L. R. 2 Mad. 333. See also above, pp. 91, 92, 287, 318, 475. As to the quantum of the estate taken, see above, pp. 283 ss. 319 ss.; and as to an extension of this by express agreement, gift, or bequest, pp. 184, 299, and *Koonjehari's Case*, *supra*; as to the widow's power of bequest, pp. 181, 214, 294; Vyav. May., Chap. IV., sec. X., para. 9. Where a widow had inherited a house from her deceased son, and was alive, it was held that "whether her mortgage was made for such purposes as will render it valid against her successor after her death, is a question which it is not necessary to determine in the present suit." The mortgagee was awarded present possession, *Malapa* v. *Basapa*, S. A. No. 379 of 1880, Bom. H. C. P. J. for 1881, p. 43. A "reversioner," however interested (see above, p. 89), is estopped from questioning the validity of an agreement in which he concurred and which he attested, whereby the widow of a person deceased, his mistress, and an illegitimate daughter by her, made a distribution of his property, *Sia Dasi* v. *Gur Sahai*, I. L. R. 3 All. 362. See further § 7 A. 1 *b*.

(*g*) *See Sumrun Singh* v. *Khedun Singh et al.* 2 Cal. Sel. R. 11; Col. Dig., Book V., T. 95, Comm.; Mit., Chap. I., sec. 3, para. 1; Stokes's H. L. B. 381; Chap. I., sec. 5, para. 1; *ibid.* 391; Smriti Chandrika, Chap. VIII., para. 5;

the property, thus subject to equal partition (*h*), see above, § 5 A, pp. 653 ss.; § 7 A 1 *a*, pp. 704 ss.

If there has been a partial distribution giving part of its share to one branch, it is debited with so much in account with the whole body of co-sharers (*i*). But there is no general mutual right to an account of past transactions (*k*), except in Bengal under the Dayabhaga (*l*).

If previously to the separation a particular member had had sole possession with the assent of his coparceners of some portion of the estate, he may retain that portion (*m*), and where a member had built a house out of his separate funds on a piece of the ancestral land, it was held that this did not become part of the family property subject to partition. All that the coparceners can claim in such a case is a proportionate addition to their shares by way of compensation for the land withdrawn from the general partition (*n*). So in a case of partition of interests without one in specie (*o*). In *Vithoba Bava* v. *Hariba Bava* (*p*), however, a house was divided, because built on family property (*q*). In

2 Str. H. L. 286, 358, 393. A mother cannot enforce a partition on an only son, 2 Str. H. L. 290; but if a partition is made they take equal shares, Steele, L. C. 49, 56.

(*h*) A gift from a parent to one of the sons while undivided is exempted from partition, Viram., Transl., 250. It must be of reasonable value; above, p. 211. *Madan Gopal Thakoor* v. *Ram Baksh Pandey*, 6 Cal. W. R. 71; *Nonomi Babuasin* v. *Muddun Mohun*, L. R. 13 I. A. 5; *Nanabhai* v. *Achratbai*, I. L. R. 12 Bom. 122, 123.

(*i*) See above, p. 645, note (*b*).

(*k*) See above, § 7 A, p. 699; *Konerrav* v. *Gururav*, Bom. H. C. P. J. 1883, p. 77; S. C., I. L. R. 5 Bom. 589; *Lakshman* v. *Ramchandra Dada Naik*, I. L. R. 1 Bom. 561; S. C., I. L. R. 5 Bom. 48 P.C. A duty to account arises from the time when a partition is wrongly refused. *Ibid.* *Narayan* v. *Nathaji*, I. L. R. 28 Bom. 201, 208; *Bala* v. *Nathaji*, I. L. R. 32 Mad. 271.

(*l*) *Obhoy* v. *Pearey Mohun*, 14 W. R. 75, F. B.

(*m*) *Sreenath Dutt et al.* v. *Nand Kishore Bose et al.*, 5 C. W. R. 208 C. R. The charge created by attachment of an undivided share and the effect given to it by an actual transfer of part of the property to the possession of an execution purchaser are to be distinguished from this case. But should the parcener in separate possession deal with the part so possessed effect would be given to the transaction so far as consistent with justice to the coparceners. See above, pp. 587, 589; *Pandurang Anandrav* v. *Bhaskar Sadashiv*, 11 Bom. H. C. R. 72.

(*n*) 2 Macn. H. L. 152.

(*o*) *The Collector of 24 Pergunnahs* v. *Debnath Roy et al.*, 21 C. W. R. 222.

(*p*) 6 Bom. H. C. R. 54 A. C. J.

(*q*) Contra, *Guru Das Dhar* v. *Bijaya Bobinda Baral*, 1 B. L. R. 108.

Jotee Roy et al. v. *Bheechuck Meal et al.* (*r*), Phear, J., says that by a long holding in severalty with consent of other sharers, a member of the family acquires a right to have that particular portion of the ancestral estate assigned, on a partition, to his share, and that a lessee under him may compel him to assert this right. Such a lessee holding on after a partition under other co-sharers, their acquiescence in his lease is presumed after some years. A purchaser may build a wall on the part in his possession, and unless it is injurious, the Court will not order its removal. But there is no right, without permission, to injure the other's interests (*s*).

Rights and duties arising on partition.—The rule regarding adopted sons given above holds good here also. The illegitimate son of a Sudra is entitled to half a share (*t*). Regarding the interpretation of the term " half a share," *see* Book I., pp. 69, 77 (*v*). On partition amongst brethren not only mothers, but step-mothers, paternal grandmothers, and step-grandmothers (*w*)

(*r*) 20 C. W. R. 289.

(*s*) *Lalla Bissumbhur Lall* v. *Rajaram et al.*, 16 C. W. R. 140; *Bissambur Shaha* v. *Shib Chunder Shaha et al.*, 22 *ibid.* 287. Under the English Law when a partition is made each parcener is entitled to a deduction of the value added at his sole expense to the part assigned to him from the valuation of such part with which he is charged in the account with the co-owners, *Watson* v. *Glass*, L. R. W. N. for 1881, p. 167.

(*t*) If there be no legitimate offspring, he is entitled to share equally with a daughter's son, 2 Str. H. L. 70. But the Mitakshara, Chap. I., sec. 12, paras. 1, 2 (Stokes's H. L. B. 466) postpones him to the grandson, except for half a share. So Yajn. II. 134.

(*v*) See also above, pp. 361, 363, 364.

(*w*) Col. Dig., Book V., Chap. II., T. 85 Comm. Madana Parijata 15. The Viramitrodaya (Tr. p. 79) lays down that though a husband making a partition must give an equal share to each of his wives, yet sons dividing after his death are not called on to give more than a maintenance to sonless stepmothers. In this it departs from the doctrine of the Mitakshara (Chap. I., sec. I., 7) which assigns in both cases equal shares to all the widows by placing them on the same footing as wives in a partition made by the husband, *Laljeet* v. *Raj*, 20 Cal. W. R. 336. Vyasa says emphatically that the sonless wives of the father and also the grandmother are entitled to shares. See p. 819. *Mohabeer Pershad* v. *Ramyad Singh et al.*, 20 C. W. R. 195; *Badri Roy* v. *Bhagwat Narain Dobey*, I. L. R. 8 Cal. 649; *Damodhur Misser* v. *Senabutty Misrain*, *ibid.* 537. But the last-quoted judgment says the stepmother takes her allotment only for life as a maintenance. As to this see above, pp. 289, 293, 295, 710. " The mother's title to her share is not founded on her former property but on positive texts," Col. Dig., Book II., Chap. IV., T. 28 *in med.*

In his wide construction of the term " Stridhana," Vijnanesvara is followed

receive a son's or grandson's share, provided they have obtained no Stridhana. If they have obtained Stridhana, they are then entitled to so much only as, with the Stridhana, will make up their proper portion (*x*).

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nearly a century later by Apararka. This author says: "The word 'Adya' is intended to include other kinds of woman's property; that, for instance, acquired under Yajnavalkya's texts, 'The wives must be made partakers of equal portions'; 'Let the mother take an equal share'; 'Sisters take a quarter of a brother's share'; 'Daughters share the nuptial present of their mother.' Everything else (in like manner) over which a woman has control, is by Manu and the rest called woman's property" (Stridhana). In *Sibbosoondery Dabia* v. *Bussoomutty Dabia*, I. L. R. 7 Cal. 191, it was held that a suit by a grand-mother would lie for an equal share with her grand-daughter and grandsons in the properties, which, under a previous partition decree, had been allotted to the representatives of her husband, and to a life-interest in the income of the property remaining unpartitioned.

In the meantime the widows are entitled to maintenance; see above, p. 259. But where two widows sought to enforce the terms of a partition deed, superseded by other arrangements, they were not allowed to turn their suit into one for maintenance, *Naro Trimback* v. *Haribai*, Bom. H. C. P. J. 1879, p. 33.

Ganga Bai v. *Sitaram*, I. L. R. 1 All., at p. 174, deals with the widow's maintenance as a charge on the joint estate, a question which is discussed at length in *Lakshman Ramachandra et al.* v. *Satyabhamabai*, I. L. R. 2 Bom. 494, S. C.; Bom. H. C. P. J. F. for 1877, p. 349. The precepts of the Sastras on the subject of the widow's residence have been variously construed, even by the Native commentators, as may be seen by comparing the Vivada Chintamani, p. 265, with Jimuta's Daya Bhaga, Chap. IV., sec. I, para. 8 (Stokes's H. L. B. 237), and Col. Dig., Book V., T. 483, with Varadraja, p. 50.

(*x*) Mit., Chap. I., sec. 1, paras. 1 sqq.; Stokes's H. L. B. 397; May., Chap. IV., sec. 4, paras. 18 and 19, *ibid.* 52. See Book I., Chap. IV. B., sec. I., Q. 10, Remark, p. 475. Col. Book V., T. 87, Comm.; *Jodoonath Dey Sircar et al.* v. *Brojanath Dey Circar et al.*, 12 B. L. R. 385. The share given to a mother, &c., on partition, may, according to Jagannatha, be dealt with by her at her own pleasure, but, on her death, is inherited by her husband's heirs. He distinguishes between property originating in a gift on account of affinity, and in affinity alone, Col. Dig., Book V., T. 87. But see Nort. L. C. 295. The texts cited there may, however, be differently explained. In the case of a widow of a coparcener put on a partition amongst survivors, into possession of a defined share, the Privy Council say, in *Bhugwandeen Doobey* v. *Myna Baee*, at 11 M. I. A. 514: "It may be a question whether her share does not become absolute, though in a case coming from Lower Bengal, the contrary was decided by this Committee." Prof. H. H. Wilson, vol. V. of his Works, p. 26, favours her absolute power of disposal. Col., in 2 Str. H. L. 383, says the Mit. and Madh. Ach. treat the allotment as an absolute assignment, contrary to the Smriti Chandrika; see above, pp. 298, 303, 307 ss., 338. She holds only the position of a tenant for life, however, and has no right to destroy buildings, according to *Umapa Kantapa* v. *Ningosa Hirasa*, S. A. No. 123 of 1876, Bom. H. C. P. J. F. for 1876, p. 144. See further below,

On partition between brothers, the marriage expenses of the unmarried brother form a charge on the whole fund to be divided, and are to be provided for by a deduction therefrom, but not those of a brother's son (*y*). A mother's share is equal to a son's (*z*). A sister's share is one-fourth of a brother's (*a*). Colebrooke, resting on the Mitakshara, makes this allotment an absolute assignment of a share (*b*), though some other commentaries regard it

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p. 782, note (*d*). *Kishori* v. *Moni Mohun*, I. L. R. 12 Cal. 165; *Jadoo* v. *Bijoynath*, 12 Beng. L. R. 385.

The construction of a deed, allotting money, &c., to a widow of a deceased coparcener, may be made according to the situation of the parties, *S. Rabutty Dossee* v. *Sib Chunder Mullick*, 6 M. I. A. 1; *Boyle Chund Dutt* v. *Khetterpaul Bysack*, 11 B. L. R. 459.

(*y*) 2 Str. H. L. 286, 288, 338, 423; Mit., Chap. I., sec. 4, para. 19 (Stokes's H. L. B. 388); sec. 5, para. 2 (*ibid.* 391); sec. 7, p. 4 (*ibid.* 398); Viram., Tr., p. 81; Steele, L. C. 57, 214, 404.

(*z*) 2 Str. H. L. 296; Mitak., Chap. 1., sec. 7, para. 1. In Bengal a mother is entitled to obtain a share as representative of a deceased son, *Jugomhoun Holdar* v. *Saradamoyee Dossee*, I. L. R. 3 Cal. 149.

(*a*) 2 Str. H. L. 288, 366; Mit., Chap. I., sec. 7, pp. 5-14; Stokes's H. L. B. 398-401; May., Chap. IV., sec. 4, paras. 39, 40 (*ibid.* 57); Viram., Tr., pp. 84, 85. Narada, Pt. II., Chap. XIII., sl. 13, says that the eldest receives a greater share, the youngest a smaller, and the others equal shares, as also a sister unmarried. The variance of precept is explained by the Smriti Chandrika, Chap. IV., as having reference to the extent of the estate, the sister's claim on her brothers being greater in proportion as the aggregate is smaller. Devanda Bhatta adds that, failing the patrimony, the brothers must perform their sister's marriage out of their own funds, as the Viramitrodaya, Tr., p. 81, imposes the duty of initiation on the brethren even though they have inherited nothing. In the case at 2 Str. H. L. 312, the Sastri, apparently with the concurrence of Colebrooke, on a partition claimed by one of four nephews against his brothers and uncles, directed that the property, being divided first amongst the different branches, sprung from the common stock, the portion allotted to the plaintiff's branch should be distributed between him and his brothers, subject to a charge for the maintenance and marriage of their sisters. *Laljeet* v. *Raj*, 20 W. R. 336. The greater share is ascertained by dividing the property into parts equal to the number of claimants and then giving a quarter of a part to each maiden sister, the rest being divided among others equally. Thus, where there are three brothers, two mothers, and two maiden sisters, the property is to be divided into seven parts, a quarter to be given to each sister, the others dividing the rest equally amongst them, *Damodar* v. *Senabutty*, I. L. R. 8 Cal. 539. See Mit. I., 7, 6; Varamitrodaya, II., 1, 2; Aprarka on Y. I., 124; Madana Parijata, p. 648.

(*b*) Mit., Chap. II., sec. 1, p. 32 (Stokes's H. L. B. 436); 2 Str. H. L. 383; Vyav. May., Chap. IV., sec. 4, para. 18 (Stokes's H. L. B. 52); sec. 10, pp. 2, 7, 9 (*ibid.* 98, 100). Ellis, at 2 Str. H. L. 404, says : "The daughter is heir of her father as well as the sons," but that is perhaps putting it rather too

merely as a provision held for life, like property, as they insist, inherited or taken by gift from the husband (*c*). Regarding the share allotted on a partition to a sister or widow, however, as absolutely assigned, it may perhaps still be looked on, according to the analogy of the estate taken by a father in a division, as hereditary property for the purposes of further descent, and as, on that principle, going on the death of the widow to the heirs in the husband's family, who being nearest to him are, for this purpose, nearest to the widow. This may possibly have been the view of Nilakantha, in the Vyav. May., Chap. IV., sec. 10, paras. 26, 28 (*d*), and would make her position similar to that of a widow of a separated coparcener as thus conceived (*e*). The Mitakshara makes the share simply Stridhana (*f*), inherited as described in Book I., pp. 135, 295; and in Digest of Vyavasthas, Chap IV., pp. 470 ss., 484 ss. (*g*).

§ 7. A. 1. *c.—Partition between reunited coparceners.*—In the case of a partition between reunited coparceners, the shares are equal, notwithstanding that the portions brought in on reunion were unequol (*h*). Regarding the descent of shares in a reunited family, see Book I., pp. 129 sqq.

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strongly. If the share allotted to a widow is to be regarded as an estate of the same character as that which she inherits, the decision of *Dhondo* v. *Balkrishna*, Bom. H. C. P. J. 1883, p. 42, is pertinent, which reiterates the rule that a widow is debarred from alienating the estate apart from any claims of her husband's relations, see above, pp. 100, 101. According to the caste usages generally, her disability to alienate fixed property is dependent on there being male relatives of her husband, Borr. Col. Lith. 46, 64, 92, 103, 230, 367. Some say relatives not more remote than nephew's sons, *ibid.* 325, comp. 349. Yet her daughter and daughter's son succeed to it, showing it is regarded as stridhana, *ibid.* 103. Exceptionally she is allowed to dispose of what she inherited from her husband, *ibid.* 188, but not what she inherited from her father, *ibid.* 165. She may alienate to relieve her necessities, *ibid.* 248, or to pay debts and funeral expenses, &c., *ibid.* 281, though even in such cases the sanction of the kinsmen may be required, *ibid.* 303.

In 78 Dekhan Castes it was found that a widow could give away property if her husband had died divided from his family but not otherwise; Steele, L. C. 373. By some she is allowed to dispose even of immovable property given by her parents, *ibid.* 236.

(*c*) See above, p. 710.

(*d*) Stokes's H. L. B. 105.

(*e*) Mit., Chap. II., sec. 8, paras. 2, 7; Stokes's H. L. B. 85.

(*f*) See above, and 2 Str. H. I. 402.

(*g*) See also 2 Str. H. L. 411, 412; Steele, Law of Caste, 62, 63.

(*h*) May., Chap. IV., sec. 9, para. 2; Stokes's H. L. B. 92. The Smriti Chandrika, Chap. XII., para. 4, understands the prohibition against inequality

§ 7 A. 2.—*Partition of a naturally indivisible property.*—Naturally indivisible property must be disposed of, so that the coparceners severally may derive from it the maximum of advantage, a principle readily deducible from the text of Brihaspati, May., Chap. IV., sec. 7, para. 22 (*i*). Thus roads or ways, wells, tanks, and pasture-grounds ought to be used by all the coparceners (*k*). The proceeds of an hereditary office are to be divided, or it may be enjoyed in turns (*l*). Places of worship and sacrifice not being divisible, the coparceners after separation are entitled to their turns of worship (*m*). Where such a mode of enjoyment

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to be directed only against the allotment of a quarter share to the eldest son, and allows an inequality in a new distribution proportionate to that of the shares brought in on reunion. This is expressly controverted by the Vyav. May., and is reconciled with Brihaspati's rule, "Brothers reunited share each other's wealth," only by a forced construction. See Smriti Chandrika, Chap. XII., para. 15; Chap. XIII., para. 14. The Smriti Chandrika, Chap. XII., para. 6, also assigns to reunited coparceners shares in any separate acquisition equal, for each, to half what the acquirer retains. See p. 645, note (*b*), and above, § 7 A. 1 *b*, p. 710.

(*i*) Stokes's H. L. B. 78; Viram., Tr., p. 3; Col. Dig., Book V., T. 366, Comm.

(*k*) Steele, L. C. 60, 61; *Nathubhai* v. *Bai Hansgavri*, I. L. R. 36 Bom. 379; *Govind* v. *Trimbak*, *ibid.* 275.

(*l*) Steele, L. C. 216, 218, 229, from which it will be seen that local or family custom in many cases allows a greater or less advantage to seniority.

(*m*) *Anund Moyee et al.* v. *Boykantnath Roy*, 8 C. W. R. 193 C. R. A refusal to deliver up an idol for the plaintiffs to perform worship was held by Pontifex, J., to constitute a cause of action, *Debendronath* v. *Odit Churn Mullick*, I. L. R. 3 Cal. 390. It is generally a privilege of the eldest to retain the household gods. Steele, L. C. 222, 417.

A division of the right to worship may be made by assignment of turns, *Mitta Kanth* v. *Niranjun et al.*, 22 C. W. R. 438, S. C.; 14 Beng. L. R. 166. Property dedicated to the service of a family idol is disposable only by the assent of all the members, and this cannot put an end to a dedication to a public temple, according to a *dictum* of Sir M. Smith, *Konwur Doorganath Roy* v. *Ram Chunder Sen*, L. R. 4 I. A., at p. 58. A religious fund or dedication is indivisible according to Viram. 249. *Narayan Sadanand* v. *Chintaman*, I. L. R. 5 Bom. 393, agreeing with *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty*, I. L. R. 1 Mad. 235, pronounces a religious endowment inalienable. It refers to *Khusalchand* v. *Mahadevgiri*, 12 Bom. H. C. R. 214, and many other cases; but *Mancharam* v. *Pranshankar*, I. L. R. 6 Bom. 298 S. C. Bom. H. C. P. J. 1882, p. 120, recognizing the general principle, allows an exception in favour of persons in the line of succession, referring to *Sitarambhat* v. *Sitaram Ganesh*, 6 Bom. H. C. R. 250 A. C. J. Such a transaction does not defeat the intended succession; it only accelerates it. In the absence of a son, and with the consent of the heir, a holder of a temple grant may alienate it

is impracticable or inconvenient, the property may be sold, and its proceeds divided, or the rights of the coparceners otherwise equitably adjusted by agreement. Clothes in use, vehicles, ornaments, furniture, books and tools are to be kept by the coparceners who use them (*n*). But see also above, § 5 B. *ad fin.*, p. 671. As already pointed out (p. 672) the family dwelling has by some been regarded as indivisible property. This doctrine has not been received by the Courts, except to the limited extent above indicated. A suit for the partition of a family dwelling may be brought by the purchaser at an execution sale of the rights of a coparcener, according to *Jhubboo Lall Sahoo* v. *Khoob Lall et al.* (*o*). But a partial partition cannot be enforced if it will destroy the intrinsic value of the whole property, a money compensation being given instead of the share (*p*).

A division of rents and other profits of land or houses called Phalavibhaga, is permissible, and constitutes a valid partition, though distinguished from the ordinary distribution *in specie*. The rule extends to the division of the profits of a Vatandari village (*pp*). But such a distribution cannot be taken as conclusive of partition (*q*). With the case quoted on this point, however, compare also *Somangouda* v. *Bharmangouda* (*r*). The Smriti Chandrika, Chap. XV., paras. 3, 4, says that a *phalavibhaga*, which has discriminated the rights of the co-sharers to the produce of the land, leaves them severally without a separate title to the land itself (*s*). But this does not seem consistent with principle (*t*).

§ 7 B. 1. *Debts*.—Debts due to the family may be distributed

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for the maintenance of the worship, Steele, L. C. 237. By custom the rights of a particular "tirth-upadya" to minister to pilgrims is divisible and alienable, *ibid.* 85.

The interest of a temple servant in land held by him as remuneration may be sold in execution, *Lotlikar* v. *Wagle*, I. L. R. 6 Bom. 596.

(*n*) Manu IX. 200, 219; Mit., Chap. I., sec. 4, pl. 16, 19.

(*o*) 22 C. W. R. 294.

(*p*) *Ashinullah* v. *Kali Kinkur*, I. L. R. 10 Cal. 675; *Rajcoomaree* v. *Gopal*, I. L. R. 3 Cal. 514.

(*pp*) *Ruvee Bhudr* v. *Rupshunkur Shunkerjee et al.*, 2 Borr. 730.

(*q*) See above, p. 641.

(*r*) 1 Bom. H. C. R. 43.

(*s*) So *Amritao* v. *Abaji*, above, p. 649. See, however, above, p. 641, note (*d*), and *Virasvami* v. *Ayyasvami*, 1 M. H. C. R. 471.

(*t*) See above, pp. 642, 649.

or assigned to a single member as part of his share (*v*). An immediate payment of his share of such debts cannot be claimed by any member from his coparcener (*w*). The common debts due by the family are to be distributed in the same proportion as the shares of the common property (*x*), and the debts incurred in carrying on a joint business override the rights of the co-sharers in the property acquired by means of it (*y*); but the common property and the other members of a joint family are not answerable for a member's separate debt (*z*). From a passage in the Mayukha, 1. c., para. 2, it might appear that the discharge of the family debts is a necessary preliminary condition to a partition. The passage of Katyayana, however, which is cited by Nilakantha,

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(*v*) Where there has been a dishonest or wanton expenditure of the family funds by one member, "a prodigal is to receive his share after deducting the amount he has dissipated on other than the necessary samskaras of the family," Steele, L. C., p. 62.

It may be noted that between Hindus the rule of damdupat, or limitation of interest to the amount of the principal, applies even in the case of a mortgage where no account of the rents and profits has to be taken. The rule has not been abrogated by Act XXVIII. of 1855 or by the Limitation Acts, *Ganpat Pandurang* v. *Adarji Dadabhai*, I. L. R. 3 Bom., at p. 333. See Steele, L. C. 265, 266. The rule of damdupat is not applicable except where the defendant is a Hindu, *Nanchand Hansraj* v. *Bapusaheb Rustambhai*, I. L. R. 3 Bom. 131. It is sometimes ignorantly supposed that the regular judicature of the British Courts has increased the oppression of agriculturist debtors and small proprietors. The incorrectness of this opinion is shown by Steele, L. C. 269, 271; M. Elphinstone's Report on the Deccan, Bom. Jud. Sel., vol. IV., p. 143, 193; Grant's Rep. *ibid.*, pp. 241, 242; Brigg's Rep. *ibid.*, 249; Chaplin's Rep. *ibid.* 260; Pottinger's Rep. *ibid.* 298, 326, 328, 337; Chaplin's Rep. *ibid.* 489, 495; Robertson's Rep. *ibid.* 589.

(*w*) *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 1 Bom. 561.

(*x*) May., Chap. IV., sec. 6; Stokes's H. L. B. 72. When one of several co-sharers in an estate pays the whole revenue, his suit to recover contribution from the other co-sharers not resting on contract cannot be brought in the Small Cause Court. *Nobin Krishna Chakravarti* v. *Ram Kumar Chakravarti*, I. L. R. 7 Cal. 605. See Act IX. of 1872, sec. 69; *Ram Tuhul Singh* v. *Bisewar Lall Sahoo*, L. R. 2 I. A. 131, 143; *Gadgeppa Desai* v. *Apaji Jivanrao*, I. L. R. 3 Bom. 237; for the circumstances under which contribution can and cannot be recovered.

(*y*) *Jokurra Bibee* v. *Shreegopal Misser*, I. L. R. 1 Cal. 470.

(*z*) *Narsingbhat* v. *Chenapa bin Ningapa*, S. A. No. 205 of 1877; Bom. H. C. P. J. F. for 1877, p. 329; and above, Book I., Chap. VI., sec. 3 (*b*), Q. 2, p. 550; 2 Str. H. L. 335; *Mahableshvar* v. *Sheshgiri*, Bom. H. C. P. J. 1881, p. 183. A vatandar's mortgage of his vatan property is not valid against his heirs either under Reg. XVI. of 1827 or under Bom. Act III. of 1874, *Kalu Narayan* v. *Hanmapa*, I. L. R. 5 Bom. 435.

is differently rendered by Colebrooke (*a*). Narada, as translated by Jolly, p. 15, directs the brothers only to pay according to the shares, if they separate, and Jimutavahana (*b*) says of another passage of Narada, Pt. II., Chap. XIII., sl. 32, that it is intended to inculcate the obligation of paying the father's debts (as that which says "when sisters are married" merely prescribes the duty), not to regulate the time of partition. The Smriti Chandrika, Chap. II., sec. 2, p. 23, says, that if there are assets, the debts should be paid before partition. But Yajnavalkya (quoted para. 18) prescribes merely that the debts and the assets shall be equally distributed. In other passages (*c*) a distribution of the debts amongst the coparceners is recognized, and the Dayakrama-Sangraha, Chap. VII., para. 28 (*d*), expressly declares that the debts may be discharged subsequently to partition.

If a distribution of the debts is made, the coparceners severally, who desire to secure themselves against further claims on the part of the creditors, should obtain the assent of the latter to that arrangement (*e*). Without this the assets may be followed in

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(*a*) Dig., Book V., T. 369.

(*b*) See Col. Dig., Book V., Chap. II., T. 111; Smriti Chandrika, Chap. II., sec. 2, para. 20.

(*c*) May., Chap. IV., sec. 4, para. 17; Stokes's H. L. B. 52; Mit., Chap. I., sec. 3, para. 1, *ibid.* 381; Col. Dig., Book I., Chap. V., Text 149, 185; Book V., Chap. III., Text 111, and Jagannatha's Comm., Chap. VI., Text 375.

(*d*) Stokes's H. L. B. 516.

(*e*) See 1 Str. H. L. 191, and the authorities quoted there; and the case of *Bholanath Sirkar* v. *Baharam Khan et al.*, 10 C. W. R. 392 C. R. The sons of deceased members are answerable after partition only for their proper shares of a father's debt, according to Col. Dig., Book I., T. 182-5. See Narada, Chap. I., sec. III., para. 2, Tr., p. 15; Vishnu, Tr., p. 45. The Sarasvati Vilasa, sec. 96 ff, understands this as relating to a separate paternal debt distinguished from a family debt binding all, but in *Doorga Persad* v. *Kesho Persad*, I. L. R. 8 Cal. 656; S. C., L. R. 9 I. A. 27, the Judicial Committee say of sons of a member of a joint family (according to the statement at the beginning of the judgment): "But it appears to their Lordships that the plaintiffs were not liable for the whole debt for which their father and other joint members of the family were originally liable, the debt having been apportioned amongst the several members of the family who had separated and several bonds given for the several portions of the debt. It appears, therefore, to their Lordships that the High Court was right, and that the infants were not bound to pay the whole of the debt for which the father was at one period jointly liable with the other members of the family, and that they were liable only for the father's portion of the debt." This they were ordered to pay, though their ostensible guardian was not the legal guardian and had no right to defend the suit in

their hands (*f*), though a separated son, it is said, is not answerable during the father's life for any debt contracted by his father (*g*). In *Mahada* v. *Narain Mahadeo* (*h*), the Bombay Sudder Court ruled that the whole of the family property remains liable for a debt (properly) contracted by any member, although another may have obtained a decree for partition (*i*). For the separate debt of a single coparcener, the common property is not liable, but the creditor may, as we have seen, make the share available by enforcing a partition (*k*). In the common case of a mortgage acquiesced in by the co-sharer seeking a partition he is liable generally in proportion to his share in the mortgaged property to the charges upon it (*l*). This does not enable him to redeem his own share alone, the obligation being indivisible, but

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their name. If several bonds for the several shares of the debts had been accepted by the creditors in discharge of the original joint debts, there could of course be no claim except upon the several obligors. But the Hindu Law seems apart from that to impose only a several obligation on the co-sharers except in virtue of any of them possessing himself of the whole estate or more than his share of it. See above, pp. 76, 569.

In an opinion given at 2 Str. H. L. 283, Colebrooke says that the distribution of the debts in a partition is to be regarded merely as an adjustment amongst the parceners not affecting a creditor's right against all or any of them. The caste rules, as at Borradaile's Collection, Lith. 41, seem merely to contemplate a partition of the debts, but so far as property subject to a charge had been taken the taker would probably be liable for the common debt. See Steele, L. C. 59, 219, 409.

(*f*) See Col. Dig., Book I., Chap. V., T. 167, note; T. 169, and Jagannatha's Comm.; Col. in 2 Str. H. L. 283.

(*g*) Col. Dig., *loc. cit.*, and *Amrut Row Trimbuck* v. *Trimbuck Row Amrutayshwur*, Bom. Sel. Ca. 249. See 2 Str. H. L. 277. And that a minor cannot be called on during his minority, *ibid.* 279. In *Bagmal et al.* v. *Sadashiw et al.*, S. A. No. 70 of 1864, Arnould and Tucker, JJ., held that separated sons are liable after the father's death for debts incurred by him before the partition. As to the personal liability for a father's debts, see above, p. 75; and below, Book II., Vyav., Chap. I., sec. 1, Q. 5. As to the liability of the property, see *Jamiyatram* v. *Purbhudas*, 9 Bom. H. C. R. 116, referred to in Book I., p. 73; and also pp. 168, 596. In *Harreedass* v. *Ghirdurdass*, S. D. A. Sel. Ca. 46, on attachment of a parcener's share it was made liable for its proportion of the funeral expenses of the parcener's mother. See Smriti Chandrika, Chap. XIII., paras. 12, 13.

(*h*) 3 Morris, 346.

(*i*) See Narada, Pt. I., Chap. III., sl. 16.

(*k*) See *supra*, § 6 B; also pp. 163, 254, 541, 543.

(*l*) *Bhyrub Chunder Mudduck* v. *Nuddiarchand Paul*, 12 C. W. R. 291; *Laljee Sahoy* v. *Fakeerchand*, I. L. R. 6 Cal. 135.

he may redeem the whole (*m*), and as a condition of giving up their proper shares to the co-owners he may require payment to him of such sums by way of contribution as shall be found due according to the nature of the original transaction and on a general adjustment of the accounts amongst the co-sharers (*n*). While the mortgagee is thus secured against any "fragmentation" of his security he must serve all co-sharers with notice of intended foreclosure under the Bengal Law (*o*), and if he obtains a decree on the mortgage debt and executes it by sale against the mortgaged property must sell both his own and the mortgagor's interest therein. And even though the mortgagor's interest only is specified as the object of sale, yet the mortgagee who has promoted the sale is bound by an estoppel against afterwards setting up his own right (*p*).

In *Sabaji Savant* v. *Vithsavant* (*q*) a one-sixth share was awarded to two brothers by a decree for partition. They were dispossessed under a decree obtained by the mortgagee of an undivided one-sixth from the common ancestor (*r*). It was held that they could not obtain a fresh partition in execution of their former decree, though it was suggested they might have a remedy against their former coparceners by an independent suit.

§ 7 B. 2. Other liabilities, that is, provisions for the maintenance or portions of persons not entitled to shares, as described above, sec. 6 B (*s*), may be distributed by agreement amongst the co-sharers. But the estate at large is liable, at least in the hands of the members of the family making a partition (*t*), and

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(*m*) The practice has sometimes been otherwise, see *Musst. Phoolbash Koonwur* v. *Lalla Jogeshwar Sahoy*, L. R. 3 I. A., at p. 26. See *Norender Narain's Case*, below.

(*n*) *Rama Gopal* v. *Pilo*, Bom. H. C. P. J. F. 1881, p. 161.

(*o*) *Norender Narain Singh* v. *Dwarka Lal Mundun*, L. R. 5 I. A., at p. 27.

(*p*) See *Hari* v. *Lakshman*, I. L. R. 5 Bom. 614, quoting *Syed Imam Momtazooddeen Mahomed* v. *Rajkumar Ghose*, 14 Beng. L. R. 408 F. B.; *Narsidas Jitram* v. *Joglekar*, I. L. R. 4 Bom. 57; Ind. Evid. Act., sec. 115; *Chooramun Singh* v. *Shaik Mahomed Ali*, L. R. 9 I. A. 21, 25.

(*q*) Bom. H. C. P. J. F. 1881, p. 193.

(*r*) *Ramchandra Dikshit* v. *Savitribai*, 4 Bom. H. C. R. 73 A. C. J. and *per* Lord Hardwicke in *Penn* v. *Lord Baltimore*, 2 W. & T., L. C. 844.

(*s*) See also 73, 163, 164, 229, 708, 712; Book II., Vyav., sec. 1, Q. 9; *Narhar Singh* v. *Dugnath Kuer*, I. L. R. 2 All. 407; above, pp. 244, 245.

(*t*) *Ramachandra Dikshit* v. *Savitribai*, 4 Bom. H. C. R. 73 A. C. J., referred to above; *Adhiranee Narain* v. *Shona Malee et al.*, I. L. R. 1 Cal. 365; Narada, Part II., Chap. XIII., paras. 25-29; Manu V. 148.

coparceners who desire to limit their responsibility must obtain the assent of the persons interested. At Calcutta it has been held (*v*) that the purchaser of part of an estate, subject to a charge, may be sued singly for the whole amount due, and the same principle would probably be applied in the case of a purchaser with notice of the lien or liability to a charge of the kind we are now considering (*w*). Lastly, if, contrary to the knowledge and expectation of the coparceners who made the partition, an absent coparcener supposed to be dead should come forward to claim his share, or the widow of one deceased should give birth to a son, the proper share of this additional parcener must be made by proportionate deductions from the shares distributed (*x*). The coparceners in existence, however, or begotten at the time of a partition, and those only, are entitled to shares. After-born members of the family share only with their father or those united with him (*y*).

A son who has for money relinquished his share to his father stands thenceforth in the position of a separated son (*z*). But as a separated son he succeeds in preference to the widow, though the father can dispose of the estate (*a*).

After a partition has been made a son born to a coparcener (including a father in relation to sons separated from him in such partition) succeeds to the share and to the acquisitions of the

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(*v*) *Prosonno Coomar Sein* v. *The Rev. B. F. X. Barboza*, 6 C. W. R. 253 C. R.

(*w*) *S. Bhagabati Dasi* v. *Kanailal Mitter et al.*, 8 B. L. R. 225; *B. Goluck Chunder Bose* v. *R. Ohilla Dayee*, 25 C. W. R. 100 C. R.

(*x*) Mit., Chap. I., sec. 6, paras. 1, 8; Stokes's H. L. B. 393-5; May., Chap. IV., sec. 4, para. 35; Stokes's H. L. B. 56; Col. Dig., Book V., Chap. VII., sec. 2, T. 394; *Chengama* v. *Munisami*, I. L. R. 20 Mad. 75.

(*y*) *Yekeyamian* v. *Agniswarian et al.*, 4 M. H. C. R. 307; Mit., Chap. I., sec. 6, pl. 4; Stokes's H. L. B. 394; *Ganpat Venkatesh* v. *Gopalrao*, I. L. R. 23 Bom. 636; *Shivajirao* v. *Vasantrao*, I. L. R. 33 Bom. 267.

(*z*) Steele, L. C. 56, 58, 61.

(*a*) See *Balkrishna Trimbak* v. *Savitribai*, I. L. R. 3 Bom. 54. The descendant who has taken a part of the property in discharge of his claims and left the family (Steele, L. C. 213) has thus forfeited his rights as a co-sharer in any further partition, but not as heir on failure of the members who remained united and their representative descendants. These rights are reciprocal. (Steele, L. C. 233, 422.) Amongst some castes this heirship of the brethren excludes the daughter except as to gifts from her father (Steele, L. C. 425) and even the widow (*ibid.* 424, 423), though in fewer cases.

separated coparcener to the exclusion of his former co-sharers (*b*). He stands on the same footing towards the paternal estate as a son who remained united with his father when a separation occurred between the latter and his other coparceners (*c*). This does not, however, prevent a gift of a moderate amount to a separated son (*d*) as to one unseparated.

Partition does not finally close all claims of the father and sons on each other (*e*) or deprive a separated son of his right of inheritance in competition with another heir, as for instance a reunited coparcener not a son (*f*). In case of absolute indigence, their claims on each other revive (*g*). So too the claim of a mother or a wife to support is not extinguished by the allotment to her of a share (*h*).

A suit on an alleged partition which the plaintiff fails to establish does not bar a subsequent suit by him as a coparcener for partition of the property set forth as undivided (*i*).

The execution of a decree for partition of an estate subject to payment of land revenue is to be made by the Collector (*k*).

(*b*) Gaut. Ad. 28, para. 26; Narada, Pt. II., Chap. XIII., para. 44; Steele. L. C. 59, 406; Note (*y*) above, p. 722.

(*c*) See Mit., Chap. I., sec. 6, para. 2; Vyav. May., Chap. IV., sec. 4, paras. 33, 34.

(*d*) Mit., Chap. I., sec. 6, paras. 13, 14, 15. See *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, I. L. R. 1 Bom. 561, 567; S. C., L. R. 7 I. A. 181. Not by will against an unseparated son, *ibid.*

(*e*) Viram., Tr., pp. 54, 218. See 2 Macn. 114, 148; Hirata, quoted in Col. Dig., Book V., T. 23.

(*f*) Viram., Tr., p. 218; *Ramappa Naiken* v. *Sithammal*, I. L. R. 2 Mad. 182.

(*g*) Steele, L. C. 40, 178, 179; Smriti Chandrika, Chap. II., sec. 1, para. 31 ss.; *Himatsing* v. *Ganpatsing*, 12 Bom. H. C. R. 94; *Ramchandra* v. *Sakharam Vagh*, I. L. R. 2 Bom. 346; *Savitribai* v. *Laxmibai*, I. L. R. 2 Bom., at p. 590. See *Sree Cheytania Anunga Deo* v. *Pursuram Deo*, Mor. Dig., p. 442, No. 38. So also a guru and a chela are bound to support each other in distress; Steele, L. C. 442.

(*h*) Col. Dig., Book V., T. 88, Comm. See 1 Str. H. L. 67, 175; Smriti Chandrika, Chap. II., sec. 1, para. 3 ss. Steele, L. C., 40, states the duty generally.

(*i*) *Konerrav* v. *Gururav*, I. L. R. 5 Bom. 589.

(*k*) Act X. of 1877, sec. 265. Rules for the performance of the duty are provided by Bombay Act V. of 1879, sec. 113.

Joint owners have, under English Law, equal rights to custody of title-deeds. On a partition they are usually assigned to the sole owner or the owner of the largest share of the portions to which they severally relate, but with a right in all interested to see and have copies of them. See *Lambert* v. *Rogers*, 1 Meriv.

Repugnant conditions cannot be annexed to the separate estates taken under a partition (*l*).

489; *Jones* v. *Robinson*, 3 De G. M. & G. 910. Hindu custom assigns the custody to the head of the family with liberty of inspection to all interested. Steele, L. C. 220.

(*l*) *K. Venkatramanna* v. *K. Bramanna Sastralu*, 4 Mad. H. C. R. 345.

VI.—DIGEST OF VYAVASTHAS.

PARTITION.

CHAPTER I.

BETWEEN THE HEAD OF A FAMILY AND HIS FIRST THREE DESCENDANTS.

SECTION I.—OF ANCESTRAL PROPERTY.

Q. 1.—Can a son claim a share of the ancestral and undivided property from his father?

A.—A son has no right to demand a share of the ancestral and undivided property from his father against his wish, unless there are good reasons for the demand. These reasons may be stated thus: (1) The father has relinquished his claim to his property. (2) He is dissipating his property. (3) He is in an unsound state of mind. (4) He is very old. (5) He is afflicted with an incurable disease. In all these cases a son can claim a share of the ancestral property from his father, though he may be unwilling to give it.

Surat, January 3rd, 1859.

Authorities.—(1) Vyav. May., Dayabhaga, p. 91, l. 7; (2*) Mit. Vyav., f. 50, p. 1, l. 7:

"For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels" (which belonged to him). (Mit., Chap. I., sec. 5, para. 3; Stokes's H. L. B. 391.)

Remarks.—1. The passage quoted by the Sastri, as well as the rules derived therefrom, refers to the self-acquired property of the father. Regarding the fourth ground for which the son is said to be able to demand division—old age—

it ought to be remarked that it holds good only if the father is unable to manage his affairs on account of old age (*a*).

2. According to the Mitakshara, *loc. cit.*, and *ibid.* paras. 5 and 8, the son has a right to demand a division of ancestral property. Nilakantha states the same. (May., Chap. IV., sec. 4, para. 13; Stokes's H. L. B. 51.) See also *Duyashunker* v. *Brijvullubh* (*b*).

Q. 2.—A man has a right to one-third of the property left by his deceased father. The man has two sons. The question is, how the man's share should be divided among the grandsons?

A.—The sons and the grandsons of the deceased have equal right to the share of the grandfather's property, but as the father of the two grandsons is alive and is in a good state of health, the share cannot be divided unless the father has no objection thereto. The Sastri assigns many conditions to the sub-division of such share, and it is, therefore, impossible to say what shall be the share of each grandson in the share of the son.

Surat, March 18*th*, 1858 (*c*).

Authority.—* Mit. Vyav., f. 50, p. 1, l. 7 (see the preceding Question).

Remarks.—1. The sons can enforce the partition of the ancestral property, and it must be divided equally between the father and his sons if the father holds a separated share. If he is united with his brethren his intervening will may defeat the sons' desire or partition unless they can make out a case of unfair dealing (*d*).

2. The Sastri thinks of the partition of property acquired by the father himself, or of the grandfather's property during his life and that of the father.

Q. 3.—Can the sons of a man divide the ancestral property among themselves without his consent?

A.—A man's sons have a right to the ancestral property, but if such property, after having passed from the family, was regained by the father, it must be considered as his acquisition. This, as

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(*a*) See Steele, L. C. 216.

(*b*) Bom. Sel. Co., pp. 44, 45. See above, pp. 611 ss.

(*c*) Similar answers were received from *Ahmednuggur*, February 21st, 1851; *Broach*, May 22nd, 1857.

(*d*) See above, pp. 564, 608.

well as that property which may have been directly acquired by the father, cannot be divided without his consent.

Tanna, March 2nd, 1854 (*e*).

Authorities.—(1) Mit. Vyav., f. 50, p. 1, l. 7 (see Q. 1 of this sec.); (2) f. 47, p. 1, l. 7; (3) Vyav. May., p. 91, l. 2; (4) p. 91, l. 4.

Remarks.—1. The sons have a right to demand from their father a division of the ancestral property, and can force him by law to make it. But they cannot divide it privately amongst themselves without reference to their father.

2. As to the meaning of "recovered," when applied to a family estate, see *Bissessur Chuckerbutty et al.* v. *Seetul Chunder Chuckerbutty* (*f*), and § 5 A. 2 *b*, p. 661.

3. Prof. H. H. Wilson observes on this subject, in vol. V. of his works, at p. 68 : "They leave no doubt that a man has neither temporally nor spiritually an absolute command over the whole of any description of his property : he may certainly make away with a great part of it, but there is a limit. That limit is an adequate provision for his family, and we can conceive no more difficulty as to the determination of this provision by the Court than there is in the ascertainment of the sum a widow is entitled to for her maintenance. In the above texts also is to be understood the existence of no distinction between self-acquired and inherited property, and they all apply to a man's wealth generally, making it imperative upon him to secure provision for his family before he alienates even self-acquired wealth. With this reservation, he may dispose of property he has gained during his own life-time as he pleases, as according to Katyayana 'except his whole estate and his dwelling house, what remains after the food and clothing of his family a man may give away' (*g*). Food and clothing are, however, not to be understood in their literal acceptation only, but imply maintenance, as appears from other texts. With regard also to movable ancestral property, there is authority for considering that to be at the father's disposal, according to the text of Yajnavalkya : 'Of precious stones, pearls, and corals, the father is master of the whole, but of the whole immovable property neither father nor grandfather is master' (*h*). The text of Vishnu, however, goes farther and declares that 'the father and son have equal ownership in the whole of the grandfather's wealth.' As, however, the control over movable property, consisting at least of money or jewels, is a nullity, the distinction may be admitted, and the power, if not the right, of a father to dispose of such property at his pleasure is in general undisputed; at the same time it may be safely said that the alienation of this property, like that of self-acquired wealth, is only allowable after provision made for the

(*e*) Similar answers were received from *Surat*, May 27th, 1847; *Ahmednuggur*, July 18th, 1850; *Poona*, October 18th, 1854; *Dharwar*, October 25th, 1858.

(*f*) 9 C. W. R. 69 C. R.

(*g*) Vyav. May., Chap. IX., p. 4; Stokes's H. L. B. 134.

(*h*) Quoted from the Mitakshara in the Vyavahara Mayukha, Chap. IV., sec. 1, p. 5; Stokes's H. L. B. 43; Dayakrama-Sangraha, Chap. VI., p. 19 f.; Stokes's H. L. B. 511; and Dayabhaga, p. 56 (Chap. II., sec. 22; Stokes's H. L. B. 204).

family, and that the unequal partition of both amongst sons, which is authorized by special considerations, may be set aside, if the least favoured son can establish undeniably that he has been deprived of a due share of his father's wealth by that father's unjust anger towards himself, or undue partiality for another son " (*i*).

Q. 4.—A Yogi had four sons. Two of these, one a minor and another of full age, lived with their father. The other two, who had a quarrel with their father, divided the house, which was the ancestral property of the family, against the will of their father and in his absence. Can the two sons divide the property, or must such a division be cancelled?

A.—The division must be cancelled.

Khandesh, October 11th, 1852.

AUTHORITY.—Vyav. May., p. 90, l. 2.

REMARKS.—1. The Sastri's answer is right, because the division had been made, as it would seem, without due regard to the equal rights of the other brothers. But it must be understood that, though this division must be cancelled, the sons may according to the Sastras force their father to make a division of his ancestral property.

2. The authority quoted by the Sastri which declares that "brothers shall divide the estate after their father's death" (*k*) refers to self-acquired property, and is, therefore, out of place.

Q. 5.—A man has instituted a suit against his father for a moiety of the ancestral property as his share. The father has answered that he has contracted some debts on account of the maintenance of the family, and that his son cannot claim a share of the property until the debts have been paid. The question, therefore, is, whether a son can claim a share of the property without paying the debts?

A.—The obligation of liquidating the debts rests on the father. His son is not at all responsible for them as long as the father is alive. The father and the son have an equal share in the ancestral property of the family. The son, therefore, can claim a moiety of the property without being obliged to pay the debts.

Surat, July 6th, 1860.

(*i*) Comp. Steele, L. C. 213, 408; Col. Dig., Book V., T. 74, 75, 77, 78; and see above, pp. 206, 592, 595, 599.

(*k*) Borradaile, May., Chap. IV., sec. 4, para. 1; Stokes's H. L. B. 47.

AUTHORITIES.—(1) Mit. Vyav., f. 19, p. 2, l. 8; (2) f. 50, p. 1, l. 7 (see Chap. I., sec. 1, Q. 1); (3) f. 46, p. 2, l. 11 :

"Even a single individual may conclude a donation, mortgage, or sale of immovable property, during a season of distress, for the sake of the family, and especially for a pious purpose."

"The meaning of that is this : While the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." (Mit., Chap. I., sec. 1, paras. 28, 29; Stokes's H. L. B. 376.) (*l*).

REMARKS.—1. "In respect of the grandfather's estate the sons are not dependent on the father, as they are in respect of the father's self-acquired property. Consequently the partition of the grandfather's estate may be made even against the father's will, and the rule regarding the father's two shares does not obtain" (*m*).

2. Though the Smritis do not provide for a son's paying the family debts while the father is alive and capable, that is because they contemplate the father as the sole manager (*n*). The passage cited shows that the Sastri's view was too narrow, for if an ordinary member may incumber the estate for the needs of the family (*o*), much more may the father; yet his power of dealing with it would be crippled if a son could at any moment claim his share free from its proportional burden. The customary law imposes on sons an obligation to pay all debts reasonably incurred in the administration of the affairs of the family (*p*), as on the father of paying those necessarily incurred by sons living with him unless he has expressly warned the creditor against lending to them (*q*).

3. The rights of a decree-holder for the father's debts were preferred to those of a decree-holder for the debts of the owner himself (*r*). This would probably not be admitted in Bombay unless the property had been attached before the father's death in execution of the decree against him. See above, pp. 73, 161, 192 (*s*).

(*l*) See Narada, Pt. I., Chap. III., paras. 2, 3, 4, &c. above, and Book II., pp. 568, 569, 575, 595, 598.

(*m*) Viram. Tr., p. 66. The father may reserve to himself one extra share of all property acquired by his own exertions, and as respects that property he may even deprive his son of succession to it; but the son has an indefeasible right to inherit descended property," Steele, L. C., p. 58.

(*n*) See above, pp. 598, 599; Steele, L. C. 405.

(*o*) Above, p. 588; Steele, L. C., 54, 398.

(*p*) Steele, L. C. 40, 217. Above, p. 164.

(*q*) Steele, L. C. 178.

(*r*) *Gunga Narain* v. *Umesh Chunder Bose et al.*, C. W. R. for 1864, p. 277.

(*s*) For the Madras Law see above, pp. 162, 585.

Q. 6.—A person had six sons, the eldest of whom is dead. The son of the deceased sues his grandfather for a share of the family property. Is the claim admissible?

A.—The grandson cannot claim any share of the property which his grandfather may have himself acquired. He may, however, claim a share of that which may have descended from his ancestors.

Dharwar, 1846 (*t*).

AUTHORITY.—* Mit. Vyav., f. 50, p. 1, l. 7 (see Chap. I., sec. 1, Q. 1).

REMARKS.—1. The authority quoted refers only to the case of a father and a son.

2. The question, whether a grandson can force his grandfather to make a division of the property which he inherited from his ancestors, has not been touched directly in the Hindu Law books. Still the correctness of the Sastri's opinion may be shown by the following considerations : The position of a son's son towards his grandfather, and his rights to the ancestral property, are exactly the same as those of a son failing the latter. Both have by and from their birth an ownership in the family property—a right which is indefeasible and unobstructible (*v*). Moreover, on the death of his father, the grandson takes his place in regard to religious ceremonies and represents him; it is only consistent, therefore, that the grandson's right to demand a division of his grandfather's ancestral property should be the same as that of his father (*w*).

Q. 7.—A man has two sons. He equally divided his property between them. He gave one share to the eldest son and the other to his grandson, because his younger son was abroad. The question for consideration in the case is, whether a father can, without the consent of his son, give his share to his grandson?

A.—The father could not give his son's share to his grandson, unless the son is incompetent to receive it.

Ahmednuggur, September 12*th,* 1855.

AUTHORITIES.—(1) Mit. Vyav., f. 47, p. 1, l. 7; (2) f. 60, p. 1, l. 13; (3) f. 60, p. 2, l. 8; (4) f. 46, p. 2, l. 14; (5) f. 50, p. 1, l. 7; (6) f. 12, p. 1, l. 16; (7) Vyav. May., p. 161, l. 8; (8) p. 94, l. 1; (9) p. 94, l. 3; (10*) Viramit., f. 181, p. 2, l. 16 :

"Now both that partition which is made at the desire of sons during the

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(*t*) A similar answer was received from *Surat*, September 19th, 1864.

(*v*) See Mit., Chap. I., sec. 1, para. 3; Stokes's H. L. B. 365; and Book I., pp. 63, 71; Steele, L. C. 58, 63, 40; Col. Dig., Book V., Chap. II. *ad. init.*

(*w*) See also Book II., p. 610; and *Nagalinga Mudali* v. *Subbiramaniya Mudali et al.*, 1 M. H. C. R. 77

lifetime (of their father), and that which is made after the father's death, are made even at the desire of one (coparcener). Therefore, that also, which has been stated by Katyayana, in his chapter on Partition, 'They shall deposit the wealth of minors and absentees, preserving it from expense, with (their) relations and friends,' can take effect. For, if a partition could not take place without the permission of such (minors or absentees) the statement that their wealth shall be deposited with relations or friends would be improper."

REMARK.—According to the above passage it would appear that an absent son must not be simply passed over in favour of his son. But there would be no objection to deposit his share with the latter, in case the son's son is of age and fit to take care of it. See also Book II., p. 626.

Q. 8.—A man gave a portion of the property belonging to his father to his son, who had separated from him. It remained in the possession of his son for ten years. The son afterwards sold it. By this time his half-brothers, born after the giving of the property, filed a suit and asserted that they had a right to a portion of the property given by their deceased father. The question is, whether or not sons, born after their father had given away his property, can claim a portion of it, even when it has been sold to another?

A.—When a father and his sons have divided their property and become separate, sons born after the partition can have no claim to the property which passed into the hands of their brothers. They cannot, therefore, sue those who have received a share of the property, nor those to whom it has been sold.

Tanna, July 12th, 1851.

AUTHORITY.—Mit. Vyav., f. 50, p. 2, l. 7:

"A son born before partition has no claim on the wealth of his parents, nor one, begotten after it, on that of his brother." (Mit., Chap. I., sec. 6, para. 4; Stokes's H. L. B. 394.)

REMARKS.—1. Sons born after partition have, however, an exclusive right to their father's share, and to any property which he may have acquired after partition (*x*).

2. In the case of *Baee Gunga* v. *Dhurumdass Nurseedas* (*y*), the interest of a son still unborn was admitted as against a dissipation of property by the father; but in the case of *Buraik Chutter Singh et al.* v. *Greedharee Singh et al.* (*z*), it was held that a grandson unborn at the time cannot afterwards

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(*x*) See above, pp. 64, 722.
(*y*) Bom. S. A. R. for 1840, p. 16.
(*z*) 9 C. W. R. 337.

question an alienation of ancestral property made by his grandfather with his father's assent. It is only on the actual birth of the son that his co-ownership arises; it is not retrospective, as adoption to some extent is when made by a widow. Perhaps this principle may be applied to explain the case of *Giridhari* v. *Kanto* (*a*), the debts there having apparently been contracted before the birth of a son (*b*). A son cannot contest an alienation made by his father before he was begotten (*c*), or adopted (*d*).

SECTION 2.—OF SELF-ACQUIRED PROPERTY.

Q. 1.—Can a man and his son divide their property between them?

A.—The property left by the grandfather may be equally shared by the son as well as his father. The property acquired by the father should be divided into three shares, two of which should be allotted to the acquirer and one to his son.

Sholapoor, January 29th, 1855.

Authorities.—(1) Viram., f. 105, p. 2, l. 3; (2) Vyav. May., p. 183, l. 6; (3) p. 174, l. 3; (4) p. 180, l. 3; (5) p. 180, l. 4; (6*) Mit. Vyav., f. 50, p. 1, l. 7 (see Chap. I., sec. 1, Q. 1); (7*) f. 50, p. 1, l. 11:

"So does that which ordains a double share (relate to property acquired by the father himself). 'Let the father making partition reserve two shares for himself.'" (Mit., Chap. I., sec. 5, para. 7; Stokes's H. L. B. 392.) But see also paras. 9, 10; Stokes's H. L. B. 393; Col. Dig., Book V., sec. 96; Narada, Pt. II., Chap. XIII., sl. 12.

Q. 2.—A man has four or five sons, and it is probable that he may have more. For some reason known only to the man, he framed a memorandum, showing what each of his sons was to receive on account of his share. Can this memorandum be taken advantage of by the sons in claiming a share during the lifetime of the father?

A.—A father may give shares to his sons if he chooses, but sons

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(*a*) L. R. 1 I. A. 320.

(*b*) See Chap. I., sec. 2, Q. 8.

(*c*) *Jado Singh* v. *Musst. Ranee*, 5 N. W. P. R. 113.

(*d*) *Rambhat* v. *Lakshman Chintaman*, I. L. R. 5 Bom. 630.

have no right to demand shares of any property acquired by their father while he is alive. The memorandum does not seem to be authoritative, and cannot be taken advantage of by the sons.

Dharwar, January 11th, 1850.

AUTHORITY.—Mit. Vyav., f. 47, p. 1, l. 12 :

"One period of partition is, when the father desires separation as expressed in the text [para. 1], 'When the father makes a partition.' Another period is while the father lives, but is indifferent to wealth, and disinclined to pleasure, and the mother is incapable of bearing more sons; at which time a partition is admissible, at the option of the sons, against the father's wish; as is shown by Narada, who premises partition subsequent to the demise of both parents, 'Let sons regularly divide the wealth when the father is dead,' and adds, 'or when the mother is past child-bearing, and the sisters are married, or when the father's sensual passions are extinguished.' Here the words 'Let sons regularly divide the wealth' are understood. Gautama likewise having said 'after the demise of the father, let sons share his estates,' states a second period, 'Or when the mother is past child-bearing'; and a third, 'While the father lives, if he desire separation.' So, while the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father be unwilling, if he be addicted to vice or afflicted with a lasting disease. That Sankha declares, 'Partition of inheritance takes place without the father's wish, if he be old, disturbed in intellect, or diseased.'" Mit., Chap. I., sec. 2, para. 7; Stokes's H. L. B. 378.

REMARK.—See Book II., p. 607 ss.; 1 Str. H. L. 193. The Mit., Chap. I., sec. 5, para. 8 (*e*), assigns to the sons power to demand a partition of ancestral property at any time, while para. 10 gives to the father full power, as against control by the sons, of dealing with property acquired by himself. At Madras it has been said, in *Nagalinga Mudali* v. *Subbiramaniya Mudali et al.* (*f*), that paras. 8 and 11 of sec. 5 relate to a partition of ancestral property, while sec. 2 relates to property acquired by the father himself. The Mit., Chap. I., sec. 2 (see Q. 4), recognizes unequal partition of self-acquired property by the father as still consistent with the Hindu Law, limited, however, so as not to allow more than a deduction of one-twentieth, one-fortieth, and one-eightieth for the first, second, and third sons respectively (*g*). It applies the prohibition against

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(*e*) Stokes's H. L. B. 393.

(*f*) 1 M. H. C. R. 77.

(*g*) So Smriti Chandrika, Chap. II., sec. 1, paras. 3, 8, 22; Chap. VIII., para. 25; Madhavija, paras. 5, 9; Varadraja, pp. 5, 8. These deductions had reference very probably as originally instituted to the rank of the wives married in succession from amongst the different classes. Such a ground of difference in the rank of the sons is found in various parts of the world, as *ex. gr.* amongst the Swathis in the Himalayas.

In Kangra it appears that the eldest son still takes either one-twentieth or else some particular field or chattel as an addition to his aliquot share in an inheritance. In return he has to pay a proportionally extra share of the paternal debts should there be any. Panj. Cust. Law, vol. II., pp. 182-3, 225.

any unequal division only to a partition by sons amongst themselves. See Q. 3, 4 below. Thus the power of disposition, generally affirmed in para. 10 of sec. 5, and extended by the High Court of the N. W. P. to ancestral property (*h*), does not imply that of a capriciously unequal distribution, that case being expressly provided against in sec. 2, para. 13 (*i*). The passage in sec. 5, para. 10, is further qualified by sec. 1, para. 27 (*k*), followed in *Muttumaran* v. *Lakshmi* (*l*).

The Vyav. May., Chap. IV., sec. 6, para. 2 (*m*), extends the prohibition against inequality to a partition by a father. The Viramitrodaya, cited *infra*, follows the Mitakshara. Narada allows the father to give the eldest the best share or to distribute according to his inclination, Narada, Pt. II., Chap. 13, para. 4. This passage points to the special deductions, as Pt. I., Chap. III., paras. 36, 40, to the father's complete authority. The Mit., Chap. I., sec. 5, pl. 7 (*n*), limits similar passages to the self-acquired property, and the father's independence as to such property in a partition seems to mean independence only of the sons, not freedom to depart from the rules prescribed by the Sastras (*o*).

In *Bahirji Tanaji* v. *Oodatsing et al.* (*p*), the High Court of Bombay ruled that a grantee of an Inam village from the Rajah of Satara might by will settle it on his two junior wives and their children to the exclusion of his eldest son. See the Remarks under Questions 4 and 5, and Book II. § 7, on the Rights and Duties arising on Partition.

Q. 3.—A man has a son by each of his two wives. Should any larger share be given to the son of the elder wife?

A.—No.

Dharwar, 1846.

Authority.—* Mit., Vyav., f. 48, p. 1, l. 8:

"It is expressly declared, 'As the duty of an appointment (to raise up seed to another), and as the slaying of a cow for a victim, are disused, so is partition

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(*h*) *Baldeo Das* v. *Sham Lall*, I. L. R. 1 All., at pp. 78, 79.

(*i*) Stokes's H. L. B. 380.

(*k*) *Ibid*. 375.

(*l*) M. S. R. for 1860, p. 227.

(*m*) Stokes's H. L. B. 72.

(*n*) Stokes's H. L. B. 392.

(*o*) Mit., Chap. I., sec. 5, pl. 10 (Stokes's H. L. B. 393) compared with sec. 2, pl. 1, 13, 14 (Stokes's H. L. B. 377, 380), and the Smriti Chandrika, Chap. II., sec. 1, pl. 14, 20, compared with Chap. VIII., pl. 19, 25, 26; Viram. Tr., pp. 54, 63 ss.

According to the early Common Law in England the inheritance if held in socage had to pass according to custom either to the eldest or youngest son or in equal parts to all the sons, saving the preferential right of the eldest to the family abode, for which allowance was made to the others. Glanv. VII. 3.

(*p*) R. A. 47 of 1871; Bom. H. C. P. J. F. for 1872, No. 33.

with deductions (in favour of elder brothers).' " (Mit., Chap. I., sec. 3, para 5; Stokes's H. L. B. 382.)

REMARK.—The "partition with deductions" (uddhara) includes the division between elder and younger sons, and between the sons of elder and younger wives. Regarding the latter, see Gautama, Adhyaya 28, paras. 11, 12, Transl., pp. 300, 301.

Q. 4.—There are two uterine brothers whose father is alive. When they divided their property, one of them obtained a larger piece of ground. The other has sued him for it. The father wishes that the unequal division should remain as it is. Can the brother's claim to an equal division be allowed?

A.—In the Kali age unequal division is forbidden. One brother can therefore sue the other. The father has no right to maintain an unequal division.

Ahmednuggur, July 30th, 1848.

AUTHORITIES.—(1) Mit. Vyav., f. 47, p. 1, l. 7; (2) f. 48, p. 1, l. 8 (see the preceding question); (3) f. 52, p. 1, l. 13; (4) f. 50, p. 1, l. 7; (5) f. 47, p. 2, l. 7; (6) f. 51, p. 1, l. 3; (7*) f. 47, p. 1, l. 11:

"This unequal distribution supposes property by himself acquired. But if the wealth descended to him from his father, an unequal partition at his pleasure is not proper; for equal ownership will be declared." (Mit., Chap. I., sec. 2, para. 6; Stokes's H. L. B. 378.)

(8*) Mit. Vyav., f. 48, p. 2, l. 10:

"The distribution of greater and less shares has been shown (§ 1). To forbid in each case an unequal partition made in any other mode than that which renders the distribution uneven by means of 'deductions,' such as are directed by the law, the author adds: 'A legal distribution, made by the father among sons separated with greater or less shares, is pronounced valid.'

"When the distribution of more or less among sons separated by an unequal partition is legal, or such as ordained by the law, then that division, made by the father, is completely made, and cannot afterwards be set aside: as is declared by Manu and the rest. Else it fails, though made by the father." (Mit., Chap. I., sec. 2, paras. 13 and 14; Stokes's H. L. B. 380.)

REMARKS.—1. Under the law of the Mitakshara the answer is correct, whether the land was ancestral (Auth. 7) or self-acquired property (Auth. 8 and 9). The inequality of distribution contemplated by the latter is strictly limited to the specified deductions that may be made in favour of the eldest son or the eldest wife's son. See Q. 2, Remark. According to the principles laid down by the Courts an unequal division of self-acquired property by a father is perhaps admissible, but it is opposed to the Commentaries (*q*), except as to a reasonable gift to a particular son. See above, pp. 203, 206, 207.

(*q*) "He may distribute his property, but he must do it according to law," Ellis, at 2 Str. H. L. 418. The Smriti Chandrika and Madhaviya, on examination by Colebrooke, yielded a similar result as to immovables, 2 Str. H. L. 439,

2. The principle adopted by the Smriti Chandrika, of a complete ownership arising immediately on birth coupled with an exclusive power of administration in the father during his life is contested by Jimutavahana and Raghunandana, who argue that the right arises only on the father's death. Mitramisra refutes their contention, Viram. pp. 7-15. At p. 45 he insists on the distinction between ownership and independence in disposal of property.

Q. 5.—A man has two wives. Each of them has a son. The husband lived with the elder wife, and to her son he gave all his property in disregard of the claim of the younger wife's son. Has he a right by law to do so?

A.—A father cannot give the whole of his property to one of his sons.

Dharwar, May 15th, 1850.

Authorities.—(*1—3) see the preceding two cases; (*4) Viramitrodaya, f. 172, p. 2, l. 13:

"If (the father's) desire only were the reason for the allotment of the shares, then this passage of Katyayana, 'But at a partition, made during his lifetime, a father shall not give an (undue) preference to one son, nor shall he disinherit a son without a sufficient reason,' would have no object. 'He shall not give preference' means 'he shall not give him, at his pleasure, a preference other than the share of the eldest and the rest, which have been declared in the law books.'" (See the passage, on which this is a commentary, quoted in the Digest of Vyavasthas, Chap. II., sec. 3, Q. 14; *supra*, p. 103.)

Remarks.—1. A father is not at liberty by way either of gift or of partition to give nearly all the ancestral movable property to one son to the exclusion of another (*r*).

2. A man cannot give his whole ancestral estate to his son excluding his grandsons by another son deceased (*s*).

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441. So according to the Benares and Mithila Law, according to Sutherland, *ibid.* 445; and in Bombay, *ibid.* 449, and Madras, *ibid.* 450.

According to the Jewish Law 'the father had no power of disinheriting his sons; the firstborn received by law two portions, the rest shared equally." Milman's Hist. of the Jews, vol. I., p. 172.

As to the earlier English Law, see above, pp. 210, 620. The Saxon Law there noticed agreed with that of the other Teutonic tribes, developed into the German Landrecht, see Laboulaye, *op. cit.*, 373, 394. The growth of the power of alienation of immovable property in Europe is the subject of a learned note by Maynz to his System, § 177.

(*r*) *Bhujangrav et al.* v. *Malojirav*, 5 Bom. H. C. R. 161 A. C. J.; *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; Col. Dig., Book V., T. 27; 2 Str. H. L. 435.

(*s*) 2 Macn. H. L. 210.

3. According to the Benares Law he cannot give all his self-acquired property to one son or grandson excluding the others. Prof. H. H. Wilson observes on this subject, in vol. V. of his Works, at p. 74 : "We cannot admit either, that the owner has more than a contingent right to make a very unequal distribution of any description of his property, without satisfactory cause. The onus of disproving such cause, it is true, rests with the plaintiff, and unless the proof were too glaring to be deniable, it would not, of course, be allowed to operate. We only mean to aver that it is at the discretion of the Court to determine whether an unequal distribution has been attended with such circumstances of caprice for injustice as shall authorize its revisal. It should never be forgotten in this investigation, that wills, as we understand them, are foreign to Hindu Law."

As to the attempted validation of such a distribution on the principle of *factum valet*, he says, *ibid.*, p. 71 : "It is therefore worth while to examine this doctrine of the validity of illegal acts. In the first place, then, where is the distinction found? In the most recent commentators, and those of a peculiar province only, those of Bengal, whose explanation is founded on a general position laid down by Jimutavahana; 'therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts,' Dayabhaga, p. 60 (*t*). This remark refers, however, to the alienation of property, of which the alienor is undoubted proprietor, as a father, of immovable property if self-acquired, or a coparcener of his own share before partition; but he himself concludes that a father cannot dispose of the ancestral property, because he is not sole master of it. 'Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth.' Nothing can be more clear than Jimutavahana's assertion of this doctrine, and the doubt cast upon it by its expounders, Raghunandana, Sri Krishna, Tarkalankara, and Jagannatha is wholly gratuitous. In fact, the latter is chiefly to blame for the distinction between illegal and invalid acts."

Q. 6.—A man has an odd number of sons and an even number of sons by his Lagna and Pat-wives respectively. How should his property be divided among them? And have both the wives equal rights and position in the eye of the law?

A.—The property should be equally divided among the sons of the Lagna and Pat-wives. Both the wives have equal rights and position in the eye of the law. The ceremonies of the "Lagna" and "Pat" are, however, different.

Dharwar, 1858.

AUTHORITIES.—(1—4). See the three preceding cases.

REMARK.—Regarding the position of Pat-wives, see remark to Book I., Chap. II., sec. 6 A, Q. 37, p. 391.

(*t*) Stokes's H. L. B. 207.

Q. 7.—A shoemaker has four sons, three by his Lagna-wife and one by his Pat-wife. Two of the Lagna-wife's sons are minors. The father has divided his property in the proportion of one-half to the son of the Pat-wife and one-half to the sons of the Lagna-wife. Is this a legal division?

A.—It is ordained in the law that, in the Kali age (*v*) a father should divide his property, real and personal, equally among his sons. If any one should divide his property against this rule, it is not legal. A son has the right to prevent his father from making any irregular transfer of his ancestral property (*w*). When a man transfers his own property it is necessary that his sons should acquiesce in the father's disposal of it. If a property has not been properly divided in the first instance, it may be re-divided so as to allot proper shares to the sons.

Ahmednuggur, July 18*th*, 1848.

AUTHORITIES.—(1) Mit. Vyav., f. 48, p. 1, l. 8 (see Q. 3 of this sec.); (2) f. 50, p. 1, l. 7 (see Chap. I., sec. 1, Q. 1); (3 & 4) see Q. 4 and 5 of this sec.

REMARK.—To give validity to an unequal distribution of the ancestral estate by a father it must be made during his life and with the assent of his sons, indicated by their taking possession of their shares (*x*). The father may probably have been moved by a tradition in his caste of a law of patnibhag. See above, p. 399, and below, Chap. II., sec. 1, Q. 6, p. 744.

Q. 8.—A Paradesi (*y*) has two sons, to the younger of whom he passed a deed of gift, stating that, as his elder son did not support or obey him, he should not lay claim to the house purchased by him, which was granted to the younger, and that the elder son might build a house for his own use on the ground which had descended to him from his ancestors. The younger son was not,

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(*v*) The Hindus divide their History into four ages; the present (Kali) is the last. Certain laws are said to have been practicable in the former ages and not to be so now.

(*w*) This answer of the Sastri illustrates what is said above, pp. 559, 564, 568, 587, 594. In another case a Sastri said : " A man who has adopted cannot alienate immovable property without good reason. With good reason he may; especially what has been acquired by himself." MS. 1725.

(*x*) *Muttervengadachellaswamy* v. *Tumbayaswamy Manigar*, M. S. D. A. R. for 1849, p. 27.

(*y*) The term means a foreigner, but is usually applied to a Hindu native of Northern Hindustan.

however, put in possession of the house, which was occupied by the elder son. The younger has therefore brought an action against him, and the question is, whether the elder son can claim a moiety of the house?

A.—A special grant from a father to his son, as a mark of his affection for him, is legal. If the elder son is an ill-behaved man, he would forfeit his claim to the property of his father, and be entitled only to a maintenance. If the ground, which is the ancestral property of the family, was granted to the elder son with the consent of the younger, the grantee's title thereto must be admitted.

Ahmednuggur, September 23rd, 1857.

AUTHORITIES.—(1) Viramitrodaya, f. 50, p. 1, l. 7; (2) f. 50, p. 123, l. 8; (3) f. 175, p. 2, l. 6; (4) Vyav. May., p. 124, l. 1; (5) p. 161, l. 8; (6) Mit. Vyav., f. 51, p. 1, l. 3; (7*) f. 46, p. 2, l. 9:

"But he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor: since it is ordained, 'Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons.'" Mit., Chap. I., sec. 1, para. 27 (Stokes's H. L. B. 375).

See also the authorities quoted under the preceding cases.

REMARKS.—1. The father may make a present, but he has, under the Mitakshara, no right to dispose of immovable property, though acquired by himself, without the consent of all his sons (Auth. 7). If, therefore, the eldest son's misconduct was not such that he might be called pitridvit, "hater of his father" (for the definition of the meaning, see the Digest of Vyavasthas, Chap. VI., sec. 3 *a*), and that he could be disinherited on this ground, he will share the father's property equally with his younger brother.

2. The Bombay High Court, however, allows the father to dispose, at his pleasure, of all self-acquired property (*z*). This may be considered the settled doctrine of the Courts (*a*), at least as to movable property acquired without the use of the ancestral estate (*b*).

3. By the Mithila Law the owner of self-acquired property has complete power to dispose of it (*c*). The same rule is implied in *B. Beer Pertab Sahee* v.

(*z*) *Gangabai* v. *Vamanaji*, 2 Bom. H. C. R. 304.

(*a*) *Muddun Gopal Thakoor et al.* v. *Ram Buksh Pandey et al.*, 6 C. W. R. 71 C. R.

(*b*) See Book II., pp. 657, 664; Col. Dig., Book V., T. 25, 27.

(*c*) Vicada Chintamani, p. 76; *R. Bishen Perakh Narain Singh* v. *Bawa Misser et al.*, 12 B. L. R. 430 P. C.

Expressions equally strong in other treatises are, however, explained as leaving the father still subject to the prohibitions against unequal partition, except according to the rules of deduction, by some recognized as still operative. See Dayakrama-Sangraha, Chap. VI., paras. 11-14 (Stokes's H. L. B. 510-11);

Rajender Pertab Sahee (*d*), as operating under the Mitakshara Law with respect to movable but not as to immovable property (*e*).

4. As to unequal disposal by will, the law of wills follows the analogy of the law of gifts (*f*), " and one leaving male descendants, may [by will] dispose of self-acquired property, if movable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants. In the *Bithoor Case* (*g*), the testator, having real as well as personal estate, made an unequal distribution of both amongst his sons, and his legal power to do so was affirmed by this Committee " (*h*).

5. The fact that a sale as to a small proportion was made for immoral purposes will not, even as to ancestral property, vitiate it as against the sons (*i*). Sons unborn at the time of a sale have no *locus standi* afterwards to impeach it (*k*).

SECTION 3.—THE MOTHER'S SHARE.

Q. 1.—A man had two sons. He proposed that his property should be divided into three shares, two to be assigned to the sons, and one to himself. The division was carried into effect to a

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Smriti Chandrika, Chap. II., sec. 1, paras. 19, 20, 24, compared with Narada, Pt. I., Chap. III., sl. 36, 40, and Pt. II., Chap. XIII., sl. 14, 15, 16; and as to the Mithila doctrine itself, see the Vivada Chintamani, p. 309.

(*d*) 12 M. I. A. 1.

(*e*) See Mit., Chap. I., sec. 1, paras. 21, 27; Vyav. May., Chap. IV., sec. 1, para. 5; Viramit., Tr., pp. 55, 68, 74. A son's alienation without his father's consent was held invalid, *Sheo Ruttun Koonwar* v. *Gour Beharee Bhukut et al.*, 7 C. W. R. 449. And a son has a right during the lifetime of his father to set aside an alienation of ancestral property made without his consent, *Aghory Ram Sarag Singh* v. *J. Cochrane et al.*, 5 Beng. L. R. 14 App.

Alienation of property, with assent of undivided without assent of divided sons, was held valid, *Tirbegnee Doobey et al.* v. *Jutta Shunket et al.*, Agra S. D. A. R. for 1862, p. 71.

So alienation by an uncle without assent of his nephew, *Gopall Dutt Pandey et al.* v. *Gopallal Misser*, Cal. S. D. A. R. for 1859, p. 1314.

(*f*) *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore*, 9 Beng. L. R., at p. 398 C. R. (P. C.)

(*g*) *Nana Narain Rao* v. *Haree Punth Bhao et al.*, 9 M. I. A. 96.

(*h*) P. C., at 12 M. I. A., p. 38; see above, pp. 618, 657, 664 ss.; *Lakshmibai* v. *Ganpat Moroba*, 5 Bom. H. C. R. 135 O. C. J.; Book I., Chap. II., sec. 14, I. A. 4, Q. 9; 2 Str. H. L. 407 (as to a widow's will); *Narottam* v. *Narsandas*, 3 Bom. H. C. R. 6 A. C. J.; *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L. R. 1 Bom. 561. In appeal the Privy Council decided that ancestral property could not be alienated as against a co-sharer (a son) by will, L. R. 7 I. A. 181. See above, p. 275; *Bhagvan Dullabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641, for a nuncupative will.

(*i*) Though their assent is generally requisite. Steele, L. C. 58, 68, 404, 210.

(*k*) S. A. No. 124, of 1876, *Kastur Bhavani* v. *Appa and Sitaram*, Bom. H. C. P. J. F. for 1876, p. 162. See Book II., Vyav., Chap. I., sec. 1, Q. 8.

certain extent. The sons, however, disagreed and prevented the division from being fully enforced. Their mother held with the elder son and the father with the younger. The elder son has sued the younger for one-half of the father's property. The father states that he is at liberty to dispose of his property in any manner he pleases. Is there any legal objection to the claim?

A.—The father divided his property into three shares, but it would have been more in accordance with the Sastra had he divided it into four shares, three to be assigned as above and one to his wife. The original acquirer is, however, at liberty to dispose of his property in any way he likes. The elder son, therefore, has no right to sue the younger for an equal share of the patrimony.

Ahmednuggur, April 28th, 1847.

Authorities.—(*1) Mit. Vyav., f. 48, p. 2, l. 10 (see the Digest of Vyavasthas, Chap. I., sec. 2, Q. 4); (2) Mit. Vyav., f. 47, p. 2, l. 3:

"If he make the allotments equal, his wives, to whom no separate property has been given by the husband or father-in-law, must be rendered partakers of like portions. (Mit., Chap. I., sec. 2, para. 8; Stokes's H. L. B. 379.)

(3) Mit. Vyav., f. 50, p. 1, l. 11:

"The first text 'When the father makes a partition,' &c. (sec. II., § I.) refers to property acquired by the father himself. So does that which ordains a double share: 'Let the father, making a partition, reserve two shares for himself.' The dependence of sons, as affirmed in the following passage, 'While both parents live, the control remains, even though they have arrived at old age' (*l*), must relate to effects acquired by the father and the mother. This other passage, 'They have not power over it (the paternal estate) while their parents live,' must also be referred to the same subject." (Mit., Chap. I., sec. 5, para. 7; Stokes's H. L. B. 392.)

Remark.—The mother is entitled to a share (Auth. 1), and a division made by the father, without taking into account her rights, is liable to re-adjustment (Auth. 2) (*m*). Under the Hindu Law the father cannot directly divide his property in any way he likes. Considerable restrictions are placed on his power even as to self-acquired property, by the Mit., Chap. I., sec. 2 (*n*). The decisions of the English Courts, however, allow it as to self-acquired property, relying on a passage (*o*) which the Sastri also in this answer appears to understand as conferring the power. The eldest son cannot enforce a partition of his father's self-acquired property (Auth. 3).

(*l*) This passage is not translated quite correctly. It ought to stand thus: "While both parents live, he (the son) is dependent, though he may have arrived at old age." Colebrooke says, "The power of giving is not restrained, unless, in the case of land, the owner having male issue living, or, in that of the whole property, leaving the family destitute." 2 Str. H. L. 6, 9, 10.

(*m*) See § 4 F, and below, Chap. II., sec. 2, Q. 3.

(*n*) See also Col. Dig., Book V., Chap. I., T. 27.

(*o*) Mit., Chap. I., sec. 5, para. 10; Stokes's H. L. B. 393.

CHAPTER II.

PARTITION BETWEEN OTHER COPARCENERS.

SECTION I.—BETWEEN BROTHERS.

Q. 1.—Would it be lawful for brothers to divide their property, when the son of a deceased brother is a minor?

A.—Yes.

Tanna, December 21*st*, 1858.

AUTHORITIES.—(1) Viram., f. 170, p. 1, l. 1; (2) f. 182, p. 1, l. 1; (3) f. 181, p. 2, l. 16 (see Book II., Chap. I., sec. 1, Q. 7); (4) Mit. Vyav., f. 46, p. 2, l. 14.

REMARKS.—1. See 2 Str. H. L. 362.

2. In the absence of unfairness, infants are bound by a division in which they were represented by their mother as guardian. But a partition cannot ordinarily be demanded on their behalf (*p*).

Q. 2.—Of four brothers, the existence of two cannot be ascertained. Can the remaining two divide their property equally between them?

A.—They cannot do so. The absent brothers will be entitled to their shares, whenever they may claim them.

Dharwar, March 31*st*, 1857.

AUTHORITIES.—(1) Mit. Vyav., f. 49, p. 1, l. 10; (2) Viramit., f. 181, p. 2, l. 16 (see Book II., Vyav., Chap. I., sec. 1, Q. 7).

REMARK.—The absence of the two brothers is no bar to the division of the estate. Their shares should, however, be set apart and kept intact. See *Nanaji* v. *Tukaram* (*q*), the decision in which, however, was based on the plaintiff's having been turned adrift within the statutable period (*r*).

(*p*) *See Lakshmibai* v. *Ganpat Moroba et al.*, 4 B. H. C. R. 153 O. C. J.; 2 Str. H. L. 310. See also Book II., § 4 *c.* 3, p. 622.

(*q*) R. A. No. 46 of 1871, Bom. H. C. P. J. F. for 1871.

(*r*) See also 2 Str. H. L. 396, 327; Col. Dig., Book V., T. 394; Vyav. May., Chap. IV., sec. 4, para. 24; Stokes's H. L. B. 54; Book II., § 4 c. 4, p. 626.

Q. 3.—There are three brothers. One of them is absent in a distant part of the country. The two are in possession of the property. One of them claims one-half of it. Can he have so much? Can the fact of the absentee being a bachelor or married have any effect on the division?

A.—If a brother is not married, the expenses of his marriage should be defrayed from the common stock (*s*). The remainder will be divided; one brother has no right to demand one-half of the property, merely because another is absent.

Ahmednuggur, July 25*th*, 1848.

AUTHORITY.—See the preceding case, and also the remark on it.

Q. 4.—A deceased man has left two sons. One of them has one son and the other has two. How should the property be divided among them?

A.—The father of the two sons should take one-half of the property and equally divide it between his two sons. The father of the one should take the other half.

Dharwar, January 8*th*, 1852.

AUTHORITY.—*Mit. Vyav., f. 47, p. 2, l. 14:

"Let sons divide equally both the effects and the debts after [the demise of] their two parents.

"[After their two parents]. After the demise of the father and mother: here the period of the distribution is shown. [The sons.] The persons who make the distribution are thus indicated. [Equally.] A rule respecting the mode is declared: in equal shares only should they divide the effects and debts." Mit., Chap. I., sec. 3, paras. 1 and 2 (Stokes's H. L. B. 381).

REMARK.—If the sons of the second brother demand a division of their father's ancestral estate, his portion must be divided into three shares, one for the father and one for each son.

Q. 5.—A man was granted a piece of land as a charity. The grantee is now dead, and the land is in the possession of one of his sons. The other son has instituted a suit against his brother for the recovery of one-half of the land as his share of the property. The question is whether land granted as a charity is divisible?

(*s*) Steele, L. C. 404.

A.—If the land was the property of the father, and if it had not been alienated by him, his sons will be entitled to equal shares of the property.

Surat, August 21*st*, 1845.

AUTHORITY.—*Mit. Vyav., f. 47, p. 2, l. 14 (see the preceding question).

REMARKS.—The answer is right only under the supposition that the land was not given for some particular purpose, *e.g.* the continual performance of an Agnihotra. If such a condition had been attached to the gift, the eldest son, who alone would be entitled to perform the ceremonies, would also alone inherit the land. This rule follows from the maxim, that "whatever has been given for religious purposes must be used for the stated purposes only" (*t*). Places of worship and sacrifice are not divisible. The parties are entitled only to their turns of worship (*v*). The Courts have recognized the illegality of a dealing with religious endowments, which by introducing strangers would make the worship impracticable or otherwise defeat the purpose of the founder, but this objection does not generally apply to alienations within the family designated as to furnish worshippers (*w*).

Q. 6.—A man died, leaving two widows, who live separately. The one has one son and the other has two. How shall the property of the deceased be apportioned between the two widows on account of their respective sons?

A.—The property should be divided into as many equal shares as the number of the sons, and each mother should, in her capacity of guardian, take as many of them as the number of her sons.

Khandesh, December 16*th*, 1858.

AUTHORITY.—*Vyav. May., p. 97, l. 7:

"Brihaspati gives this apposite example, 'Among brothers, who are equal in class, but vary in regard to the number [of sons produced by each mother],

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(*t*) Vyav. May., Chap. IV., sec. 7, para. 23; Stokes's H. L. B. 79. Quod divini juris est id nullius in bonis est. Sec. De Divis. Rer. Di. Li. I. Ti. VIII. Fr. VI. § 2.

(*v*) *Anund Moyee Chowdhrain et al.* v. *Boykantnath Roy*, 8 C. W. R. 193, C. R.; *Mitta Kunth* v. *Neerunjun*, 14 Beng. L. R. 166, and see also the case of *Nobkissen Mitter* v. *Hurrischunder Mitter*, East's Notes of Cases, 2 Mor. Dig., p. 146.

(*w*) *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty*, I. L. R. 1 Mad. 235; *Mancharam* v. *Pranshankar*, I. L. R. 6 Bom. 298; *Ganesh Moreshwar* v. *Prabhakar Sakharam*, Bom. H. C. P. J. F. 1882, p. 181; *Anuntha Tirtha Shariar* v. *Nagamuthu Ambalagaren*, I. L. R. 4 Mad. 200; *Sitarambhat* v. *Sitaram Ganesh*, 6 Bom. H. C. R. 250 A. C. J.

the shares of the heritage are allotted to the males [not to their mothers].' " (Mayukha, Chap. IV., sec. 4, para. 26; Stokes's H. L. B. 54.)

REMARKS.—1. Widows have no right to their husband's estate during the lifetime of their sons, and it is, therefore, impossible that the partition should be made through them. But if a man leave two or three wives, who have an equal number of sons who are minors, circumstances may arise which make a division into two or three shares more advantageous than one into many, and in that case the Hindu Law is not opposed to a " division according to mothers." Even if the sons be unequal in number, a proportional allotment might be made (*x*). This appears to be the sense in which Nilakantha took the passage of Brihaspati and Vyasa, quoted by him (*y*). In any other sense Patnibhaga would probably not be recognized (*z*).

2. The widows are, however, entitled to a share each. A claim for partition must on this account be scrutinized, not granted as of course while the children are minors, as by delay their portions may improve. A kind of patnibhaga would arise in the way suggested by Jagannatha (*a*), by equal division according to the number of all wives, and then a subdivision of the portions falling to all born of the same mother, by their number plus one, so as to afford her a share equal to each of her own sons (*b*). In this way each son's share would be larger in proportion as he had more uterine brothers (*c*). This seems to agree with the Sastri's opinion and with the Vyav. May. The passages determining the shares of wives having sons, when their husband distributes the property, seem to admit of a corresponding construction (*d*). The rule had reference originally, it would seem, to sons by mothers of different castes, but this cause of difference no longer operates (*e*).

In the case (a Bombay case) at 2 Str. H. L. 404, there would seem to have been a partition, whereby one of two widows was allotted her own share only, she being the mother of a daughter but not of a son, while the remainder was

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(*x*) According to Ellis, 2 Str. H. L. 176, 355, 357, 425, a true *patnibhaga* prevails among some classes in Madras, an equal share being allotted to the family by each wife. Colebrooke approves this where it is supported by custom. See Col. Dig., Book V., T. 59, 62. But see also T. 63, which prescribes equal shares for all sons of equal class.

A similar custom in the Panjab is noted; Tupper, Panj. Cust. Law, vol. I., pp. 72, 78. The tribes, however, appear to be Mahomedans by faith, though they follow some Hindu usages.

(*y*) May., Chap. IV., sec. 4, para. 25; Stokes's H. L. B. 54. See also Col. Dig., Book V., T. 62, 63.

(*z*) *Moottoovengadachellasawmy* v. *Toombayasawmy et al.*, M. S. D. A. R. for 1849, p. 27.

(*a*) *Vide* Col. Dig., Book V., T. 89.

(*b*) Mothers take shares according to the shares of their sons, Viram., Tr., pp. 79, 80. Vishnu, cited by Varadraja (by Burnell), p. 19; so also Daya-krama-Sangraha, Chap. VII., p. 2, quoting Brihaspati; Stokes's H. L. B. 513.

(*c*) See Col. Dig., Book V., T. 89, Comm.

(*d*) Mit., Chap. I., sec. 2, para. 9; Stokes's H. L. B. 379; Vyav. May., Chap. IV., sec. 4, para. 18; *ibid.* 52.

(*e*) Col. Dig., Book V., T. 86, Comm.

given to her co-widow and the two sons by her. In an ordinary partition stepmothers, though sonless, are entitled to equal shares (*f*).

Q. 7.—A person of the goldsmith caste had two wives, one of whom has three sons and the other one. How should the ancestral property be divided among them?

A.—A larger share being allotted to the eldest, the rest should be equally divided among the other three.

Sholapore, January 17th, 1846.

AUTHORITIES.—(1) Vyav. May., p. 97, l. 7 (see the preceding question); (*) Mit. Vyav., f. 48, p. 1, l. 8 (Digest of Vyavasthas, Chap. I., sec. 2, Q. 3); (*3) f. 47, p. 2, l. 14 (Digest of Vyavasthas, Chap. II., sec. 1, Q. 4).

REMARKS.—1. The eldest does not receive any larger share than the others (Auth. 2).

2. The estate must be divided into six equal shares, as the mothers receive shares as well as the sons (Auth. 3). According to some authors quoted by Jagannatha, the passage of Yajnavalkya relates only to sonless wives (*g*), but this does not seem to be the accepted theory, now that unequal partition is abolished.

Q. 8.—There are three brothers, of whom one is unmarried. A house belonging to their father is to be divided among them. The question is, whether it should be equally divided among the three, or whether the whole or a large part of it should be given to the unmarried brother? Another question in connection with this case is, whether an elder son can mortgage his house during the lifetime of his mother?

A.—If a brother is unmarried, a sum sufficient to defray the expenses of his marriage should be first set aside from the common property, and then the rest equally divided among them. If the property is just sufficient for the expenses of the marriage, the whole may be set aside for the purpose (*h*). The house cannot be mortgaged without the consent of all the brothers having a

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(*f*) Mit., Chap. I. 397, sec. 7, para. 1 (Stokes's H. L. B. 397); Vyav. May., Chap. IV., sec. 4, pl. 19 (*ibid.* 52); Col. Dig., Book V., T. 83, 84, 85, Comm., where the string of arguments and distinctions, that Jagannatha at last rejects, must not be mistaken for his own.

(*g*) Col. Dig., Book V., T. 83, 84, Comm.

(*h*) Steele, L. C., pp. 57, 404.

share in it. The consent of the mother is not required. If, however, some of the brothers are absent, and the money is required for an urgent necessity of the family, one of them can mortgage the house (*i*).

Poona, August 10*th*, 1851.

AUTHORITIES.—(1) Mit. Vyav., f. 69, p. 1, l. 8; (2) f. 47, p. 2, l. 10; (3) f. 46, p. 2, l. 11; (*) f. 51, p. 1, l. 7 (see the Digest of Vyavasthas, Chap. II., sec. 2, Q. 1); (5) f. 46, p. 2, l. 11:

"If any of the brethren be uninitiated when the father dies, who is competent to complete their initiation? The author replies: 'Uninitiated brothers should be initiated by those for whom the ceremonies have been already completed.'

"By the brethren, who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate." Mit., Chap. I., sec. 7, paras. 3 and 4 (Stokes's H. L. B. 398).

REMARKS.—1. Compare also the rules of Narada Dayavibhaga, Chap. XIII., vs. 33 and 34 (*k*).

2. As to the concurrence of all the coparceners being necessary, see Book II., pp. 560, 564 (*l*).

Q. 9.—1. Three daughters of one and one of another brother were married when the family was undivided. Afterwards, when they separated, the brother, whose one daughter only was married, objected to his brother's taking an equal share of the family property on the ground of a large expense having been thrown upon the resources of the family by the marriages of his three daughters. Is this a proper objection? Should the brother whose three daughters were married have a smaller share of the property?

2. Suppose the case stands as follows: Three daughters of one brother were married. After this, the other brother became separate and got his daughter married. When the brothers subsequently came to actually divide the property, the father of one daughter proposed that the expense which he had incurred on account of the marriage of his daughter should be paid to him from the property, and that it should then be equally divided between them. Is this a just proposal?

(*i*) See Steele, L. C., pp. 399, 400.

(*k*) The joint property must provide for the weddings of the unmarried brothers and sisters amongst Sudras, 2 Str. H. L. 354.

(*l*) In the Panjab the consent of all the co-sharers is generally essential to a gift of even less than the donor's share, Panj. Cust. Law, vol. II., p. 167.

A.—1. The brother whose three daughters were married during the union of the family is entitled to a half of his father's property.

2. In the other case, the proposal made by the father of one daughter is proper.

Sdr. Adalat, June 22*nd*, 1825.

AUTHORITY not quoted.

REMARKS.—1. The correctness of para. 1 of the Sastri's answer follows from the fact that the duty of marrying a girl lies with her father.

2. The second part of the answer is based on the maxim that all expenses of united brothers must be defrayed out of the family estate. For the two brothers, though one 'became separate,' still were members of a united family, because a partition of the estate had not taken place (*m*).

Q. 10.—A lunatic has a son and a wife. Can his brother, who is not separated from him, claim the share of a certain property, to which the lunatic is entitled?

A.—A man who is blind, lame, mad, &c., forfeits his right to a share of the family property, but a son of such a person, if not labouring under a similar disqualification, can claim the share due to his father.

Tanna, February 24*th*, 1853.

AUTHORITIES.—(1) Mit., f. 60, p. 1, l. 13; (2) f. 60, p. 2, l. 8:

"But their (the lame, blind, &c., man's sons), whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects." (Mit., Chap. II., sec. 10, para. 9; Stokes's H. L. B. 457.)

REMARK.—See Book I., "PERSONS DISQUALIFIED," &c. In the case of *Koer Sheopershad Narain* v. *The Collector of Monghyr et al.* (*n*), it is said that an idiot, though excluded from inheritance, may take by conveyance. The source of the disabled member's title, therefore, is of importance.

Q. 11.—Is an elder brother entitled to the right side of a house whether it be of a more or less value, or should he receive a share which is equal in point of value on whatever side it might be?

(*m*) See Col. Dig., Book V., T. 136, 373; and Jagannatha's Commentary, 2 Str. H. L. 394.

(*n*) 7 C. W. R. 5 C. R.

A.—It is a custom to assign the right side of a house to the elder brother. It will rest with the Court to decide how far the custom should be respected.

Ahmednuggur, July 29th, 1848 (*o*).

Q. 12.—A deceased man has left two sons. They are engaged in a dispute regarding the division of a house. Their father has not left any writing as to the side of the house on which each of his sons should take his share of it. The question is, whether the share of the elder son should be on the right side of the house?

A.—The usage allows the elder son to have his share on the right side, but in the book called "Santiratnakara," it is stated that the elder brother should have his residence on the western side of a house. The western part of the house, therefore, should be assigned to the elder brother.

Poona, August 22nd, 1853.

Q. 13.—There are four shares in a house, three belonging to the sons and the fourth to their mother. On what side of the house should the second son have his share?

A.—There are no provisions in the Sastras on the subject.

Rutnagherry, November 23rd, 1846.

SECTION 2.—THE MOTHER AND SON.

Q. 1.—If a mother and her son do not wish to live together as an undivided family, can the mother claim a share?

A.—If the property is ancestral or acquired conjointly by the mother and her son, it should be equally divided between them. The mother should support herself from the proceeds of her share, but cannot dispose of it by gift or sale. On her death her son will inherit it.

Rutnagherry, October 27th, 1851.

(*o*) Similar answers were received from *Rutnagherry*, December, 17th, 1859; *Poona*, December 15th, 1859; *Tanna*, March 9th, 1860.

AUTHORITY.—Mit., Vyav., l. 51, p. 1, l. 7:

"Of heirs dividing after the death of the father, let the mother also take an equal share." (Col., Mit., Chap. I., sec. 7, para. 1; Stokes's H. L. B. 397.)

REMARKS.—1. The text shows only *the right of the mother to a share*, in case a partition is made, but not her right to *demand a partition*. The latter right does not exist, and it would therefore seem that in the case in question, where there is only one son, she cannot ask for a division (*p*). So, too, though sons acquire a right in their mother's property by birth, they cannot exact a partition of it during her life (*q*). If a partition should be made the mother takes a share equal to her son's (*r*).

2. As to the nature of the mother's estate in the portion allotted to her, see 2 Str. H. L. 294, 383, where Colebrooke shows that, according to the Mitakshara, there is an absolute assignment of a share, not a mere setting apart of a maintenance, though maintenance be the object of the assignment (*s*). In the case at 2 Str. H. L. 404, the Sastri's opinion has not been preserved. The English scholars, consulted by Sir T. Strange, seem not to have been able to make up their minds as to the law of the Mitakshara on the point submitted to them. The allotment to the mother, however, is by Mit., Chap. I., sec. 7, pl. 2 ss. (*t*), put on the same footing precisely as that assigned to a daughter, in which it has never in Bombay been contended that a full ownership does not subsist; and Chap. II., sec. 1, pl. 31, 32 (*tt*), use the analogy of the complete ownership arising to the mother, on a partition, as an argument for the widow's sole succession, when one son is left to share the property with her (*v*). In Bengal an allotment to a mother on partition is regarded as given in lieu of maintenance and on her death it reverts to the heir of the husband (*vv*). In Allahabad it is regarded as her stridhan (*w*). The Judicial Committee (*ww*) favour the view held by the Calcutta High Court.

Q. 2.—Can a son and his mother divide the family property between themselves?

A.—The Sastra declares that if sons, after the death of their father, should divide their property, a share of it, equal to that

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(*p*) See also Book II., § 3 A. Rem. 2; and § 4 C. Rem. 5.

(*q*) Viram. Tr., p. 228.

(*r*) So, too, does a grandmother. The same rule applies in the case of an adopted son. See *Thukoo Baee* v. *Ruma Baee Bhide*, 2 Borr. R. 488.

(*s*) See also Col. Dig., Book V., T. 87, Comm.

(*t*) Stokes's H. L. B. 397.

(*tt*) Stokes's H. L. B. 436.

(*v*) See Book II., "RIGHTS AND DUTIES ARISING ON PARTITION," and Book I., Vyav., Chap. II., sec. 6 A, Q. 6.

(*vv*) *Somlah Dasee* v. *Bhoobun*, I. L. R. 15 Cal. 291; *Damodar* v. *Senabutty*, I. L. R. 8 Cal. 537.

(*w*) *Chiddo* v. *Naubat*, I. L. R. 24 All. 67; *Sri Pal* v. *Suraj Bali*, *ibid.* 82.

(*ww*) *Sheo Shankar* v. *Debi Sahai*, L. R. 30 I. A. 202.

which is taken by each of the sons, should be allotted to their mother.

Ahmednuggur, November 29th, 1855.

Authorities.—(1) Mit. Vyav., f. 47, p. 2, l. 13; (2) f. 26, p. 2, l. 9; (3) f. 46, p. 1, l. 9; (4) f. 46, p. 2, l. 14; (5) f. 51, p. 1, l. 7 (see the preceding question); (6) Mit. Achara, f. 12, p. 1, l. 4; (7) Vyav. May., p. 175, l. 8.

Q. 3.—Three sons of a man became separate and received their shares of the common property. They did not, however, set apart a share for their mother. Can the deed of division framed by the sons be considered valid?

A.—The deed of division may be considered valid, but the sons should be obliged to give a share to their mother.

Rutnagherry, June 12th, 1851.

Authorities.—(1) Mit. Vyav., l. 47, p. 2, l. 13; (2) f. 51, p. 1, l. 7 (see the first question of this section); (3) Vyav. May., p. 90, l. 2, 3.

Remark.—See Book II., § 4 e, and also pp. 289, 710, 712.

Q. 4.—In order to recover the amount of a decree passed in his favour, a man has attached a house of his debtor. The house was once the property of the debtor's father. The debtor's mother claims the removal of the attachment from a half of the house. She alleges that the house was once her husband's property, and that she therefore has a right to one-half of it. The question is, whether the widow of the owner of the house has a claim to any part of the house while her sons are still living? and if so, to what extent?

A.—A son after the death of his father acquires a perfect right to his property, and while sons are alive the widow has no claim to his property. She cannot, therefore, claim any share of the house.

Surat, December 19th, 1850.

Authorities.—Vyav. May. Dayabhaga, p. 83, l. 7 (Stokes's H. L. B. 42); Vyav. May. Rinadana, p. 179, l. 6 (Stokes's H. L. B. 121).

Remark.—Though the mother cannot claim a partition of the house, still she has a claim to maintenance out of the family property (*x*), extending in

(*x*) See Book II., sec. 7 a, 1 *b*.

amount to a son's share (*y*). It seems necessary, therefore, that her rights should be protected against the creditors of her son to this extent, just as those of a separated brother would be. In *Ruttunchund* v. *Gholamun Khan* (*z*) it was held that a widow of one of three undivided brothers has no such right to a share of a house, the joint property of the family, as to prevent an effective sale by the surviving brothers, and *Jivan* v. *Kasi Ambiadas* (*a*) was decided on the same principle (*b*); but the Sholapoor Sastri pronounced against the validity of the sale, which moreover was by one brother of his share in the ancestral family house to another brother (*c*). Subject perhaps to the right of widows to residence, partition of the dwelling may, it seems, be claimed and enforced (*d*).

SECTION 3.—BETWEEN REMOTER RELATIONS.

Q. 1.—One of two brothers left the country and died 40 years ago. His son, who grew up in the house of his maternal uncle, claims from his paternal uncle a share of his movable property.

A.—He cannot claim a share of whatever his uncle may have acquired by his own labour, without using the claimant's father's means for its acquisition.

Poona, October 18*th*, 1845.

AUTHORITY.—*Viramitrodaya, f. 177, p. 1, l. 6. See Book II., § 3 A, *supra*, p. 606.

Q. 2.—A paternal uncle and a nephew, who were united in interests, agreed to an unequal division of property between them. Can they do so?

A.—If the nephew has taken a small share of the property from

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(*y*) Stepmothers also have a claim to maintenance against their stepsons, taking the paternal or ancestral estate, 2 Str. H. L. 315.

(*z*) N. W. P. Rep. for 1860, p. 447.

(*a*) 8 Harr. 172.

(*b*) A widow having sued a mortgagee from her son for a declaration of her right as against the mortgaged property to maintenance and recoupment of her daughter's marriage expenses, it was held that she might, under her general prayer for relief, be awarded the amount to which on these accounts she should be found entitled, *S. Nistarini Dossee* v. *Mokhun Lall Dutt et al.*, 17 C. W. R. 432.

(*c*) See the cases cited in Book I., p. 245.

(*d*) *Hullodhur* v. *Ramnath*, 1 Marsh. 35. The occupation of a house by a widow is equivalent to notice of her right to residence. *Dalsukhram* v. *Lallubhai*, Bom. H. C. P. J. 1883, p. 106.

his uncle and given him a deed of acquittance, he is at liberty to do so. Ordinarily he is entitled to an equal share with his uncle.

Ahmednuggur, December 30th, 1846.

AUTHORITY.—*Viramitrodaya, f. 177, p. 1, l. 6. See Book II., § 3 A, *supra*, pp. 605, 606, 615.

Q. 3.—Two brothers separated, but did not divide their movable or immovable property. Can the son of one of them file a suit for a share of the common property?

A.—Yes, he can. The property, acquired during the time when the family was united in interest, must be divided into as many shares as the number of brothers owning it. If one of them is dead, his share can be claimed by his son and grandson.

Rutnagherry, January 20th, 1846.

AUTHORITY.—*Viramitrodaya, f. 177, p. 1, l. 7. See Book II., § 3 A, *supra*, pp. 605, 606.

REMARK.—Cesser of commensality is a strong but not conclusive evidence of partition (*e*). A question of limitation or prescription would now in some cases arise under Reg. V. of 1827, and the successive Limitation Acts down to Act IX. of 1908 (*f*). See Book II., SEPARATION.

Q. 4.—A deceased person left seven sons. Of these three are alive and four dead. Of those that died, three have left one son each and the fourth no son. The deceased father's property consists of one house only. How should each of these sons be allowed to share in the patrimony? Can the share of the brother who died without leaving a son be claimed by all the brothers? Can the sons of the brothers previously deceased claim the share of the brother who has now died? If so, how should each be allowed to share in it?

A.—It appears that the father died leaving seven sons, and that one of them died and has left no sons. His share should

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(*e*) *Musst. Anundee Koonwar* v. *Khedoo Lal*, 14 M. I. A. 412.

(*f*) According to the Hindu Law, the right to demand a partition of property solely possessed continues through four generations of persons present, and seven of absentees, *Moro Vishvanath et al.* v. *Ganesh Vithal et al.*, 10 Bom. H. C. R. 444; 2 Str. H. L. 396; see Steele, L. C. 219.

be equally divided by the surviving brothers and the three sons of the deceased brothers. The house should be considered divided into six shares, and one share should be assigned to each member of the family.

Broach, September 7th, 1848.

Authorities.—(*1) Mit. Vyav., f. 50, p. 1, l. 7 (see the Digest of Vyavasthas, Chap. I., sec. 1, Q. 1); (*2) Viramitrodaya, f. 177, p. 1, l. 6 (see Book II., § 3 a).

Remark.—The son of each of the predeceased brothers succeeds to his father's share (*g*).

Q. 5.—Two brothers paid money in equal proportions, and received a house in mortgage. They subsequently died, one leaving a son and the other a grandson. Unequal portions of the house had, however, passed into their possession, and the question is whether or not each party has a right to an equal share?

A.—Each has a right to an equal share, and the heirs of the mortgagees may divide it so.

Ahmednuggur, May 8th, 1851.

Authorities.—(1) Viramitrodaya, f. 177, p. 1, l. 6 (see Book II., § 3 a. Rem. 1); (2) Vyav. May., p. 89, l. 2; (3) p. 169, l. 6; (4) p. 171, l. 6; (5) p. 96, l. 2.

(*g*) *See Gungoo Mull* v. *Bunseedhur*, 1 N. W. P. R. 79; *Duljeetsing* v. *Sheomunook Sing*, 1 Cal. Sel. R. 59; *Debi Parshad et al.* v. *Thakur Dial et al*, I. L. R. 1 All. 105; *Bhimul Doss* v. *Choonee Lall*, I. L. R. 2 Cal. 379, referring to *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 M. I. A., at p. 611.

CHAPTER III.

MANNER AND LEGALITY OF PARTITION.

SECTION 1.—DISPOSAL OF NATURALLY INDIVISIBLE PROPERTY.

Q. 1.—Can a village held on Inam tenure be divided?

A.—Any property which, if divided, would not yield equal profit, may be enjoyed by each of the co-sharers in rotation for a certain fixed period.

Dharwar, September 14th, 1852.

Authority.—Vivadabhangarnava, in the Chapter called Indivisible Property.

Remarks.—1. The question is too general to admit of an exact answer. For it is not clear of what nature the Inam grant was. Usually Inams, which are merely tax-free property, or which consist in the Government share of the produce of the land, are divisible either by an actual apportioning of the land or by a division of the produce (*h*).

2. In one case the Sadar Court of the N. W. Provinces ruled that a partition might be refused where it would be obviously detrimental to the interests of the sharers resisting it (*i*), but this is not supported by the Hindu authorities; and when a partition legally claimed is objected to on the ground of inconvenience, some more convenient method of distribution must be shown by the objector (*k*). Partition of a Court-yard, advisedly reserved for common enjoyment, was refused in *Gopala Achyarya* v. *Keshav Daje* (*l*).

Q. 2.—One of three brothers, who lived as members of an undivided family, died. Can his widow sue on behalf of her son, who

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(*h*) *See Ruvee Bhudr* v. *Roopshunkur et al.*, 2 Borr. 730; *Shib Narain Bose* v. *Ram Nidhee Bose et al.*, 9 C. W. R. 87 C. R.; see Book I., Chap. II., sec. 6 A, Q. 8, p. 377. Steele, L. C. 215, 218, 229, 230, show how estates held free or for service are dealt with.

(*i*) *Durbaree Singh et al.* v. *Saligram et al.*, N. W. P. Sel. Dec. 1852, p. 271.

(*k*) *Summun Jha et al.* v. *Bhooput Jha et al.*, 18 C. W. R. 498.

(*l*) S. A. No. 240 of 1876, Bom. H. C. P. J. F. for 1876, p. 244.

is a minor under her protection, for a share of the family property? and can the idols be divided?

A.—The woman cannot claim a share of the property, unless it be shown that her brothers-in-law are likely to defraud her. The idols may be divided as any other property.

Poona, August 5th, 1852.

AUTHORITIES.—(1) Vyav. May., p. 127, l. 7; (2) Vivadabhangarnava; (3) Viramitrodaya, f. 181, p. 2, l. 16 (see Book II., Chap. I., sec. 1, Q. 7).

REMARKS.—1. The mother can sue for a division, under the conditions stated, if she is the guardian of her son (*m*).

2. The custom regarding family "idols" is stated to be as follows:

(*a*) If there is only one image it is given to the eldest son (*n*).

(*b*) If there are several images, the eldest son receives the principal idol, and the rest are divided (*o*).

If property has been dedicated to a family idol, the members are entitled to worship and take the emoluments in rotation (*p*).

Q. 3.—Two brothers possess a proprietary right to a well and use the water to irrigate their respective fields by turns. Can the right of one brother to a half of the well be sold in payment of his debts?

A.—The well cannot be sold, the debtor having the right only to use it in his turn. A well or door, which is the common property of a family, and which cannot be divided, can only be used by those who have limited enjoyment of it.

Ahmednuggur, December 19*th*, 1854.

AUTHORITIES.—(1) Vyav. May., p. 125, l. 5:

Other things exempt from partition have been enumerated by Manu:

"Clothes, vehicles, ornaments, prepared food, water, women, sacrifices, and pious acts, as well as the common way, are declared not liable to distribution." (Borradaile, May., Chap. IV., sec. 7, para. 15 (Stokes's H. L. B. 77.)

(2) Vyav. May., p. 127, l. 1:

"Brihaspati: They by whom it is affirmed that clothes and the like are indivisible have not proved that the collected wealth of opulent men, their

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(*m*) See Book II., p. 622.

(*n*) Comp. Steele, L. C., p. 179.

(*o*) The eldest sometimes retains all the images, as in the case at Steele, L. C., p. 222.

(*p*) See Book II., p. 671.

vehicles and ornaments, shall not be divided (*q*); property held in common (would be) unemployed, for it cannot be given to one (in exclusion of another); therefore it must be divided by (some mode deduced from) reasoning (*r*); else it would be useless. By the sale of clothes and ornaments, on the recovery of a written debt, by compensating the dressed food with (an equal allotment of) undressed grain; an (equitable) partition is made. Water drawn from a (single) well or pool shall be taken by turns . . . A bridge and a field shall be shared (by co-heirs) in due proportion." Borradaile, May., Chap. IV., sec. 7, para. 22 (Stokes's H. L. B. 78).

Remark.—When it is said that the water of a well cannot be divided the meaning is that it cannot be distributed like land or money. But the ownership admits of a mental division, to which effect is given by an agreement to use the (physically) undivided thing in turns, and if the terms of the partition in this case were that each brother should take the water by turn for the irrigation of particular fields, each acquired a distinct property transferable along with that in the fields to be irrigated (as thus only could it be made available), and saleable in execution of a decree along with the fields themselves. As to the needlessness of a partition in specie to constitute separate property, &c., see pp. 633 ss.

Q. 4.—Certain brothers divided all their property excepting a well, a privy, and a compound. It appears that no partition can be made in regard to the former two, but that the latter may be divided, though not without inconvenience, by building up a wall in the middle. The question is, whether or not it should be divided?

A.—It is not necessary to divide a well, a privy, and a compound. There are rules which forbid the division of such property.

Poona, July 18*th*, 1851.

Authorities.—See the preceding Question and Q. 1; Vyav. May., p. 125, l. 5; Stokes's H. L. B. 87.

Remarks.—1. A compound may be divided under ordinary circumstances. If, however, in this case, the "inconvenience" arising from its division would be of such a nature as to diminish or impair the rights of one of the co-heirs, *i.e.* prevent his using the compound for its intended purposes, then it must be used by all in common.

2. This, as all similar cases, must be decided according to the rules of equity.

(*q*) The translation of the second line ought to run thus:

"They . . . have not considered, that the property of opulent men may consist of clothes and ornaments and such property."

(*r*) Yuktya, "by (some mode deduced from) reasoning," may be better translated, "according to (the rules of) equity."

SECTION 2.—DISPOSAL OF PROPERTY DISCOVERED AFTER PARTITION.

Q. 1.—A hoard of treasure was discovered in an ancestral house which was pulled down. The treasure was not divided between the cousins twice removed. The cousins had become separated forty years ago, when the house was assigned to one of them as a part of his share. The hoard was found in this house, and the question is, whether the other cousin should have a share of it?

A.—Whenever any ancestral property is discovered, it should be divided. The treasure should therefore be divided.

Poona, July 14th, 1855.

Authority.—Vyav. May., p. 129, l. 1:

"Manu: When any common property whatever is brought to light after partition has been effected, that is not considered a (fair) partition; it must even be made again." (Borradaile, May., Chap. IV., sec. 7, para. 26; Stokes's H. L. B. 79.)

Remarks.—1. The answer is right, supposing it can be proved that the treasure was concealed by an ancestor of the now divided claimants. As to the disposal of treasure trove in general, see Vyav. May., Chap. VII., para. 10 (*s*); Yajnavalkya, I. 34, 35. Narada, Pt. II., Chap. VI., paras. 6-8. Buried or sunk property belongs to the Government, which should allot one-sixth to the finder. Property found in the road is to be returned to the owner, less one-sixth for the Government, of which one-fourth should be given to the finder. Omission to inform is punishable by fine (*t*).

2. For the present law see the Treasure Trove Act, VI. of 1878.

Q. 2.—There are three brothers. One of them claims a share of certain immovable property on the ground that it was not divided along with the rest. The other brothers do not prove that the property was divided. How should the question be decided?

A.—If the fact of the division be in dispute, the whole of the property may be redivided. If the fact of the division of a part of the property is agreed to, the undivided portion only may be divided.

Rutnagherry, March 6th, 1856.

Authorities.—(1) Vyav. May., p. 129, l. 1; (2) p. 128, l. 2; (3) p. 133, l. 1.

Remark.—See the preceding question and Book II., p. 642. The first

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(*s*) Stokes's H. L. B. 131. See Steele, L. C., p. 60.

(*t*) Q. 64 MS. Surat, June 15th, 1845.

proposition in the Sastri's answer is laid down much too broadly. A mere dispute will not entitle any separated member to claim a repartition (*v*).

Q. 3.—Each of the members of a family received his share of a Vritti (*w*), which was divided amongst them. The actual extent of the land, however, was subsequently found to be in excess of that taken as the basis of the partition. Should the excess be divided among the sharers?

A.—Any new property discovered after the partition of the known property of a family should be divided among the sharers.

Dharwar, February 16*th*, 1852.

Authorities.—(1) Vyav. May., p. 90, l. 2; (2) p. 90, l. 6; (3) p. 128, l. 2; (4) p. 129, l. 1 (see the Digest of Vyavasthas, Chap. III., sec. 2, Q. 1).

Q. 4.—A man had three sons. The eldest of them gave a writing to his father, engaging that he would not commit any fraud in regard to the money and jewels given by him to his mother. The property was estimated at Rs. 3,000. The father is now dead, and the eldest son has run away. Property valued at 1,200 rupees only has been discovered. The second son is in league with the eldest. The third son is a minor. Their mother claims the whole of the property which has been discovered on the ground that her husband gave it to her. The question is, how should the property now discovered and that which may hereafter be discovered be divided?

A.—It is illegal for a man to give his whole property to his wife in disregard of the claims of his sons (*x*). The property should therefore be divided into four shares, of which one should be allotted to the mother and three to the three sons.

Poona, September 10*th*, 1853 (*y*).

Authorities.—(1) Mit. Vyav., f. 69, p. 1, l. 4; (2) f. 51, p. 1, l. 7.

Remarks.—1. If the property had been acquired by the father himself, he would, according to the ruling of *Gangabai* v. *Vamnaji* (*z*), be at liberty to

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(*v*) See Col. Dig., Book V., Chap. VI., Texts 378.

(*w*) Land, or hereditary property, or office, which is the means of subsistence of a family. See above, p. 681.

(*x*) See above, pp. 204, 205.

(*y*) A similar answer was received from Rutnagherry, October 27th, 1851.

(*z*) 2 Bom. H. C. R. 304.

dispose of it at his pleasure, and, in this case, the donation to the widow would be legal, if it could be proved.

2. The Sastri's opinion, that each of the sons is to have a share, even the eldest, who ran away, is not quite correct. For though, according to the Mitakshara and the Viramitrodaya, fraud practised by one of the co-sharers does not disqualify him from receiving a share (*a*), still, it would seem that he ought to be held liable for any ascertained portion of the share which he might have made away with. Hence the absconded son ought not to receive a share of the Rs. 1,200, since the Rs. 1,800 which he must be supposed to have made away with amounts to more than his own share.

3. The liability of the fraudulent coparcener to make good any ascertained portion of fraudulently concealed property is laid down explicitly (*b*). The rule extends to fraudulent or unjustifiably extravagant expenditure during the state of union (*c*).

4. In regard to the last point, it ought, however, to be borne in mind that a proportionately large expenditure on the part of one brother ought to be proved to have been clearly "dishonest." Otherwise it cannot be deducted from his share. The Viramitrodaya, f. 220, p. 2, l. 5, says on this point :

"In order to show that (one brother) ought not to say of the (other) 'He has consumed (too) much, whilst we were undivided,' and that the king ought not to allow (the others) to take (back) that which may have been consumed (in excess of his portion by one of them), the same (author Katyayana) says : 'He shall certainly not cause to be paid back property, which the brothers consumed, while living in union.' The bearing (of this text is) that enjoyment (of the common property) in unequal proportions cannot be forbidden, because it is unavoidable."

The same remark applies to the second son, if it can be proved that he really participated in the fraud.

The proper division of the recovered Rs. 1,200, therefore, seems to be one in equal shares between the mother and the minor son.

5. In regard to property in excess of the Rs. 1,200 that might be discovered afterwards, such property ought, in the first instance, to be used to make up the full shares of Rs. 750, to which the mother and the minor were originally entitled. Afterwards only, the rights of the two fraudulent coparceners can be taken into account. Members of an undivided Hindu family, making partition, are entitled as a rule not to an account of past transactions, but to a division of the family property actually existing (*d*). In *Darlatrav* v. *Narayanrav* (*e*) it is ruled that the principle applies generally to a managing member. He is not in the absence of fraud or wanton extravagance to be made answerable for every item of expenditure, nor on the other hand to receive credit for family debts paid by him as an addition to his own share on a partition. See "RIGHTS AND DUTIES ARISING ON PARTITION."

(*a*) See pp. 629, 630.

(*b*) Mit., Chap. I., sec. 9, paras. 1—3; Stokes's H. L. B. 404; Mayukha, Chap. IV., sec. 7, para. 24; Stokes's H. L. B. 79.

(*c*) See Col. Dig., Book V., Chap. VI., Text 373; Steele, L. C. 60, 217, 223.

(*d*) *Lakshman Dada Naik* v. *Ramachandra Dada Naik*, I. L. R. 1 Bom. 561; above, p. 698.

(*e*) R. A. No. 5 of 1875; Bom. H. C. P. J. F. for 1877, p. 175.

6. The several members may, however, enter into agreements with each other for the expenditure on joint purposes of their separate property (*f*). Such expenditure must, of course, be allowed for in a subsequent partition (*g*).

SECTION 3.—LEGALITY OF PARTITION.

Q. 1.—A father divided his property between his two sons. They then executed a deed of separation which continued to be respected for about eight years. Afterwards the father executed a document in favour of one of his sons in the absence of the other, modifying the terms of the deed. Has the father authority to do so?

A.—It appears that certain property was first set apart for the maintenance of the father and mother, and the rest divided between the sons. The father cannot, therefore, modify the terms of the deed of separation without the consent of both his sons.

Poona, September 15th, 1845.

AUTHORITIES.—(*1) Manu IX. 47 :

" Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say 'I give': these three are, by good men, done once for all (and invariably)."

" Kulluka's gloss : 'A partition of the wealth belonging to the father and others, which has been *made by brothers according to law*, is made once only, and cannot again be changed.' "

(*2) Viramitrodaya, f. 223, p. 2, l. 8 :

" But what has been said by Manu, 'Once is the partition of an inheritance made,' &c., that (applies to cases) where there is no ground for annulling that (partition)."

REMARKS.—1. The answer is right, if the first partition had been made in accordance with the law, that is, in due proportions, or by mutual assent (*h*).

2. A fresh partition cannot be claimed when, though the original division was equal, supervening circumstances have made the shares unequal in value. But if one of the divided coparceners has lost part of his share, through the wrongful act of another, he may recover damages (*i*).

(*f*) See *Muttusvani Gaundan et al.* v. *Subbiramaniya et al.*, 1 M. H. C. R. 311.

(*g*) See Steele, L. C. 217, 219.

(*h*) See the Smriti Chandrika, Chap. XIV., para. 7; Chap. XV., para. 4; *Mootoovengadachellasamy* v. *Toombayasamy et al.*, M. S. D. A. R. for 1849, p. 27; and *Govind Wisvanath* v. *Mahadajee Narayan*, 1 Bom. S. D. A. R. 167.

(*i*) *Rango Mairal* v. *Chinto Ganesh et al.*, S. A. No. 297 of 1874; Bom. H. C. P. J. F. for 1876, p. 74.

Q. 2.—A man possesses some houses and shops. Of these, all the shops and one house were given by him to his three sons, who live separate from him. The father has filed a suit for the recovery of the property in the possession of his sons. The property was acquired by the father himself. Can he claim it?

A.—No sooner is a son born than he acquires a right to his father's property (*k*), but if he wishes to have a share in his father's property, he cannot have it unless his father is willing to give it to him (*l*). If the father is very old or of a bad character, his son has a right to insist upon a division of his property, even though the father is unwilling.

Dharwar, December 15th, 1853.

Authorities.—(1) Vyav. May., p. 91, l. 2; (2) p. 91, l. 7; see the preceding case.

Remark.—The Sastri's answer is not to the point. If the father had really made a division, and if the division had been made according to the law, *i.e.* under the observance of the rules detailed above, or, with the consent of all parties, even against those rules, it stands good. As to the relation of the passage in the Mitakshara corresponding to that (*m*) quoted by the Sastri (*n*) and sec. 5, paras. 8, 11 (*o*), reference may be made to *Nagalinga Mudali* v. *Subbiramaniya et al.* (*p*), and to the Digest of Vyavasthas, Chap. I., sec. 2, Q. 2—8, *supra.*

Q. 3.—The common property of two brothers amounted to Rs. 30,000. One of them obtained a Farikhat from the younger brother by offering him about Rs. 7,000 in full payment of his share. A part of it was paid, but in consequence of the non-payment of the rest, the younger brother filed a suit against his brother to oblige him to pay a moiety of the whole property. Is this in accordance with the Sastras?

A.—When a person thinks himself able to acquire property or is otherwise unwilling to take his share, it is directed that a small portion should be given to him at the time of his separation (*q*).

(*k*) See above, p. 601.
(*l*) See above, pp. 608, 611.
(*m*) Borradaile, Vyav. May., Chap. IV., sec. 4, para. 7; Stokes's H. L. B. 49.
(*n*) Col., Mit., Chap. I., sec. 2, para. 7; Stokes's H. L. B. 378.
(*o*) Stokes's H. L. B. 60, 62.
(*p*) 1 M. H. C. R. 77.
(*q*) See Steele, L. C. 58, 214

It is also enjoined that the Sirkar should prevent the person whose claim has been thus compounded from making a further demand afterwards. The younger brother, therefore, can only claim what he agreed to receive at the time of writing the Farikhat. His claim to a moiety is not proper.

Tanna, July 28th, 1849 (*r*).

AUTHORITIES.—(1) Vyav. May., p. 134, l. 1 :

" The same author, with reference to one separated by his own wish, and afterwards disputing, says : If he subsequently dispute a distribution, which was made with his own consent, he shall be compelled by the king to abide by his share, or be amerced if he persist in contention." (Borradaile, May., Chap. IV., sec. 7, para. 38; Stokes's H. L. B. 83.)

(*2) Mit. Vyav., f. 52, p. 1, l. 13 :

" Something is here added respecting the residue of a general distribution of the estate (*s*).

" Effects which have been withheld by one co-heir from another, and which are discovered after the separation, let them again divide in equal shares : this is a settled rule." (Col., Mit., Chap. I., sec. 9, para. 1; Stokes's H. L. B. 404.)

REMARK.—The Sastri's answer is not quite to the point. If the younger brother agreed, knowing or having the means of knowing the facts, to an unequal division, then it holds good (Auth. 1). If he was induced to consent to it by fraudulent representations, then he is not bound by his agreement (Auth. 2) (*t*).

Q. 4.—Four brothers divided their interests. The share of a certain piece of land which one of them received was attached by Government. He therefore claims a new share of the land in possession of his brothers. Can he do so?

A.—No.

Dharwar, April 11th, 1849.

AUTHORITY.—Manu IX. 47 (see Digest of Vyavasthas, Chap. III., sec. 3, Q. 1).

REMARK.—The Sastri's answer is right only on the supposition that no fraud was committed in making the division, and that the claim for which the land was attached was not an old unsettled claim against the family estate. For, as regards the first point, " fraud in Hindu Law vitiates every transaction " (*v*).

(*r*) A similar answer was received from *Khandesh*, February 17th, 1854.

(*s*) The translation of the first sentence ought to run as follows :

" Now something is declared which is a supplementary (rule to be observed) at all Partitions."

(*t*) See also § 4 F, pp. 649 ss.

(*v*) § 4 F, Remark.

As to the second point, if there was an old claim against the family estate which, on partition, had not been taken into account, and for which the portion of one brother was afterwards attached, it would seem that the latter would have a right to claim compensation from the others. For "*a partition made according to the law*," to which alone the authority quoted by the Sastri refers, presupposes an equal division of the family debts (*w*). It seems not improbable that by "attached" is meant "resumed," that is reduced from "Inam" or rent-free land to "khalsat," "paying revenue," to the entire exclusion of the former Inamdar if the land was held by an hereditary cultivator. In this case the same rule would apply.

Q. 5.—Certain brothers wrote a memorandum regarding their separation. Afterwards they remained together for a year and then divided their property. The question, therefore, is whether the separation should be considered to have taken place from the date of the memorandum or from the date of the actual separation? And should expense incurred during the year be set to the account of the family, or should each man's expenses be laid upon him individually?

A.—The brothers should be considered united in interests so long as they take their meals together. The expense during the year should therefore be set to the account of the family. If any one should have expended any money on his own private account, it should be charged to him alone. The separation should be considered to have taken place from the date on which they actually divided the property and began to perform "Naivedya" (food-offering to gods) and "Vaisvadeva" (the burnt-offering to fire) ceremonies separately.

Sadr Adalat, May 21*st*, 1833.

AUTHORITY.—Vyav. May., p. 89, l. 8: "Even when there is a total failure of common property, a partition may also be made by the mere declaration, 'I am separate from thee.' A partition may even be a mere mental distinction. This exposition clearly distinguishes the various qualities of this [term]" (*x*). Borradaile, May., Chap. IV., sec. 3, para. 2; Stokes's H. L. B. 47.

REMARKS.—1. The Sastri's view seems to be, that the memorandum has no value, because it was not carried out.

2. But partition is primarily a mental act. If the brothers therefore agreed

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(*w*) See § 7 B 1, p. 718.

(*x*) The translation of the last lines ought to run thus: "For partition is merely a particular kind of intention. The declaration 'I am separate from thee' indicates this."

on a partition and drew up a document setting forth the division of their estate, this act constitutes a partition, and it is unnecessary to carry it out by a physical distribution of the property. They must be considered divided from the time at which the writing was signed. If afterwards, a year elapsed before the intentions declared in the writing were carried out, the expenses must be divided in due proportion, and be paid by each brother out of his share (*y*). In many of the older cases separate possession was held essential to constitute a binding partition (*z*). At Bombay it was held that a deed of partition must have been acted on (*a*). These cases show that the Sastri's view has been extensively held, but see now *Appovier* v. *Rama Subba Aiyan et al.* (*b*). A partnership in receipts and expenditure sometimes follows a dissolution of the status of a united family. Steele, L. C. 214.

Q. 6.—One brother passed a Farikhat to another, but it was not carried out for a long time. One of the brothers and his son died. The question is whether the widow of the deceased can get her husband's share as specified in the Farikhat?

A.—Yes, she can.

Tanna, October 15*th*, 1858.

AUTHORITIES.—(1) Vyav. May., p. 134, l. 4; (2) p. 136, l. 4.

REMARKS.—1. The Sastri's authorities refer only to the right of a widow to inherit her "*separated*" husband's property.

2. For authorities see the preceding Question and § 4 D, pp. 630 ss. A suit for partition, however, conveys no right to the coparcener's widow (*c*), and at Madras it has been ruled that even a decree, if not executed, will not have this effect (*d*). Compare the Vyavasthas, at p. 175 of the report, with the rule enunciated in *Rany Pudmavati* v. *B. Doolar Singh et al.* (*e*), and *Rewun Persal* v. *Musst. Radha Beeby* (*f*).

(*y*) See § 4 D 1, p. 631.

In England when two tenants in common agreed to a partition and acted on the agreement, but did not execute a deed, the devisees of one of them were held answerable for the costs of carrying out the partition under which the devise to them took effect. *In re Tann*, L. R. 7 Eq. Ca. 434.

(*z*) *Naggappa Nynair* v. *Mudundee Swora Nyair*, M. S. D. A. R. for 1853, p. 125; *Subba Naiken* v. *Tangaparoomal*, *ibid.* for 1859, p. 11; *Kuppammal* v. *Panchanadaiyan*, *ibid.* for 1859, p. 260.

(*a*) *Gokuldas* v. *Hurgovindas*, 3 S. D. A. R. 236.

(*b*) 11 M. I. A. 75. See above, p. 685.

(*c*) *Bhuggaji* v. *Bhaggawoo et al.*, Sp. App. 691 of 1865.

(*d*) *Govinda Ooodian* v. *Alamaloo*, M. S. D. A. R. for 1855, p. 157; *Babaji Parsharam* v. *Ramchandra Anant*, I. L. R. 4 Bom. 157, and as to a decree under appeal, *Sakharam Mahadev v. Hari Krishna*, I. L. R. 6 Bom. 113.

(*e*) 4 M. I. A. 259.

(*f*) 4 M. I. A. 137, and see the cases referred to above, and *Suraj Bunsee Koer* v. *Sheo Prasad*, L. R. 6 I. A., at p. 103, and *Chidambaram Chettiar* v. *Gauri Nachiar*, I. L. R. 2 Mad. 83, C. S., L. R. 6 I. A. 177.

Q. 7.—Three persons drew up a memorandum regarding the division of their family property. Each received his share of everything except the Vritti, which was left under the management of one person acting on behalf of all the co-sharers. Afterwards when the adopted grandson of a deceased co-sharer was on the point of death, the sharers framed a memorandum in triplicate, setting forth the division of the Vritti. The original memorandum was duly signed, and attested by the sharers, but before the duplicate and triplicate could be signed, the man on the point of death expired. Can his widow under such circumstances claim a share of the Vritti?

A.—If a share of the Vritti has been assigned to the adopted grandson, his widow, who has no son, can claim it. If a share has not been assigned to the husband, the widow cannot claim it. It is for the Court to determine whether the incompleteness of the duplicate and triplicate of the memorandum of division leads to the supposition that a partition of the Vritti was not made.

Tanna, January 19th, 1859.

AUTHORITY not quoted.

REMARKS.—1. See the preceding Question, and Introd., § 4 D, p. 632; § 4 E, pp. 645 ss.

2. No doubt is expressed as to the partibility of the Vritti. See above, p. 671.

Q. 8.—There were five brothers who divided their father's movable property into five shares, each of them taking one. The immovable property was left for the maintenance of the father, with an agreement that, after his death, it also should be equally divided among them. One of the brothers subsequently died; and his death was followed by that of his father. The widow of the former claims one-fifth of the immovable property as the share of her husband. Is this claim right?

A.—As the family is divided, the widow is entitled to the share which was assigned to her husband.

Dharwar, December 31st, 1847 (*g*).

AUTHORITIES.—(1) Vyav. May., p. 90, l. 1; (2) p. 134, l. 4.

REMARK.—The widow cannot claim any portion of undivided family property

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(*g*) A similar answer was received from *Khandesh*, September 26th, 1857.

(§ 4 E, p. 645), but if there was an agreement amongst the coparceners that the property should be divided amongst them in definite shares, subject only to the father's enjoyment for life of the whole, it would appear that the Courts would regard this as a partition conferring a right of inheritance on the widow (*h*).

SECTION 4.—PARTIAL DIVISION.

Q. 1.—One of three brothers desires to have a share of his father's house without insisting on the division of the whole property. Can he do so?

A.—The Sastra allows sons to take equal shares of their father's property, but there is nothing to prevent one of them from demanding the share of any particular portion of such property.

Dharwar, January 28th, 1848 (*i*).

AUTHORITY.—Mit. Vyav., f. 47, p. 2, l. 13.

REMARK.—The partial division may take place by consent, but the brother cannot insist on it (*k*). The same principle was subsequently affirmed in *Ragvindrapa* v. *Soobapa* (*l*).

Q. 2.—Certain members of a divided family of the Kunabi caste lived together again as a family united in interest, and held their ancestral estate in common. They afterwards separated leaving some property undivided in possession of one of them. After some time, the other members claimed a share of the undivided property. Can the exclusive enjoyment of the property by one member of the family be a bar to the claims of the other members?

A.—If the members of a divided family become united in interests and again separate themselves from each other, they are still entitled to a share of the common property (*m*), even

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(*h*) *Rewun Persad* v. *Musst Radha Beeby*, 4 M. I. A. 137. See § 4 D 1, pp. 631 ss., and Remark 2 under Q. 6.

(*i*) A similar answer was received from *Sholapoor*, September 28th, 1849.

(*k*) See *Dadjee Deorao* v. *Wittul Deorao*, Bom. Sel. Ca., p. 175. A partial partition is obviously only an accommodation not strictly consistent with the principle by which members of a family must be either united or severed in their sacra, and the estate that accompanies them.

(*l*) S. A. No. 3948, 27th September, 1858. See also § 4 E, p. 645.

(*m*) See above, pp. 131, 132; Steele, L. C. 214.

though it may, on their second separation, have remained in possession of one of them.

Ahmednuggur, July 19th, 1847.

AUTHORITIES.—(1) Mit. Vyav., f. 45, p. 1, l. 5; (2) f. 40, p. 1, l. 4; (3) f. 49, p. 1, l. 10; (4) Vyav. May., p. 143, l. 2; (5) p. 128, l. 1; (6) p. 128, l. 3; (7) p. 128, l. 5; (8) Manu, Chap. X., verse 105.

REMARK.—As there are no particular provisions in the law books regarding a partial division, it is impossible to prove the correctness of the Sastri's view by any explicit passages. Still it appears to be founded on the reason of the law (*n*).

Q. 3.—There are two claimants to a Vatan. One of them has had the management of it for a long time. Can the one who has not the management claim a share in the emoluments?

A.—The descendants of the person who acquired the Vatan have a right to a share of it. There is nothing in the Sastras which prevents a descendant from claiming his share because he does not manage the affairs of the Vatan.

Ahmednuggur, March 1st, 1851.

AUTHORITIES.—(1) Viramit., f. 175, p. 2, l. 6; (2) Mit. Vyav., f. 50; p. 1, l. 7; (3) Vyav. May., p. 94, l. 3.

REMARK.—See Bom. Act III. of 1874, and the note below (*o*).

(*n*) See § 4 E, pp. 645 ss.

(*o*) The Sastri regards the Vatan (service holding) merely as a private estate with a certain obligation attached to it as a whole, not affecting the rights of the coparceners *inter se*. For the Regulation law on the subject, see Reg. XVI. of 1827, section 20, and the cases quoted under it in the Bombay Acts and Regulations. Different views have been held at different times as to the nature of this kind of property. The opinion of the Hon. Mountstuart Elphinstone appears, from some MS. notes collected by one of the Editors, to have been very nearly that of the Sastri, and the estate is not resumable on a mere discontinuance of the service, see *Jagjivandas Javerdas* v. *Imdad Ali*, I. L. R. 6 Bom. 211, and cases there referred to. The late Sadr Court of Bombay at one time held that the mortgage prior to 1827 of a Vatan was valid, but only for the lifetime of the Vatandar mortgagor, *Baee Rutton* v. *Mansooram*, Bom. S. D. R. R. for 1848, p. 93. By subsequent decisions it was ruled that mortgages prior to the passing of Reg. XVI. were not to be subjected to the rule there laid down, *Sukaram Govind et al.* v. *Shreeneewas Row et al.*, 2 Bom. S. D. A. R. 26; *Hureebhaee Soonderjee*, 2 *ibid.* 29; *Rachapa* v. *Amingaoda*, S. A. No. 307 of 1874, Bom. H. C. P. J. F. for 1875, p. 269; *Narayan Govind* v. *Sarjiapa*, R. A. No. 4 of 1874, *ibid.* for 1875, p. 99, wherein it was held that alienation prior to

Q. 4.—A woman has brought an action against her brother-in-law for the recovery of her son's share of property. She urges that during the lifetime of her son some of the family property was divided, but that it is for a share of the remainder that she now sues.

A.—She cannot claim any share, unless on the ground of some special agreement entered into by the parties when the division first took place.

Dharwar, March 1*st*, 1849.

AUTHORITY.—Vyav. May., p. 89, l. 6.

REMARK.—See § 4 E, Remark. The Sastri, probably, means to say that the mother can claim her son's property if an agreement to divide had been made during his liftime.

Q. 5.—A, a man of the Sudra caste, separated himself from his brother B, but left the family Vatan undivided. A few years afterwards A died, leaving his widow C pregnant. Should C be

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Reg. XVI. of 1827, coupled with long acquiescence, was good. After *Sukaram Govind et al.* v. *Shreneewas Row et al.*, quoted above, it was held that a Vatan was permanently alienable, *Sobharam* v. *Sumbhooram*, 3 Bom. S. D. R. 242; *Jesing Bhaee et al.* v. *Baee Jeetawowoo*, 2 *ibid.* 131, except as regards the portion set aside under Act XI., sec. 13, of 1843, for the office-holder, *Yeshwantraw* v. *Mulharrao*, *ibid.* 244. But in the end the doctrine adopted was that a sale was invalid even as to the vendor's life-interest, *Ramachander Nursew* v. *Krishnaji*, S. A. No. 2830, decided in 1852.

The Courts will distribute the surplus produce of a Vatan, though it cannot leave the family, *Jewajee* v. *Shamrow*, Morris, Part. II., p. 110; *Mulkojee* v. *Balojee*, Morris, Part. III., p. 111. See now Book I., Vyav., Chap. I., sec. 2, Q. 5, note (*i*), p. 326, and the following cases : *The Collector of Madura* v. *Mootoo Ramalinga*, 12 M. I. A. 438; *Krishnarav* v. *Rang Rav et al.*, 4 Bom. H. C. R. 1 A. C. J.; *The Government of Bombay* v. *Damodhur Parmanandas et al.*, 5 *ibid.* 203 A. C. J. The limitation of a Vatandar's estate by Reg. XVI. of 1827, sec. 20, is not extended by Bom. Act III. of 1874, see *Jagjivandas Javerdas* v. *Imdad Ali*, I. L. R. 6 Bom. 211. For the analogous case of Ghatvali estates in Bengal see *Raja Nilmony Sing* v. *Bakranath Sing*, L. R. 9 I. A. 104, and the cases there referred to.

A Vatan may be compared with a fief under the feudal law to a man and his heirs which "the ancestor and his heirs equally as a succession of usufructuaries, each of which, during his life, enjoyed the beneficial, but none of whom possessed or could lawfully dispose of the direct or absolute dominion of the property," Co. Lit. 191 *a*, *Butler's* note, which absolute dominion, however, as opposed to the *dominium utile*, belonged in England only to the Sovereign, Bl. Com., vol. II., Chap. IV.

considered as the heir of A from the date of A's death until her delivery? And is she during this period competent to recover from her brother-in-law B her husband A's share of the Vatan? If C be delivered of a son, will C and her son be entitled to separate shares of the Vatan?

A.—On the death of a man who has separated himself from his family, his son or adopted son is his heir, and is entitled to inherit his property. If he leave no son, his widow, daughter, and other relatives, in the order of precedence laid down in the Sastras, inherit his property. If a brother who has not separated from the family die, leaving a pregnant widow, the division of the family property should be deferred till she has been delivered. If a son be born, though his father is dead, he should be allowed the share to which his father would have been entitled. Though a grandson be supported from the proceeds of his grandfather's property, his claim to recover a share from his uncle, or his uncle's son, is in no way prejudiced. If at the time of the division of the family any property may have been concealed, it should be divided, whenever it is discovered. In the case stated in the question, C, while pregnant, is A's heir. If she bring forth a son he becomes his father's heir, and as such is entitled to recover his father's share of all the movable and immovable property of the family. From the date of her son's birth, C is no longer entitled to claim A's share of the property.

Tanna, June 26th, 1848.

Authorities.—(1) Mit. Vyav., f. 55, p. 2, l. 1; (2) f. 51, p. 1, l. 1; (3) f. 50, p. 1, l. 1; (4) f. 52, p. 1, l. 13; (5) Vyav. May., p. 96, l. 3.

Remark.—See the preceding cases, and § 4 e. Regarding the rule of deferring a partition until the delivery of a coparcener's pregnant widow, see § 4 b. 1, p. 609.

CHAPTER IV.

EVIDENCE OF PARTITION.

Q. 1.—Can the separation of a family be held to have taken place when there is no documentary evidence to prove it?

A.—A Farikhat or written instrument attested by the members of the family is the necessary proof of separation.

Ahmednuggur, 1845.

AUTHORITY.—Vyav. May., p. 132, l. 8:

"Those, by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence." (Borradaile, Mayukha, Chap. IV., sec. 7, para. 34; Stokes's H. L. B. 82.)

REMARK.—A Farikhat is not necessary in order to prove a division (*p*). The doctrine enunciated by the Sastri was adopted by the Sadr Court in some of the older cases, as in *Oomedchund* v. *Gungadhur* (*q*). *But in Sukaram* v. *Ramdas* (*r*), and *Kaseeshet et al.* v. *Nagshet* (*s*), this rule was abandoned, and now it is clear that partition may be proved like any other fact (*t*).

Q. 2.—A man had two wives. The elder has one son, and the younger has four sons. The man divided his property into five shares, assigning one to each of his sons. The son of the elder wife executed a writing to the other four to the effect that he would never interfere in any matter concerning them, and that

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(*p*) According to the customary law a farikhat or deed of partition is thought indispensable in a few castes. In others it is not used. But in a vast majority it is general though its place may be supplied by the testimony of eye-witnesses of an actual physical distribution of the property. Steele, L. C., p. 402. See above, Book II., sec. 4 D, p. 631. As to the common form of a deed of partition, see 2 Str. H. L. 389.

(*q*) 3 S. D. A. R. 108.

(*r*) 1 *ibid.* 22.

(*s*) 4 *ibid.* 100.

(*t*) See Col. Dig., Book V., Chap. VI., T. 381, 384; Book II., § 4 D 1, p. 631; and Digest of Vyavasthas, Chap. II., sec. 6A, Q. 31, p. 388.

they were at liberty to settle among themselves any questions respecting their affairs. After this one of the four brothers died without issue. Subsequently the son of the elder widow, having received some produce of a field, offered three-fifths to the three surviving brothers. They assert their right to four-fifths. How is this question to be decided?

A.—The three full-brothers of the deceased are his heirs. The half-brother cannot claim to be his heir. It will rest with the Court to consider the weight and effect of the writing passed by the half-brother.

Dharwar, April 24th, 1854.

AUTHORITY.—Vyav. May., p. 134, l. 4.

REMARK.—The facts of the case seem to be these: The father of the five brothers had effected a division, which, in part at least, was a so-called "phalavibhaga" or division of produce. The eldest brother, who appears to have been the manager of the estate, left undivided *in specie*, had given to his younger brothers a document confirming the division. Afterwards, on the death of one of the younger brothers, he seems to have disputed the division, and appropriated that share of the produce of the undivided property which would have gone to the deceased half-brother. Under these circumstances the division would be proved by the document and by the receipt of separate shares by the brothers. As the brothers were divided, the full brothers inherit before the half-brother, however the case might have been had there been no division. See Book I., "COPARCENERS," p. 70.

If the brothers are to be considered as reunited, still the share of the one deceased would descend to his brother of the full blood. In no case could the eldest be entitled to two-fifths without a special agreement. See above, pp. 131, 698 ss.; Steele, L. C. 56.

Q. 3.—Two uterine brothers prepare and take their meals separately. Is this practice a sufficient evidence of the separation?

A.—When two brothers perform the sraddha of their father separately, and when they have separate trade and separate means of maintenance, they may be considered separated, and in this case no documentary evidence is necessary (*v*). A verbal declaration of separation is also sufficient evidence in case the brothers have no property which they can divide.

Surat, September 4th, 1845.

(*v*) See 2 Str. H. L. 346; Steele, L. C. 56, 213.

AUTHORITY.—* Vyav. May., p. 133, l. 2:

"Narada declares also other signs of partition: Separated, but not unseparated, brethren, may reciprocally bear testimony, become sureties, bestow gifts, and accept presents. Gift and acceptance, cattle and grain, houses, land, and attendants, must be considered as distinct among separated brethren, as also the rules of gift, income, and expenditure. Those, by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence." (Borradaile, May., Chap. IV., sec. 7, para. 34; Stokes's H. L. B. 82.)

REMARK.—See also § 4 D 2, p. 636.

Q. 4.—What are the signs of the separation of a father and a son? A father and a son of his younger wife live in one and the same house. The son of the elder wife has been living in a separate house for about twenty years. The property of the father has not been divided, nor has the elder wife's son received any share. He was in the habit of performing the sacrifice called "Vaisvadeva" (*w*) on his own account. Should he be considered a separated member of the family? and can any man whose food is cooked separately perform the ceremony, or is it a sign of separation? Since the death of the father the elder son has joined the family, and assuming the guardianship of his half-brothers, has got them married. Can the half-brothers claim a share of the property acquired by the elder brother during the time he was away from the family? Can the elder brother claim a share of the ancestral property?

A.—Those members of a family who individually perform the ceremonies of "Vaisvadeva" and "Kuladharma" (*x*), and have signed a Farikhat, may be considered separated. It does not appear from the Sastras that the elder son of a person is obliged to perform the Vaisvadeva on his own account, although his father and half-brother are united in interests, and he himself lives and cooks his food separately in the same town without receiving the share of his ancestral property. A person may, however, perform the ceremony by the permission of his father. The Sastra authorizes the elder son of a man to take possession of the ancestral property, and protect his younger brother and mother. A

(*w*) This ceremony is performed for the sanctification of food before dinner. See Steele, L. C. 56.

(*x*) The ceremonial worship of the tutelary deity. Steele, L. C. *loc. cit.*

son, who has not made use of his father's means and who has declared himself separate and has acquired property through his learning, enterprise, &c., is not under the obligation of allowing shares of his property to his brothers. They can claim shares of the ancestral property only.

Ahmednuggur, April 13th, 1847.

Authorities.—(1) Vyav. May., p. 129, l. 2; (2) p. 129, l. 4; (3) p. 133, l. 2; (4) Mit. Vyav., f. 25, p. 1, l. 9; (5) Mit. Vyav., f. 48, p. 2, l. 5:

"That which had been acquired by the coparcener himself without any detriment to the goods of his father or mother, or which has been received by him from a friend or obtained by marriage, shall not appertain to the co-heirs of brethren." (Col., Mit., Chap. I., sec. 4, para. 2; Stokes's H. L. B. 384.)

Remarks.—1. For a full enumeration of the signs of a partition, see Introd. § 4 D. 2, pp. 636, &c.

2. The Sastri is right in not considering the separate performance of the "Vaisvadeva" as a certain sign of "partition," though it is enumerated in the Smritis among these signs. The general custom is in the present day, that even undivided coparceners, who take their meals separately, perform this ceremony, at least once every day, each for himself, because it is considered to purify the food. We subjoin a passage on this point from the Dharmasindhu, f. 90, p. 2, ll. 3 and 6 (Bombay lith. ed.):

"Rice mixed with clarified butter should be offered in the sacred domestic fire, or in a common fire. The oblation (at the Vaisvadeva) should be made in that fire, with which the food is cooked. . . . Bhattojidikshita declares that, if members of an undivided family prepare their food separately, the Vaisvadeva-offering may be performed separately (in each household) or not" (*y*).

Q. 5.—A man had three sons. They used to live and take their meals separately in a house which was their ancestral property. They all subsequently died. A son of one of them claims a moiety of the house from the son of the other. The defendant in this case takes no objection to the equal division of the house. The widow of the third brother has joined the plaintiff. The house, which is the ancestral acquisition of the family, appears to be undivided property. Should the above-mentioned claimants be allowed under these circumstances equal or different shares in it?

(*y*) See the remarks of Prof. Goldstücker (On the Deficiencies, &c., p. 34 ss.) which are instructive, though captious. In the passage "amongst members of a united family, when they cook their food in common, a separate performance of the *Vaisvadeva* is not allowed," read, "is not necessary." The passages at pages 39 and 42 show the correctness of the view presented in the text.

A.—Preparing food and taking meals separately by brothers is considered by the Sastras to be a mark of separation. According to this rule the three brothers are duly separated. Each of them has an equal share in the property. The widow of one of them should be allowed one-third of the house as the share of her husband.

Surat, November 29th, 1853.

AUTHORITY.—Viramit., Dayabhaga, f. 223, p. 1, l. 12.

REMARKS.—1. "Preparing food and taking meals separately" is by itself not a sufficient proof of separation (*z*).

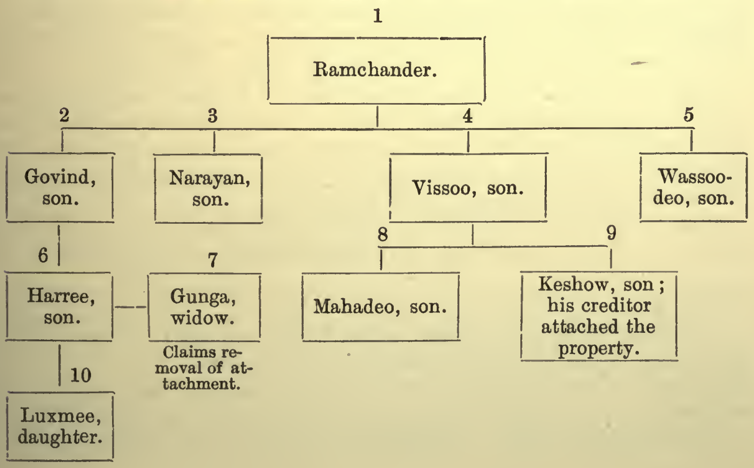
2. If the ancestral house is undivided, as stated in the question, the widow must be allowed the use of it and may establish a lien on it for her maintenance, but can in no case inherit it (*a*).

Q. 6.—Four uterine brothers lived separately in a house belonging to their father. They had neither divided their property nor passed deeds of separation to each other. They, however, used to take their meals separately. Afterwards all of them died. The eldest of them has left a widowed daughter-in-law. She has a maiden daughter. Two sons of her father-in-law's brother are alive (*b*). A creditor of one of them has attached the whole house.

(*z*) It is an indication when the relatives occupy the same house, 2 Str. H. L. 397. Joint performance of ceremonies implies union of interests, 2 Str. H. L. 393. See Book II., § 4 D. 2 *a*, p. 636.

(*a*) See above, pp. 250—1; Book II., § 4 E., p. 645, and pp. 245, 690; Chap. II., sec. 2, Q. 4, p. 751.

(*b*) The following genealogical table will be found to illustrate the question :



The widowed daughter-in-law has applied for the removal of the attachment from that portion of the house which constitutes her husband's share. The question therefore is, whether, according to the Sastras, and by reason of the four brothers having lived separately, their property, excepting the house in dispute, should be considered as divided, and whether the daughter-in-law can claim a share of it?

A.—Although there is no documentary evidence to show that the brothers were separate, yet, as their places of living, meals, and business were separate, they should be considered separated. Their property, including the house in which they lived, must also be considered divided. When any one, after the division of the property in which he has a share, is dead, his widow has a right to that share.

Surat, December 16th, 1847.

Authorities.—(1) Vyav. May., p. 129, l. 3; (2) p. 134, l. 8; (3) Vyav. May., p. 129, l. 2:

"Yajnavalkya states the modes of decision in case of denial of partition made by any one: 'When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof or by house or field' (separately possessed)." Borradaile, May., Chap. IV., sec. 7, para. 27; Stokes's H. L. B. 80 (*c*).

(4) Vyav. May., p. 132, l. 4:

"Brihaspati: They, who have their income, expenditure, and wealth distinct, and have mutual transactions of money-lending and traffic, are undoubtedly separate." May., Chap. IV., sec. 7, p. 34; Stokes's H. L. B. 82.

(5) Vyav. May., p. 134, l. 4:

"Yajnavalkya thus relates the order of succession to the wealth of one (dying) separated and not reunited: The wife and the daughters also; both parents; brothers likewise and their sons; gentiles, cognates, a pupil and a fellow-student; on failure of the first among these, the next in order is indeed heir." (Borradaile, May., Chap. IV., sec. 8, para. 1; Stokes's H. L. B. 83.)

Remark.—The question states nothing about the brothers having carried on business separately. If the Sastri is right as to this fact, his conclusions also would stand (*d*). But the dining separately does not alone prove that the brothers were divided. If they were undivided the widow is entitled to residence and maintenance as a charge on the property (*e*).

When the house of one member of the family was burnt down, and he then went to live in the same house with another, this was, it was held, to be

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(*c*) Narada, Pt. II., Chap. XIII., sl. 36, to the same effect, is quoted by the Mit., Chap. II., sec. 12, para. 3; Stokes's H. L. B. 467.

(*d*) Digest of Vyavasthas, Chap. II., § 6a, Q. 31, *supra*, p. 387; 2 Str. H. L. 387, 397.

(*e*) *Ramchandra Dikshit* v. *Savitribai*, 4 Bom. H. C. R. 73 A. C. J.

referred rather to an exercise of a common right than an acceptance of mere hospitality, and the prior separate residence was not deemed sufficient proof of partition between the two (*f*). But see also § 4 D. 2, p. 636 ss.

Q. 7.—Two brothers have been separate for the last fifteen years, but they did not pass a formal deed of separation. One of them has now filed a suit for a share of the land held on Miras tenure. The other has answered that there is some debt, and that the property should be divided along with the debt. How should this be decided?

A.—When a formal deed of separation is passed in the presence of the kinsmen of the parties concerned, and when each member is put in possession of his share of houses, lands, and other property, the family should be considered as separated. When the members merely live and take their dinner in separate places in the same village, they cannot be considered separated. The property as well as the debt should therefore be equally divided in the case referred to in the question.

Ahmednuggur, April 28th, 1856.

AUTHORITY.—Vyav. May., p. 129, l. 2 (see the preceding Question, Auth. 1).

Q. 8.—The parties are not able to produce a deed of separation. It is, however, proved that the parties separated about thirty-five years ago, and that the deed of separation was then executed. Can the separation be considered established on other grounds than the production of the deed?

A.—As the evidence has proved that the separation took place, and that the parties concerned are in possession of their proper shares, the separation may be considered established. The production of the deed would have only strengthened the proof.

Ahmednuggur, July 2nd, 1847.

AUTHORITIES.—(1) Vyav. May., p. 129, l. 2, see Digest of Vyavasthas, Chap. IV., Q. 6, Auth. 3; (2) Vyav. May., p. 133, l. 2 (see *ibid*. Q. 3).

(*f*) *Sheshapa et al.* v. *Igapa et al.*, R. A. No. 12 of 1873, Bom. H. C. P. J. F. for 1877, p. 37.

REMARKS.—See particularly § 4 D. 1, p. 630. In the case of *Bulakee Lall et al. v. Musst. Indurputtee Kowur et al.* (*g*), it is laid down that any act or declaration showing an unequivocal intention on the part of a shareholder to hold and enjoy his own share separately, and to renounce all rights upon the shares of his coparceners, constitutes, when accepted, a complete severance or partition.

(*g*) 3 C. W. R. 41 C. R.

BOOK III.

ADOPTION.

SECTION I.—SOURCES OF THE LAW.

In their opinions on the cases laid before them the Sastris have in many instances referred to Adoption "made with the ceremonies of the Vedas and the Smritis." No precepts as to such ceremonies are to be found in the Vedic literature, and even in the Smritis the recognition of the "son by gift" is but a part of a scheme in which he holds only a comparatively low place amongst the dozen varieties of substitutionary sons approved by those writings. They present few or no traces of the developed and elaborate system which has come down to our generation enriched and complicated by the inventive suggestions and the subtle controversies of a long series of lawyers, who were at the same time scholastics having unbounded confidence in the methods of a highly technical philosophy (*a*). The fundamental notion indeed on which the institution was afterwards reared is found already in full possession of the Brahmanical mind in the Vedic period. The manes were to be worshipped; the family was to be continued; the householder was to esteem his own being complete only when his home was furnished with a wife and son (*b*). But other means than adoption supply the defects of nature; some further stages on the way to refinement have still to be passed before those means become discredited. In the meantime Adoption is but slightly glanced at. Its fitness for the

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(*a*) For the methods of interpretation and development brought to bear on the Vedas, see Whitney's Essays, 1st Series, pp. 108 ss.

(*b*) See Whitney's Essays, 1st Ser., pp. 50, 59; comp. Manu IX. 45.

needs of a people of the peculiar mental and spiritual character of the Hindus was not at first perceived. Here, therefore, even more than in other departments of the law, the Veda has, for the practical lawyer of the present day, but little importance as a direct source of the law (*c*). For a complete history of the "origins" of the subject the requisite researches have still to be made, the needful competence has still perhaps to be perfected. The modern edifice, though bearing everywhere the impress of the primitive religion and its early modifications, is planned in the main on ideas of a later time, the growth and variances of which can be gathered from the existing literature with at least an approach to confidence (*d*).

In the long interval between the Veda and the Smritis more had been done towards systematizing than towards refining the theory of paternal and filial relations. The importance of maintaining the family is at the close of this period as strongly recognized as ever; the relations of the living to the dead had, through long meditation, become more vividly conceived than before. But the grossness of a barbarous time is not as yet cast off, nor have the ideas of the people settled down to any final appreciation of the several recognized modes of replenishing the family. Gautama, Baudhayana and Vasishtha, Manu and Yajnavalkya, Harita, Vishnu and Narada present their several lists. The order in which they rank the different substitutionary sons (*e*) will be discussed hereafter. That a substituted son is indispensable, failing one begotten, the rishis agree, with the exception of Apastamba (*f*). In him we have an echo perhaps of the then already ancient objection to the gift or acceptance of a child, an objection which later commentators found no great difficulty by means of distinctions and particular applications in explaining away (*g*).

Another long break in the record follows the period of the Smritis. That a considerable development of the Hindu mind and character took place in the interval is manifest from the works in other departments which have come down to us. Poetry and philosophy awakened higher moral sensibilities, and the myths of the earlier times became enveloped in a mist of sacred

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(*c*) See above, p. 50.
(*d*) Comp. Whitney, *op. cit.* pp. 62, 70.
(*e*) See Col. Dig., Book V., Chap. IV.
(*f*) Transl., p. 131.
(*g*) Comp. Datt. Mim. Sec. I., 36—47.

association which softened their repulsive features and prevented their exercising an injurious influence (*h*). The uncertain strivings of the nobler minds towards refinement and delicacy in the relations of the sexes and the constitution of the family were gradually in some measure realized by the Brahmanical class, and those in close communication with them, while neither at any time quite lost such a hold of the primitive beliefs and conceptions of duty as served to bind the slow changes of their institutions together in historical continuity. When we come into clear light again we find a marked advance in purity of sentiment. Adoption has in a great measure supplanted the grosser institutions that once competed with it on more than equal terms. The archaic formulas are still preserved, but they have been subtly emptied of their former contents, or have become themes for mere academic disquisitions, which show the learning of the commentators and their tenderness for the sacred writings, but stand apart in a great measure from actual practice and the living law. The far-fetched explanations of the hard sayings which could not be set aside (*i*) show at once the reverential spirit of the commentators, and their resolution to mould even intractable materials to the uses and cravings of a society always in movement, and for centuries in a general movement forward, though not always on lines which led to the best conceivable results, or which entirely commend themselves to European sympathies formed under wholly different influences.

From the time that Adoption comes upon the scene as an established section of the Hindu jural system, many authors have dealt with it either as the subject of separate treatises or along with the other leading topics of the law (*k*). Besides the Vyav. May., which is the most frequently quoted, the Bombay Sastris have referred to the Viramitrodaya, the Samskara Ganapati, to the Samskar, and "Datta" Kaustubha, to the Narnayasindhu and Dharmasindhu, the Dattaka Darpana and the Dvaita

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(*h*) Comp. for the earlier period Gough's Phil. of the Upanishads, p. 17.

(*i*) On the reconciliation of discrepancies in the sacred writings and the application of reason to establish harmony, reference may be made to *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C. R., at pp. 265 ss. See, too, the Datt. Mim., sec. II. 102, where reasoning, it is said, is to be applied to draw out an obvious inferential sense rather than separate revelations assumed for rules resting on one and the same principle.

(*k*) Many of these works are preserved amongst the learned in MS.

Nirnaya (*l*). The doctrines drawn from these authorities are supported by citations from Manu and other Smritis, as well as from the Mitakshara, and the Daya Bhaga of Jimuta Vahana. These last are but infrequent. The Dattaka Mimansa and Dattaka Chandrika are hardly referred to at all. The opinions enunciated agree for the most part with the rules laid down in these treatises, but the remark of Rao Saheb V. N. Mandlik (*m*) seems to be substantially correct, that till quite recent years they were but little known and relied on in Western India (*n*). It does not follow, however, that they are not valuable guides to the law. Though the law of Adoption has, in historical fact, grown up by a process of gradual adaptation, yet the Hindu commentators do not, any more than the English Judges, ever set themselves up as makers of the law. They claim to be expositors, and if one of them develops principles in a way more consonant to the general ethical and jural system than another he naturally obtains the preference (*o*). The congruousness of his doctrines with the whole mass of received notions is recognized, and they are received into the legal consciousness of the people as rules which, from their fitness, must be followed (*p*). This fitness implies a due agreement with the traditions that have descended in slowly modified interpretations from the Vedic era, and forms a proper ground on Hindu principles for the acceptance into the common law of the particular phases of doctrine which come thus recommended (*q*). This is more especially so if they are set forth with a clearness and point which makes them readily intelligible. It may seem that the Dattaka Mimansa and Dattaka Chandrika have not any very strong claims on these grounds, but excellence is essentially comparative, and very high authorities have agreed in assigning to the Dattaka Mimansa the first place amongst the treatises on Adoption (*r*). Colebrooke says (*s*) that "the Dattaka Mimansa is

(*l*) The one intended is that of Shankara Bhatta, father of Nilkantha, author of the Mayukha.

(*m*) Vyav. May., Introd. lxxii.

(*n*) That the Rao Saheb is a little too sweeping in his assertion may be seen by a reference to the opinions of the Poona Sastris in *Haebutrao's Case*, 2 Borr. R., at pp. 104, 105.

(*o*) See Col. Dig., Book II., Chap. IV., T. 15 Com.; T. 17; Book V., T. 57, 424 Comm.

(*p*) Comp. Mayer, Inst. Jud. Tom. V., p. 7.

(*q*) See *Bhau Nanaji Utpat* v. *Sundrabai*, 11 Bom. H. C. R. 267.

(*r*) *Bhagwan Singh* v. *Bhagwan Singh*, L. R. 26 I. A. 153; S. C., I. L. R. 21 All. 412.

(*s*) 2 Str. H. L. 133.

no doubt the best treatise on Hindu Adoption." By this Sutherland was led to translate it: "The Dattaka Mimansa," he says (*t*), "is the most celebrated work extant on the Hindu law of Adoption." Of the Dattaka Chandrika he says, "it is a work of authority" (*v*). In assigning it to Devanda Bhatta as its author he may probably have been mistaken (*w*), but this does not affect his judgment as to its popular reception as a guide to the law. Sir M. Westropp, C.J., says of the Dattaka Mimansa that "though not quite invariably followed [it] is generally of high authority in this Presidency" (Bombay) (*x*). In Bengal the authority of both works stands still higher. It was said by Mitter, J., that "The Dattaka Chandrika and the Dattaka Mimansa are undoubtedly entitled to be considered, and have always been considered, the highest authorities on the subject of Adoption" (*y*) But that their influence is not thus confined is plain from the description given by Sir W. Macnaghten, cited by the Privy Council in *The Collector of Madura's Case* (*z*): "Again of the Dattaka Mimansa of Nanda Pandita, and the Dattaka Chandrika of Devanda Bhatta, two treatises on the particular subject of Adoption, Sir William Macnaghten says, that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares."

As supplementary to the Mitakshara and the Mayukha, then, these may fairly be regarded as the principal authorities. The others referred to, though in some instances of importance, are not only less accessible, but on the whole less valuable when got at, and less suited to bringing about a general harmony of doctrines and decisions on a subject on which it is specially desirable that the law should be uniform and widely known. Still usage, the ultimate test, has in some instances decisively rejected the doctrines of these two works, as for instance in allowing adoption by a widow without express authority from her husband (*a*),

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(*t*) Preface.

(*v*) *Ibid.*

(*w*) See Rao Saheb V. N. Mandlik, *loc. cit.*

(*x*) *In Gopal N. Safray* v. *Hanmant G. Safray*, I. L. R. 3 Bom., at p. 277.

(*y*) In *Rajendro Narain Lahoree* v. *Saroda Soondaree Dabee*, 15 C. W. R. 548.

(*z*) 12 M. I. A., at p. 437.

(*a*) See *Haebutrao Mankur's Case*, 2 Borr., at pp. 104, 105.

while Nanda Pandita insists that Vasishtha's text requiring the husband's assent prevents any adoption at all after his death. The Samskara Kaustubha (*b*) says that the assent of kinsmen cannot properly be withheld, and therefore the widow, who is competent and bound to perform this service for her husband, may act without their concurrence. The Sastris in *Thukoo Baee Bhide* v. *Rama Baee Bhide* (*c*) deduced a like competence from the injunction of the Mitakshara, "a woman must be restrained only from unnecessary or useless acts," and declared that the widow could adopt even against the wishes of her husband's kinsmen. In a previous case (*d*) the Sastris had quoted the Mayukha to prove that the widow might indeed adopt without an express authority from her husband, but after "obtaining the sanction of the kinsmen and informing the ruling authorities." This they said "corresponds with the custom of the country." Yet should the widow have actually adopted a son with due ceremonies, such an adoption conformable to the Vedas could not "be set aside should the person opposing it be ever so near of kin." The Courts, as will be seen, have steered a middle course amongst the conflicting authorities. That they should have had to do so implies that none can be received as absolutely supreme.

In the present day it does not seem likely that the fountain-heads of the law will be much drawn on for new principles in the Law of Adoption. They are, indeed, too meagre to afford such principles save through an elaborate process of constructive inference. To this they have been subjected by the Hindu writers for many centuries, and the rules deduced by these writers have in their turn been tried and sifted by express or tacit reference to the usages and the peculiarities of Hindu society, until those best suited to its needs have been ascertained and appropriated. The Smritis come nearer than the Veda to modern practice, but the most important authorities are the writers, such as have been referred to, whose expositions have partly embodied and partly fashioned the customary law. In the great case of *The Collector of Madura* (*e*) the chief authorities on the law touching a widow's power to adopt had been collected under the four heads of (1) Original Sanskrit texts, (2) Responses of Sastris, (3) Opinions of

(*b*) As to the authority of this work, see 2 Borr. R. *loc. cit.*

(*c*) 2 Borr. R. 488, 499.

(*d*) *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. R. 202, 214.

(*e*) 12 M. I. A. 397, 411.

European writers, and (4) Decisions of the Courts. The judgments, both in the first instance and in appeal, proceeded almost entirely on the third and the fourth classes of authorities, and of the first the Judicial Committee speak as "a catena of texts, of which many have been taken from works little known and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these," while accepting those recognized by the chief European writers on Hindu Law as of unquestionable authority in the South of India, where the case under appeal had arisen.

To the opinions of the Sastris, which the High Court had denounced as having "polluted the administration of Hindu law" (*ee*), their Lordships, as already observed (*f*), attach considerable importance. Those opinions, they say, "which are consistent with [translated works of authority] should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country" (*g*).

In dealing with authorities the analogy of the rules accepted by kindred schools may greatly strengthen one of two or more inconsistent doctrines propounded by rival authors (*h*). All rely on the same ancient texts, and the waves of philosophical or moral influence which have moulded the derived notions in one part of India have almost of necessity extended their effect to the neighbouring regions, aided in the case of the learned by their possession of a common language. Through the medium of Sanskrit, ideas having in themselves a fitness for wide reception have been capable at all times of diffusion with something like the same

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(*ee*) *In Collector of Madura* v. *Anandayi*, 2 Mad. H. C. R., at p. 223.

(*f*) Above, p. 2.

(*g*) *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A., at p. 438, 439. The Sastris vacillated occasionally in the opinions they delivered. On points of difficulty they naturally differed. When one considers the cobweb structure of the Hindu Law laboriously spun out of a primitive theology by means of a philosophy having but little respect for mere practice, it was impossible that there should not be variances of opinion. One view was in itself as reasonable in many cases as the other. In some instances the Sastris seem to have gone wholly wrong. The same may be said of jurists and Judges everywhere. A reading of the Sastris' responses, as wide as that on which the present work is founded, would convince any unprejudiced student that as Law Officers of the Courts these learned men performed their duties, save in very rare instances, with integrity as well as intelligence.

(*h*) *Ibid.*

striking celerity which obtained through the use of Latin in the Europe of four and five centuries ago.

The tendency of usage to conform to the received scripture standards has been noticed in the first part of this work (*i*). Hindu theory justifies variances from the normal rule of conduct only by a supposition of some lost revelation (*k*) to which they may be referred, except in cases purposely left to individual discretion (*l*), and the Sastris assert the superiority of the Vedas to mere custom (*m*), but when the precept is not decisive they allow custom to replace it (*n*). The Charters of the High Courts and the Regulations of the Legislature give the next place in authority after the Statute law to usage, and however in learned speculation the sacred texts may be exalted above mere human practice there can be no doubt that the Hindu lawyers had arrived substantially at the same conclusion that the British Government has defined. The general force of custom as law is repeatedly asserted by Manu (*o*), as by Katyayana, Yajnavalkya, and the other great Rishis (*p*). The Mitakshara allows that custom has abolished Manu's rules for specific deductions and unequal shares in partition (*q*). The Vyavahara Mayukha declares that the very practice given by Gautama as an example of one that usage could not establish, the marriage of a maternal uncle's daughter, is sanctioned by custom in the Dekhan (*r*). Macnaghten instances the Kshetraja as a legal subsidiary son still recognized by the local law of Orissa (*s*). Mitramisra, following the Mitakshara, says the conflicting texts respecting subsidiary sons are to be reconciled by

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(*i*) See above, pp. 9, 402, 403. As to the determination of caste rules, see sec. II. below.

(*k*) See 2 Muir's Sanskrit Texts, 165, and references below.

(*l*) Manu II. 12, 18; Gaut. XI. 20.

(*m*) 2 Borr. 488; see M. Müller, H. A. S. Lit., p. 53; Muir's Sanskrit Texts, vol. III., pp. 179, 181; Col. Dig., Book I., T. 50 Comm.; Datt. Mim., sec. I., paras. 10, 11.

(*n*) Apastamba, Transl., pp. 15, 55. At p. 47 is a caution against inferring the former existence of a Vedic passage from a usage which can be accounted for on merely utilitarian grounds, and a caution against following a usage with no higher justification.

(*o*) I. 108, 110; II. 12; IV. 178; VII. 203; VIII. 41, 42.

(*p*) See the quotations in *Rawut Urjun* v. *Sing Rawut Ghunsiam Sing*, 5 M. I. A. 180.

(*q*) Mit., Chap. I., sec. 3, para. 4.

(*r*) Vyav. May., Chap. I., sec. 1, para. 13.

(*s*) Macn. H. L. 102.

referring them to different local customs (*t*). On this principle the Sastri, in a case amongst the Bhatele caste, declared that by the caste custom an adoption could not be allowed while male kinsmen survived to continue the family (*v*). This agrees with the answers preserved in Borradaile's collection, and shows that custom well established is practically supreme. In the particular instance, which is not a solitary one, it may well be that the custom embodies a rule against adoption, which once existed in some sacred writings as Apastamba indicates, but has faded away in the transcriptions of later centuries.

The importance of custom as a source and standard of the law is specially great in the case of adoption, because, this being of comparatively modern development, the Vedic texts, written without respect to it, admit of manipulation very much according to the desires of the interpreters. The Smritis even are far from regarding adoption in the light in which it is now viewed. Thus, though the Sruti and Smriti are to the pious Hindu above all reasoning (*w*), and a rationalist ranks as an atheist (*x*), yet Vijnanesvara, who raises the sacred code above all rules of ethics, has still to admit an adjustment by reference to the general and particular and other modes of interpretation (*y*), and custom and approved usage (*z*) govern the received construction of the texts in proportion as these are in themselves indecisive and incapable of direct application (*a*). This does not exclude a comparison of the relative weight of those who pronounce on the customary law.

(*t*) Viram. Transl., p. 127; Macn. H. L. 188.

(*v*) MS. 405, Surat, 14th June, 1847.

(*w*) Manu II. 10; comp. *ibid.* XII. 105.

(*x*) Manu II. 11; see Smriti Chandr., Chap. III., para. 21; Manu. XII. 106.

(*y*) See Yajn. II. 21; Vyav. May., Chap. I., pl. 112; Col. Dig., Book II., Chap. IV., T. 15 Com.; Book V., T. 332 Com.; Comp. Goldstücker, *op. cit.* p. 2; 2 Muir's Sanskrit Texts, 169, 177, 200.

(*z*) Judicial Committee in *Bhya Ram Singh* v. *Bhaya Ugur Singh*, 13 M. I. A. 390.

(*a*) Vijn. in Roer and Montriou's Yajn. p. 8; Manu I. 110; IV. 155. He goes so far as to say that precepts are not to be followed in a practice that has become repulsive to the community, as, for instance, by raising up seed to a man deceased, and by sacrificing a cow, though these are commended by the Hindu scriptures; Mit., Chap. I., sec. III., para. 4. But Devandha Bhatta censures this looseness of doctrine, and quotes Vasishtha (I. 17) to prove that usage is of authority only where it is not opposed to the Vedas and Sastras, Smri. Chand., Chap. III., p. 21 ss. See Gaut. XI. 20; Baudh. Pr. Adh. 1, Kand. 2, paras. 1-7; Manu VIII. 41; VII. 203.

Superior knowledge is to be recognized in some men, of local usages and of tradition (*b*); they, in fact, are the depositaries of custom, as it is gradually organized (*c*), and reproduce it in its living forms (*d*). It was a consciousness of this which moved the Bombay Government of the early part of the present century to set on foot the enquiries conducted by Steele and Borradaile. The information gathered by the former on adoption is embodied in his Law of Caste. The answers collected by the latter have not been all preserved, but in English and Gujarati a considerable body remain (*e*). These were obtained from the representative members of the several castes. They were given, it is evident, with care and consciousness as well as knowledge. They have for other purposes been frequently referred to in the foregoing pages of this work, and they must be used as additional and valuable authorities on the Law of Adoption (*f*).

It may be necessary to add that a particular custom which is relied on in any case as derogating from the common law, based itself on a more general custom, must be clearly proved (*g*) in this as in other departments of the law (*h*). Of a general custom the Courts take notice without its being proved and without their attention being called to it. Works like the present may make the performance of this duty somewhat easier.

For the application of the law as ascertained from its various sources the Judicial Committee have laid down principles which must always constitute a great part of the science of the Courts. Thus in dealing with the Hindu Law "Nothing from any foreign source should be introduced into it; nor should the Courts interpret the texts by the application to their language of strained

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(*b*) 2 Muir's S. Texts, 173.

(*c*) See Savigny, System, vol. I., § 12; Goudsm. Pand., Book I., § 15, and notes.

(*d*) Comp. Savigny, System, vol. I., §§ 7, 8, 29, 30; Puchta Gewohnheitsrecht, vol. I., p. 162 ss.

(*e*) The Gujarati collection by Sir Mangaldas Nathubhai.

(*f*) As to the force of custom see further *Rama Lakshmi* v. *Shivanantha*, 14 M. I. A. 576; *Surendra Nath Roy* v. *Hiramani Barmani*, 1 Beng. L. R. 26 Pr. Co.; *Lala Joti Lal* v. *Mussamat Durani Kuar*, Beng. L. R. F. B. R. 67; *Court of Wards* v. *Pirthee Singh*, 21 C. W. R. 89 C. R.; *Bai Amrit* v. *Bai Manek*, 12 Bom. H. C. R. 79; *Damodhur Abaji* v. *Martand Apaji*, Bom. H. C. P. J. 1875, p. 293.

(*g*) See Col. in 2 Str. H. L. 181.

(*h*) See *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*, 12 M. I. A. 523; 14 M. I. A. 576; *supra*, note (*f*).

analogies " (*i*). As to the weight to be given to decisions, " It is entirely opposed to the spirit of the Hindu customs to allow the words of the law to control its long received interpretation as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country " (*k*), and " a new construction ought not to be placed on a text of Hindu Law contrary to the current of modern authority " (*l*).

SECTION II.—NATURE OF ADOPTION AND ITS PLACE IN THE HINDU SYSTEM.

Though Adoption now holds among the Hindu jural institutions a place second in importance only to Marriage, it has won this place only by slow degrees. A craving for a real, and failing that, for a fictitious, perpetuation of the family seems to have prevailed amongst the Hindus from the earliest ages (*m*). This craving has sprung less from a desire to satisfy the capacity for affection and protection—though this has not been absent—than from a sense of the need of a son to save the Brahman from endless discomfort in the other world (*n*). The connexion of putra (= son) with " put " (= hell) even if not well founded etymologically is ancient (*o*), and corresponds to thoughts that have possessed the Hindu's mind in all ages (*p*). " Heaven," says the Veda, " awaits not one destitute of a son " (*q*), and " a Brahman is born under three obligations: to the saints for religious duties, to the gods for

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(*i*) *Bhya Ram Singh* v. *Bhaya Ugur Singh*, 13 M. I. A. 390.

(*k*) *Kooer Goolab Singh* v. *Rai Kurum Singh*, 14 M. I. A., at p. 196.

(*l*) *Thakoorain Sahibu* v. *Mohan Lal*, 11 M. I. A., at p. 403; *Bhagwan Singh* v. *Bhagwan Singh*, L. R. 26 I. A. 153; *Bai Kesserbai* v. *Morariji*, I. L. R. 30 Bom. 431 P.C.

(*m*) See Ait. Brahm. VII. 3, 9; Vasishtha, Chap. XVII., para. 2; Manu IX. 8, 9, 45, 106; III. 37, 262, 277, IV. 184.

(*n*) See Apast. Pr. II., Khand. 24, paras. 1, 3, 4; Vasish. XVII. 1—4; Baudh. Pr. II., Kand. 11, para. 34; Col. Dig., Book V., T. 270.

(*o*) Col. Dig., Book V., T. 302, 303.

(*p*) See Vishnu XV. 43 ss.

(*q*) Col. Dig., Book V., T. 311; Viram. Transl., p. 115; *Huradhun Mookurjia* v. *Musst. Mookurjia*, 4 M. I. A. 414. Yet in the absence of a son the widow may perform the kriya and sraddhs of her deceased husband. Steele, L. C. 34; above, p. 87.

sacrifices, to his forefathers for offspring (*r*). He is absolved who has a son, performs religious duties, and has offered sacrifices " (*s*). When the Brahman dies a son is indispensable " for the funeral cake, the libation, and the solemn rites " (*t*). These obligations of the son are persistently dwelt on in the sacred books, and when we see how the sacerdotal class were interested in the multiplication of ceremonies (*v*) it is easy to understand why the duty of paternity (*w*) was one which they never failed to magnify. The more sacrifices, the more vicarious feasting, and the more distributions to learned Brahmans (*x*), the more prominent the position assigned to them (*y*).

(*r*) See Phil. of the Upanishads, p. 264. Comp. Manu III., 70, 81. Thus it is that " on viewing the fact of his begotten son a father is released from his debt to his ancestors," 2 Str. H. L. 198.

(*s*) Datt. Mim., sec. I. 5; so Baudh. Pr. II., Kand. 11, para. 33; Kand. 16, paras. 2—7.

(*t*) Datt. Mim., sec. I. 3; Vishnu XV. 43; Col. Dig., Book IV., Chap. I., T. 8. If unworthy, however, the son could be replaced. Col. Dig., Book V., T. 263, 264, 278, Comm. " Perpetuated offspring and a heavenly abode are obtained through a son, a grandson, and a great-grandson," Yajn. quoted Col. Dig., Book IV., Chap I., T. 36.

(*v*) See Manu III. 117, 146.

(*w*) Paternity, not Maternity. " Males only need sons to relieve them from the debt due to ancestors," Col. Dig., Book V., T. 273 Comm. Nor is adoption of a daughter warranted by any Smriti; *ibid.*, T. 334 Comm., though it is supported by Puranic legends. In *Gangabai* v. *Anant*, I. L. R. 13 Bom. 690, a case under the Vyav. May., it has been held that a Brahman cannot adopt a daughter conferring on her the right of a real daughter. Manu V. 160, 161, in recommending continence to a childless widow, does not suggest adoption, but promises salvation as the reward of austerity. Comp. Steele, L. C. 34.

Nilkantha gathers from Manu IX. 168 that, according to his precept, only a son, not a daughter, can be given in adoption. Vyav. May., Chap. IV., sec. V., para. 6.

(*x*) See Gaut., Chap. XV. 5—15; Apast. Pr. II., Khand. 16, paras. 3 ss.; Manu I. 95; III. 97, 138, 145, 146, 187, 189, 207, 208, 236, 237. Individual moderation, however, is prescribed; Manu, IV. 186, 190, 195.

(*y*) Marriage is a samskara that is strongly enjoined, see Col. Dig., Book V., T. 252, Comm.; see Manu II. 67; III. 2, 4; Col. Dig., Book IV., Chap. I., T. 17.

The Brahman should marry and light the domestic hearth as soon as possible after leaving his guru or teacher. A girl, it is prescribed, is to be married at from six to eight years of age, Steele, L. C. 26, though the validity of the marriage is not affected if she be under the age of maturity. Col. Dig., Book V., T. 338 Comm. The injunctions laid on the parents and on the husband by Manu show the main purpose of the union (see also Col. Dig., Book V., T. 198, 199; Datt. Mim., sec. I. 5), but in consequence of the legal severance of a girl from her family of birth in some instances for years before her husband's

It is strange to modern feelings how much amongst the ancients sacrifices and religious celebrations were conceived as a bargain (*z*) in which, for a consideration of oblations duly offered (*a*), with formulas duly uttered (*b*), protection and prosperity might be justly claimed (*c*). There was but little bowing down before the sublime conception of Almighty benevolence, less dwelling on a single supreme Creator and controller of events than on partial deifications of persons and of qualities within the reach of a limited intelligence (*d*). In the adoption of a son the Hindu aimed and still aims at satisfying an exacting group of manes greedy in the other world for recognition and offerings in this (*e*). He looks too for appreciable benefits which he is himself to derive

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unfitness can be discovered, and of her having in the meantime become disqualified by attaining maturity for another marriage, she remains a member of her *quasi*-husband's family, to which the marriage rites have transferred her. See above, p. 418; Manu III. 11, 37, 45; IX. 4, 26, 77, 81; Col. Dig., Book IV., Chap. I., T. 15, 16, 18, 19, 62, 64, 65, 66, 84. The sacred writings readily lent themselves to this, as they generally contemplated the replacement of a husband where necessary by a substitute. See *ex. gr.* Col. Dig., Book V., T. 231. In the case of a marriage ceremony performed between relatives or between persons of different castes whose marriage is forbidden no conjugal connection is recognized, the woman is put away and her children are illegitimate; but she is entitled to maintenance. Steele, L. C. 29, 30. On the other hand, a mere defect in reciting the formulas (mantras) at the wedding is rectified by reciting them again correctly, *ibid.*

(*z*) See Ihne, Hist. of Rome, Book VI., Chap. XIII.; Soury, Etudes Historiques, p. 280; Phil. of the Upanishads, p. 262; Manu III. 63, 67; IV. 155 ss.

(*a*) Manu III. 279.

(*b*) See Baudh. Pr. II., Kand. 11, para. 32; Kand. 14, paras. 4, 5, 11, 12; Manu III. 217, 277 ss.; IV. 99, 100; Apast. Pr. II., Khand. 16, paras. 7 ss.; Phil. of the Upanishads, p. 102.

(*c*) For the purposes sought to be attained by the due utterance of the "mantras" or spells, and their coercive force over the gods, reference may be made to Whitney's Essays, 1st Series, p. 20; see Manu IV. 234.

(*d*) "The innumerable gods of Hinduism are deified ghosts or famous personages, invested with all sorts of attributes in order to account for the caprices of nature. This is the state of the vulgar pagan mind; by the more reflective intelligence the gods are recognized . . . as beings capable of making themselves very troublesome; whom it is, therefore, good to propitiate, like men in office." Sir A. C. Lyall, Asiatic Studies, p. 51.

(*e*) Manu, Chap. III. *passim;* Vasish. XI. 40—44; Gaut. XV. 15 ss. A higher range is attained in such passages as those quoted by M. Müller, Lect. on the Sc. of Religion, pp. 233, 265; comp. *ibid.* 153; Tiele, Anc. Religions, pp. 114, 143. The manes were on particular occasions to be honoured with animal sacrifices. Manu V. 41; comp. v. 35.

from the future ceremonies (*f*), the fruit of which will reach him in the realm of shades (*g*). He shrinks with horror from being left destitute beyond the pyre to suffer the mysterious anguish which awaits the man for whom no son can perform the Sraddhas (*h*). The stronger and more materialistic may resist this tendency (*i*), in some few active faith is lost in metaphysical subtleties (*k*), some are too obtuse to realize the future at which others shudder; but for the most the pressure of a social opinion pervaded everywhere with these ideas, moulds their desires (*l*) and defines their spiritual outlook and their hopes and fears. In somehow acquiring a son the Hindu thinks generally that he is making the best of all possible bargains for himself in this world and the one to come (*m*).

Various means for supplying a natural deficiency of male offspring were devised, or still adhered to the family in its gradual consolidation on a permanent type from the looser and grosser associations that preceded the dawn of civilization. Amongst these expedients, Adoption, when first admitted, seems to have been received with but doubtful favour (*n*). The levirate and the appointment of a daughter in one or other of the forms of these

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(*f*) See Manu IX. 180; Col. Dig., Book V., T. 306; Baudh. Pr. II., Kand. 14.

(*g*) See Manu III. 274, 275. As to the sin of the son who omits to satisfy his obligations, see Vishnu XXXVII. 29; LXXVI. 2; Phil. of the Upanishads, p. 264. The enumeration of the right seasons for oblations to the manes in Yajn. I. 217, may remind one of the famous five reasons for drinking amongst the Western nations. So too Vishnu, LXXVI—LXXVIII.

(*h*) Vishnu, XX. 33—37; Col. Dig., Book V., T. 312, 313.

(*i*) Individual Hindus have no hesitation (see the Sarva-Darsana-Sangraha, p. 10) in expressing their contempt for the whole system, but they are rare exceptions. Others think that their duty may be fulfilled and their salvation secured under the Hindu Law by other means than procuring a lineage. They rely on such texts as Yajn. I. 40, 50; III. 190, 204, 205; Manu V. 159.

(*k*) See Phil. of the Upanishads, Chaps. IV., V., p. 263.

(*l*) For the ceremonies and the mantras or spells to be recited see Vishnu, LXXIII—LXXVI.

(*m*) See Manu III. 81, 82, 122, 127; Col. Dig., Book V., T. 270.

(*n*) Apast. Pr. II., Pat. VI., Khand. 13, para. 11, positively forbids the gift equally with the sale of a child. He does not recognize the substitutionary sons. He condemns vicarious procreation, *loc. cit.*, para. 7, at the same time indicating that it was common. Medhatithi, much later, contends that there can be no real substitute for the son, from whose production, not his replacement, the proposed spiritual benefit is to be derived. See Datt. Mim., sec. I. 36, and comp. the alternative rendering of Gaut. IX. 53, quoted under Vasish. XII. 8. This would forbid leaving the family of birth to join another by adoption.

institutions must for generations and even centuries have been the approved modes of obtaining a substitutionary son (*o*). Other methods, still less commendable, according to modern ideas, must have had a certain vogue, seeing that they are recognized in the sacred Smritis (*p*). The final survival of adoption while the rival institutions perished is a mark of its greater suitableness to the moral sensibilities and needs of a society gradually advancing in refinement, yet clinging always to the traditions of the past. The field is here still encumbered with the remains of fallen structures which have engaged a good deal of the attention of the native authors. They have only a partial and occasional influence on the law of to-day, but some observations may be necessary in order to place Adoption in its proper historical relation to the rival, and no doubt older, institutions, which in the end it has supplanted and extinguished.

It is possible to trace in the Vedic literature (*q*) some indications of the appointment of a daughter to produce a son, not for her husband, but for her own father (*r*). This and the levirate (*s*) may be regarded as having in the Vedic period almost completely filled the space now occupied by adoption (*t*). It is impossible to suppose that a subject of such importance as adoption, so stirring to the feelings of the religious, and so calling for ceremonies and sacred ministrations, should not have been frequently mentioned if in fact the institution was generally recognized when the hymns were composed (*v*). Yet that it was creeping into existence

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(*o*) See Col. Dig., Book V., Chap. IV., sec. III., arts. I. and II.

(*p*) See *ex. gr.* the quotations in Col. Dig. *loc. cit.*, sec. IV.

(*q*) It is necessary to go back so far to find the root of this as of nearly all existing Hindu institutions. See Whitney, Or. and Ling. Studies, 1st Series, pp. 101 ss.

(*r*) Müller, Rigveda, vol. I., p. 232; Transl. Tag. Lect. 1880, p. 249.

(*s*) A passage quoted in Muir's Sansk. Texts, vol. V., p. 459, makes it plain that the young widow of the Vedic period sought the society of her brother-in-law just as amongst the Jews. (See above, p. 397.) The frequent references to the same custom in the Smritis have already been noticed. (See above, p. 394 ss.)

(*t*) Above, p. 394; Rig. Veda, X. 40, referred to above, p. 276. The Vedic passage apparently insisting on a really paternal relation as the condition of celebrating certain sacrifices has to be explained away in the Datt. Mim., sec. I. 44.

(*v*) The myth of Sunahsepa's giving himself to Visvamitra, who already had a hundred sons, is referred to in the Rig Veda, but it is evidently not recognized as a part of the social system. Nor is it connected by any chain of natural development or deduction with adoption. A mere casual and partial similarity does not under such circumstances indicate derivation. Sunahsepa, it appears,

may be inferred even from the exhortation against it as incapable of supplying a deficiency of begotten offspring (*w*).

The levirate, as a means of raising up issue, became in the course of time disreputable amongst the Brahmans (*x*) or at any rate somewhat discredited. It is by Manu made one of the reproaches of king Vena, who appears to have strongly resisted the pretensions of the Brahmans, that he made this practice "fit only for cattle" a law for men (*y*). Yet a few verses later the institution in a modified form is fully recognized (*z*), and a sonless woman it is admitted might be legally authorized to take a substitute for her husband (*a*). Thus the ruder arrangements of a half-

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must have already uttered mantras and must therefore have been initiated. Hence it is said arises an authority for the adoption of a son whose samkaras have been completed in another family. When history admits the legend, logic may accept the inference.

In the comparatively late Yajur Veda there is an instance in the story of Atri of a man's giving away all his children and in place of them adopting a religious ceremony. Such myths sprang merely from the unchecked play of invention. Taken seriously as examples for imitation they would warrant what the law strongly condemns, needless adoption and parting with all sons. The story of Manu's appointment of a daughter though he had sons, Col. Dig., Book V., T. 216, is not by any one held to validate a similar appointment now, nor is Pandu's liberal acceptance of his wife's children a pattern for a less meritorious generation. See Col. Dig., Book V., T. 301 Comm., T. 273 Comm. A further pitch of imaginative licence is reached in the story of Daksha's appointing his fifty daughters and giving twenty-seven to one husband. See Col. Dig., Book V., T. 222.

(*w*) See the passages cited by Zimmer, Altindisches Leben, p. 318; and comp. Rig. Ved. I. 124, 125.

(*x*) Above, pp. 395—6; Manu V. 161, 162.

(*y*) See Muir, Sansk. Texts, vol. I., p. 297; Manu IX. 66.

(*z*) Manu IX. 69, 70; comp. Gaut. Ad. 28, para. 19; Vasish., Chap. XVII., para. 11; Vishnu, Chap. XV., para. 3.

(*a*) Manu IX. 147, 159, 161; Baudh. Pr. II., Kand. 2, para. 12. Not only could a wife be borrowed, but a Brahman might be hired, as well as a relative called in, to supply a suspected defect on the part of the husband desirous of offspring. See the passage quoted Datt. Min., § V. 16. Various bargains could be made between the father and the *quasi*-father; see the texts, Col. Dig., Book V., T. 213, 214, 217, 235, 238, 240, 241, 244, 252.

In the passage quoted Datt. Chand., sec. III. 9, it is provided that a son begotten on the widow by a brother of the deceased husband is to be regarded as a son of the latter only. He is to take precedence as heir over sons begotten by the deceased on other men's wives. As to these see Gautama, quoted Col. Dig., Book V., T. 265. The Brahma Purana, quoted *ibid.* T. 217, would, taken without the gloss, reverse the order of succession.

savage time (*b*) stand recorded side by side with higher conceptions still struggling for admittance. The higher cause prevailed, but its supremacy is even now not completely established amongst the primitive tribes (*c*). Amongst the higher castes the older notions are virtually obsolete, yet in the law books we find rules still based on them with more or less of artificiality (*d*). These instances of adjustment must be taken rather perhaps as proofs of the strong conservative tendency of learned men building on sacred foundations, than as the real grounds of customs which had an obvious recommendation in their fitness; but they give a peculiar turn to the reasonings on some points of the chief authorities which has had a palpable influence on the development of the practical law.

As an example of this, reference may be made to the rule that the place as heir of a member of a family disqualified by some personal defect may be taken by a son begotten either by the man himself or by a kinsman on his behalf (*e*). The specific mention of these substitutes is held by the Mitakshara (*f*) to exclude a son adopted by a man himself disqualified for inheritance, and the Smriti has probably come down from a time when the family might refuse to accept any one not actually born in it under arrangements which provided that a child thus born shared the common ancestral blood (*g*).

(*b*) Polygamy, though the indications of it in the Vedic hymns are not frequent, is yet referred to, see Muir's Sansk. Texts, vol. V., p. 458; Zimmer, Altin, Leb. 324. The seclusion of women seems from other Vedic passages not to have been practised. It is probable that under such circumstances a considerable licence of manners prevailed, and of this there are several indications. Wilson, Rig Veda, 2, xvii.; Zimm. *op cit.* 332, 334.

(*c*) See above, p. 357.

(*d*) Doctor Burnell, Introd. to the Madhaviya, says : "Indian jurists never attempted to record such merely human details" as those of local custom, but the perusal of such a work as the Vyav. Mayukha can leave no doubt that the commentators were no more independent than other human beings of the moral medium in which they lived. An ingenious and laboured interpretation not infrequently leads merely to a corroboration of what custom had already made law.

(*e*) Mit., Chap. II., sec. 10, para. 9.

(*f*) *Ibid.*, para. 11.

(*g*) There was no such thing as a repeal of a Smriti law. See above, pp. 46—50. As the sacred writings were inspired all had authority, and when they clashed had in some way to be reconciled by interpretation (see Manu II. 12—15). Here the precise rule prescribed for the particular case is declared by Vijnanesvara to override the more general law of replenishment of the family,

Another instance is the reference by some authors of the right of a widow to adopt a son without express authorization to the duty in former ages of raising up seed to her deceased husband by an appointed relative (*h*). And as this function was assigned to the brother or other near kinsman, so he, it was said, was the person to concur in an adoption by the widow, without which such an adoption could not be valid (*i*). The Privy Council refused to admit the analogy as affording more than "an explanatory argument for an actual practice" (*k*), and placed the necessity for kinsmen's assent upon the ground of "the presumed incapacity of women for independence," but the logical method pursued by the Indian writers referred to and adopted by the High Court of Madras in this case is extensively applied in the Hindu Law (*l*).

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and the rule has been preserved, though its effect now is to prevent disqualified persons from supplying their own places at all, comp. pp. 48—50, above; *The Collector of Madura* v. *Muttu Ramalinga Sathupathy*, 12 M. I. A., at p. 435, and S. C. 2 M. H. C. R., at p. 231. It is a canon of construction that when there is a general rule a special one of possible narrower scope is to be interpreted so as not to deprive the wider rule of its general operation. See Datt. Chand., sec. V., 27. This is equally a rule of the English Law; see Co. Litt. 299*a*, and *Ebbs* v. *Boulnois*, L. R. 10 Ch. A., at p. 484. The apparent contradiction is got rid of by a limitation of the one or the other rule as to persons, time, or place of operation.

(*h*) See *Collector of Madura* v. *Srimatee Muttu Ramalinga Sathupathy*, 2 M. H. C. R., at pp. 213, 221, 222, 224, 226, 230.

(*i*) *Ibid.*

(*k*) S. C. 12 M. I. A., at p. 441. The Samskara Kaustubha argues that a woman's necessary dependence does not disqualify her for adopting, but it does not decisively dispense with the assent of kinsmen, though these may incur damnation by wrongly withholding it. The construction given by the Sastris (above, p. 783) is subject to this qualification.

(*l*) The principle of development on which, as a formulated scheme, the whole law of adoption rests, is strongly insisted on at 2 M. H .C. R. 227. The Judicial Committee at 12 M. I. A. 441, says that "as a ground for judicial decision these speculations are inadmissible": the force of any doctrine depends on its reception. (*Ibid.*, p. 436.) But the character of the doctrine is sometimes virtually conclusive for or against its admissibleness, and the view expressed by the High Court may derive some support from the dicta of Lord Wensleydale in *Morehouse* v. *Rennell*, 1 Cl. & Fin. 546, adopted by Willes, J., in the *Tagore Case*, L. R. Suppl. I. A., at p. 68. On the other hand, in *Reg.* v. *Bertrand*, L. R. 1 P. C., at p. 520, it is said that the Courts cannot make that law which the Legislature or usage has not made so. This is quoted and approved in *Reg.* v. *Duncan*, L. R. 7 Q. B. D., at p. 200. In *Dalton* v. *Angus*, L. R. 6 A. C., at p. 812, Lord Blackburne recognizes fictions as a beneficent usurpation, departure from which would be as great a usurpation by the Courts. That even principles quite foreign to the Hindu Law may thus obtain reception and react on the

It is only necessary to read the Smritis with a little care to perceive that something like a Spartan indifference to mere sexual purity (*m*) prevailed amongst the Hindus whose habits and ideas are recorded in these ancient compositions (*n*). In discussing the punarbhu (twice-married woman) and the svairina (faithless wife) Narada shows that irregular relations were common. The chief care manifested is as to the ownership of the children, which is said to belong to him who has begotten them, if the husband

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whole system appears from the discussion above, p. 578 ss. See *Suraj Bunsee Koer's Case*, L. R. 6 I. A., at p. 102.

(*m*) Vishnu, Transl. XV. 27, and note. See McLennan, Studies in Anc. Hist., p. 178. For the legend of Vasishtha, called in to his aid by King Saudasa, see Col. Dig., Book V., T. 229, Comm. The controversy pointed at in Vasishtha, Chap. XVII., paras. 6 ss., shows very clearly that in his time it was still an open question whether additions to a family might not allowably be obtained by the aid of an outsider. Vasishtha expresses no decided view. The puritan Apastamba (Pr. II., Pat. 6, Khand. 13, paras. 6, 7) ascribes the son thus obtained to the real father, but the Vedic Gatha quoted by him necessarily implies that procreation by deputy was very common. Manu, IX. 51, ascribes the offspring to the woman's husband, comp. V. 162. He recognizes, IX. 162, that a man may have two heirs, one only of whom was begotten by himself, and takes it as of course that a child of an unknown father belongs to the master of the house in which he is born, V. 170; see above, p. 794, note (*a*). An indication of the same ancient usage is to be found in the Buddhist Law, published by Mr. Jardine, Judicial Commissioner of British Burmah. In Chap. II., sec. 89, it is said that where a daughter, disapproving of the husband chosen for her by her parents, gets a son procreated by another man, such a one is recognized as a Khettadza (*i.e.* Kshetraja) son. This part of the Burmese Law has obviously been introduced from India, and probably reproduces more archaic rules in many instances than those that have been preserved in India itself.

(*n*) The capture of brides by force or pretended force was common. It is noted of a blind daughter that any wooer may carry her off, and no one hurl a javelin at him. Muir's Sansk. Texts, vol. V., p. 458; comp. Manu, III. 33, 34. In Baudhayana, Pr. IV., Adh. I., para. 15, it is said that an abduction gives no marital right. The "mundium" jealously guarded by early European law was a corrective of the rough wooing of capture. It is found insisted on in the "Vagaru Dhammathat," translated from Pali by Dr. Forchhammer; but the law is evaded by three successive elopements.

The passage quoted from the Atharva Veda in Muir's Sansk. Texts, vol. I., p. 280, seems to indicate that Brahman women were sometimes taken from their husbands by powerful men. It shows also that Brahmans married the wives or widows of Rajanyas and of Vaisyas. In such a case the Brahman is to be regarded as the only real husband. See Zimmer, Altin. Leb., p. 326. Such practices are far removed from the Brahmanical usages and ideas of the present day.

has sold his wife's embraces (*o*), but otherwise (*p*) to the husband. Vasishtha (*q*) calmly deals with the case of a woman who, having left the husband of her youth to live with another, afterwards returns to his family. She stands on the same social footing as a widow remarried in the family she joins (*r*).

(*o*) The purchase or hiring of another man's wife to procure offspring for oneself is authorized by the texts of Narada, quoted in Col. Dig., Book V., T. 342, 343. See also T. 257, 264, 265 and Comm. The prevalence of such a custom affords the readiest explanation of the illegality of the adoption of a sister's or a daughter's son. The adopted is "a reflexion of a begotten son." The conditions of legality in the case of the begotten son adhere, therefore, as far as possible to his representative. Now when a sonless man leased another's wife to provide him with offspring, it was impossible that he should take his own sister or daughter: incest was abominable, while other immoralities had not yet assumed that character. When adoption took the place of procreation an imitation of nature was still kept up, and she who could not be to a man the actual mother of a begotten substitutionary son was not allowed to be mother of *his* substitute the son given in adoption.

The Dattaka Mimamsa, sec. V., 16 ss. places the prohibition on the ground that a man could not be called in to procure a son for the husband of his own daughter or sister. The statement is of course quite true. The one form of licence even with its limitation is as revolting to modern ideas as the other. Of the two it seems more reasonable to trace the rule to an extension of the fiction of a natural relation in the adoptive father's own family rather than to limitations on the replenishment of another family. The Roman Law said, "Adoptio demum in his personis locum habet in quibus etiam natura potest habere," Poth. Pand. Li. I. Tit. VII. § XVI.; and the Hindu law of adoption presents many instances of the influence of the same principle, as in preventing a man's adoption of one older than himself, and whom, therefore, he could not possibly have begotten, and adoption by an immature girl who could not be mother of the representative son. See Steele, 388, 44, 48.

(*p*) Hence the story of Pandu in the Mahabbharata, quoted Col. Dig., Book V., T. 273, Comm. There was much controversy on the point, as may be seen from Col. Dig., Book V., T. 253 Comm., and many other passages.

One of the laws of the Alamanni provided that where a man had carried off the wife of another he was to pay a fine to the husband. If the captor took her to wife while the fine remained unpaid, any child resulting from the marriage before the fine was paid was to belong to the former husband. So as to the children of a daughter taken without the mundium or guardianship being acquired from her father, see Canciani, Leg. Barb., vol. II., p. 335.

(*q*) Chap. XVII. 19.

(*r*) Along with general censures of adultery (Manu IX. 30) there are in Manu (VIII. 352, ss.) and the other Smritis (Yajn. I. 72, 74; comp. Vishnu XXXVII. 33) such indulgences allowed as show that caste was thought much more of than mere chastity. Girls are indeed encouraged to fornication with men of high class. (Manu VIII. 365; comp. 2 Str. H. L. 162, and p. 376, *supra*.) The penalties provided are for the insolence of those who connect

It is not amongst people of such habits and ideas that we can look for the delicacy which now characterizes the relations of the sexes in advanced communities. The gradual abolition of the grosser means of supplementing a family in favour of the system

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themselves with members of a class different from their own (Vyav. May., Chap. XIX., para. 6)—in the case of men with their superiors (Manu VIII. 374 ss.), in the case of women (Manu VIII. 371) with their inferiors. To the same effect is Narada. (Pt. II., Chap. XII., Sutra 78; Vyav. May., Chap. XIX., para. 11; comp. 2 Str. H. L. 167.) The object of the restrictions and the indulgences was to maintain the lordly superiority of the twice born (Manu III. 155, 156, 178; IV. 80; V. 104; X. 317, 319; XI. 84, 101; XII. 43) and to prevent their corruption (Manu V. 89; VIII. 353; IX. 7; Col. Dig., Book IV., Chap. I., T. 8, 77, 78, 79, 83) through the infusion of low-caste blood; the sons being supposed to partake more largely of the nature of their fathers (Manu, III. 49; IX. 9, 32, 35, 36; X. 5, 12, 30, 64, 67, 72; Yajn. I. 93).

The notion that male offspring partake more largely of the father's nature, and female offspring of the mother's, has been widely entertained : see *ex. gr.* Lucr. De Nat. Rer. IV. 1229—1232, Ed. Munro; and the denunciations of adultery that occur rest on its tendency to confuse caste, and to deprive the manes of the true ancestors of their due offerings—a privation regarded as a great though undefined calamity. See Thomson's Bhagavadgita, p. 7. Vasishtha says (Chap. XXVIII. 1—9; Chap. V. 1—4) that a woman is not by unchastity made more than temporarily impure. (So Yajn. I. 72.) She imparts no taint of sin during dalliance, and is not to be cast off by her husband for any impurity. A tradition preserved in the Mahabharata commends king Mitrasaha for accommodating the sage Vasishtha with his wife Damavanti.

In the case of unmarried women the state of feeling may be gathered from the functions assigned to the Apsarases in the Vedic heaven (see Muir, Sansk. Texts, vol. V., pp. 307, 308, 345, 430; vol. IV., p. 461). Manu's approval or permission of a sacrifice of modesty to a man of higher class (Manu VIII. 364) is reproduced in the Pali law books of the Burmese. See Notes on Buddhist Law, III., sec. 140, p. 14. And that some men had no troublesome sensitiveness about their wives' chastity is plainly indicated (see Vas. XIV. 6—11). The Taittiriya Brahmana gravely explains the character of the reward given for sexual association, and the sage Yajnavalkya (II. 290, 292) provides against cheating on either side. With "Dasis" or slaves not secluded, Narada thinks connexion innocent (Nar., Pt. II., Chap. XII., paras. 78, 79), and he treats the ornaments of courtesans as exempt from seizure like the instruments of musicians, as the means by which they gain their livelihood. This way of regarding the subject has come down to modern times, and, not to go farther, Nilakantha in the Mayukha ranks courtesans with the members of other business associations. (Vyav. May., Chap. XVII. 2; Chap. XIX. 10, 11; Chap. XXII.) The sisterhoods of dancing women must hence be deemed not wholly foreign to the Hindu system as it was, though that system contains within itself the means of a gradual purification corresponding to the advance in moral and social refinement manifested in the adoption of higher standards in the customary law.

of adoption is itself a striking evidence of progress in civilization. The appointment of a daughter held an intermediate place between this and the coarse materialism of the earliest modes of substitution (*s*). It is no longer recognized (*t*), but traces of the institution still remain in the existing law. From it on the one hand has been derived the right of succession of the daughter and the daughter's son (*v*), while on the other it is connected with the fitness of a daughter's son for adoption. As an imitation of a real son the adopted son ought to be born of some woman whom the adopted father could have married (*w*). This excludes the son of a daughter, and such is the law generally received amongst the higher castes (*x*), but amongst the lower castes sub-divisions of the great Sudra class almost everywhere, and amongst some of the higher castes by their customary law, the daughter's son is deemed fit for adoption, and even the most fit on account of the place he might formerly have taken as a son by appointment, as well as of the blood connexion on which the system of appointment itself was founded (*y*).

The passage of Vasishtha (*z*) which directs that a man desiring to adopt shall make his selection from amongst near relatives, and for choice take the nearest (*a*), is so obscurely expressed as to admit of various interpretations (*b*). How the ingenuity of commentators has been exercised upon it may be seen in Colebrooke's note to the Mit. Chap. I., sec. 11, para. 13. The Samskara Kaustubha (*c*), and the Nirnaya Sindhu (*d*), construing the direc-

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(*s*) Col. Dig., Book V., T. 295, 296, 304.

(*t*) Vyav. May., Chap. IV., sec. IV., para. 46.

(*v*) See above, pp. 79, 405—6; *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C. R., at p. 274.

(*w*) See above, pp. 798, note (*o*); *Ramchandra* v. *Gopal*, I. L. R. 32 Bom. 623; *Walbai* v. *Heerbai*, I. L. R. 34 Bom. 491; *Yamnava* v. *Lakshman*, I. L. R. 36 Bom. 533.

(*x*) See Datt. Mim., sec. II. 74; Vyav. May., Chap. IV., sec. V., para. 11; *Bai Nani* v. *Chuni Lal*, I. L. R. 22 Bom. 973.

(*y*) Datt. Mim., sec. II. 74, 93, 105, 107, 108; comp. Vishnu XV. 47; *Ramlinga Pillai* v. *Sadasiva Pillai*, 9 M. I. A. 506.

(*z*) Chap. XV., para. 6; Datt. Mim. II. 15, 75.

(*a*) This is not compulsory now, see *Sreemati Uma Dayi* v. *Gokool Ananddas Mahapatra*, L. R. 5 I. A. 40, 51, unless for Bombay a special local law is constituted by the Vyav. May., Chap. IV., sec. V., paras. 16, 19. This does not seem to be admitted by the Sastris. See below, sec. 4.

(*b*) The Datt. Mim. rests on a passage of Saunaka. See D. M., sec. II. 2.

(*c*) Sec. III., pp. 45*b*, 47*a*.

(*d*) Sec. III., p. 63*a*.

tion most liberally, approve the adoption, failing a sagotra sapinda, of a daughter's or a sister's son (*e*). The Sastris, following the Vyav. Mayukha (*f*), are almost uniformly opposed to this, except in the case of Sudras (*g*). They rely on the impossibility of a real paternal and filial relation between the fictitious father and a son so born; and the decisions in Bombay must be considered perhaps to have confirmed the Sastris' view (*h*), but the customary law seems in a measure at least to have been represented by the doctrine of the two works referred to (*i*). These were no doubt written under the influence of ideas which shaped the customary law, and they afford an example in their divergence from the more generally received authorities of parallel growths of doctrine springing from the same original source, yet taking quite different lines of development according to the medium in which they were placed. The real nearness of the daughter's son once procured ready acceptance for the doctrine of appointment, and this in its turn has facilitated the admission of the daughter's son as fit for adoption. The Sastra had, however, to be interpreted accordingly, and this interpretation, setting aside the ordinary doctrine of a necessary difference in the families of birth of the real mother and the adoptive father, paved a way for the admission of the sister's son (*k*). In the South of India the Brahmanical law was for the most part apparently accepted only with this qualification, adapting it to previously existing customs, as in the case of marriage between the children of a brother and a sister rejected by the stricter law of the North, but allowed in the South, because it could not be prevented (*l*).

The appointment of a daughter appears to have been conceived in two ways. According to the one the appointed daughter herself

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(*e*) This is opposed to the Datt. Mim., sec. II. 32, 33, 74, 95, 98, 102.

(*f*) Chap. IV., sec. V., para. 36.

(*g*) See *ex. gr.* above, p. 410.

(*h*) *Gopal Narhar Safray* v. *Hanmant G.*, I. L. R. 3 Bom. 273, 298; *Sriramalu* v. *Ramayya*, I. L. R. 3 Mad. 15.

(*i*) Steele, L. C. 44, 46, 183; 2 Str. H. L. 101. See *Gopal Narhar* v. *Hanmant G. Saffray*, Bom. H. C. P. J. 1881, p. 715; S. C. I. L. R. 6 Bom. 107.

(*k*) The sister's son was amongst many of the aboriginal tribes heir to his uncle, see above, pp. 271, 274; and as adoption became regarded as necessary to heirship he would thus appear to the lower castes the most fit for adoption. Amongst the higher castes such adoptions are probably imitations suggested by natural affection.

(*l*) Baudh. Pr. I. Adh. 1, Kand. 2, para. 3; comp. *supra*, pp. 7, 155.

took the place of a son (*m*), and then her son naturally succeeded her by representation. She was given for inheritance the place of a male, a place as a source of further succession, such as the Vyavahara Mayukha assigns her in the devolution of property not included amongst the special varieties of stridhana. According to the other conception she was merely the instrument by which an heir to her father could be produced in the person of her son (*n*). Vasishtha places the appointed daughter third amongst the subsidiary sons, and he says (*o*), "it is declared in the Veda, a maiden who has no brothers comes back to the male ancestors, returning as their son." In Manu IX. 127 ss., the transition may be observed to the second conception. The daughter, it is said, meaning the appointed daughter, is a man's heir failing a son, and as a woman's daughter usually takes the property given to the mother at her marriage, so in the particular case of the appointed daughter her son takes the property of his maternal grandfather through her. That her right is deemed the prior one appears from verse 134, in which it is said she takes equally with the after-begotten son of her father, and from verse 135, which on her death without a son gives the property that has devolved on her to her surviving husband. Yet in verse 136 it is said that by the son whom she produces "the maternal grandfather becomes in law the father of a son (*p*): let that son give the funeral cake and possess the inheritance." This seems to make a subsidiary son of the grandson by the appointed daughter; but again in verse 139 this grandson is placed on the same footing as a son's son, which implies an intervening right through which his own is derived and a consequent precedence of his mother. Apastamba makes no provision for appointment, or for the succession of a widow. He hesitatingly admits the daughter on failure of other heirs (*q*). Gautama recognizes the son of the appointed daughter but not the

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(*m*) Col. Dig., Book V., T. 203, 204, 215, 216; Vasish., Chap. XVII., para. 15. See Dr. Bühler's note *ad loc.*

(*n*) Vishnu, Chap. XV., paras. 4—6. The two senses of putrikaputra are dwelt on in the Vyav. May., Chap. IV., sec. VI., para. 43. The institution, though continued in some places down to modern times, is distinctly excluded by Nilkantha from the law of the present day. Vyav. May., *loc. cit.*, para. 46.

(*o*) Sec. 16.

(*p*) Col. Dig., Book V., T. 207 says "sire of a son's son," probably from a different reading. See also T. 209, compared with Manu IX, 131.

(*q*) Pr. II., Pat. 6, Khand. 314, Sutra 4.

daughter herself (*r*). Vishnu has a similar rule (*s*), to which he adds one providing for the daughter's succession as such after the widow (*t*). Baudhayana (*v*) also recognizes the appointed daughter's son, but not the daughter, as a subsidiary son, to whom he assigns the next place after the son lawfully begotten. In his list the adopted son comes fourth.

By the time when the Mitakshara was written the daughter's right as heir had gained general recognition apart from her appointment (*w*). As putrika-putra her place is speculatively recognized (*x*), but as secondary to that of her son born under the prescribed condition. She no longer enjoys an equal right with her own after-born brother as in Manu, and her son ranks but as a subsidiary son, equal, as Visvesvara says, to a lawfully begotten son in the absence of such a son, but inferior in being one degree more distant from the propositus (*y*).

The son by simple adoption had in the meantime been gaining a greater and greater preference to the other substitutionary sons. When, traversing a wide interval, we pass from the Vedic period to that of the Smritis (*z*), we find adoption recognized, but still in a comparatively subordinate rank, as a means of continuing the family. It is mentioned, along with the appointment of a daughter, the levirate, and other means of procuring offspring, in all the principal compilations whose precepts on this subject have been

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(*r*) Chap. XXVIII., Sutra 33. He gives him only the tenth place, which is explained or explained away by Haradatta *ad loc*, and Vijnanesvara in the Mit., Chap. I., sec. XI., para. 35.

(*s*) Chap. XV., Sutra 4.

(*t*) Chap. XVII., Sutra 5.

(*v*) Pr. LL., Adh. 2, Kand. 3, Sutras 15, 31. See Col. Dig., Book V., T. 213, and Comm.

(*w*) Mit., Chap. II., sec. II., para. 5. See the *Utpat Case*, 11 Bom. H. C. R., at p. 274.

(*x*) Mit., Chap. I., sec. XI., para. 3.

(*y*) The appointed daughter's son, superior to his own mother as heir to her father, had almost a counterpart amongst the Greeks. The heiress given in marriage by her father transmitted to her son a right of succession to her father which excluded herself and her husband, though, failing sons, she was capable of inheriting. See the seventh and ninth speeches of Isaeus, translated by Sir W. Jones in his works, vol. IX., pp. 188, 200, and 226, 231, with the summary of the Attic laws prefixed to the collection. The son born under such an arrangement appears to have been capable of taking both estates unless he had brothers. See Dem. *adv*. Makart; secs. 12, 13, 14.

(*z*) Above, pp. 25 ss.

preserved. The different relative places assigned in these works to the different kinds of sons are due probably to the several modes of affiliation having come into vogue in different families or tribes long before any methodical classification of them was attempted. A reference to some vague principle or a mere convenience in enumeration determined the order of the sons in the earliest lists. In the later ones contained in such systematic compilations as Manu and Vasishtha the different kinds of sons are divided into those who are kinsmen and heirs, and kinsmen without being heirs (*a*). Several lists are given in Colebrooke's Digest, Book V., Chap. IV., sec. 1, and in the Viramitrodaya, Chap. II., Pt. II.

The kinsmen not heirs are described by the Mitakshara (*b*) as not heirs to collaterals. To their fictitious fathers they are in their turn equally heirs as the other substitutionary sons (*c*). The place of the several kinds of sons in the one or the other class differs in different Smritis (*d*). It is probably impossible to find any better ground of reason for the variances than that assigned by Vijnanesvara, who says that precedence must be determined by the character of the subsidiary son (*e*). Visvesvara in the Subodhini says that Manu's list is a mere loose enumeration not aiming at a precise regulation of priority, and that the same observation applies to the other Smritis in which a similar apparent classification occurs.

(*a*) See *ex. gr.* Gautama, Adh. 28, paras. 29—32. This Smriti assigns the third place to the adopted son, making him a kinsman and heir, while the son of an appointed daughter stands tenth, and amongst the kinsmen without heirship.

(*b*) Chap. I., sec. XI., p. 30.

(*c*) It seems probable from the rule evidently derived from the Hindu Law, still preserved amongst the Burmese, that the "sons not heirs" were originally not heirs to their ceremonial father. They may have been taken merely to perform the indispensable exequial rites, as they seem to have had in competition with the other class no higher right than the illegitimate son, a right to what the father gave them. See Notes on Buddhist Law by J. Jardine, Esq., Judicial Commissioner in Burmah, Part V., Chap. II., sec. 85. The dharmaputra or ceremonial son, appointed merely to perform exequial rites, not taking any share in the estate, is a still existing institution, Steele, L. C. 185, 226. The Madhaviya (Trans. p. 21) quotes Vishnu as wholly excluding the four classes of sons of unknown paternity in competition with the legitimate son, refusing them even the quarter of a share allowed to other secondary sons. This passage is wrongly attributed, it seems, to Vishnu, but it may still embody an ancient rule.

(*d*) Comp. Baudh., Pr. II., Kand. 2, para. 23, with Gaut., Adh. 28, paras. 29, 30.

(*e*) See also Col. Dig., Book V., T. 277, Comm.; T. 278, Comm.

This grouping of the several kinds of subsidiary sons in two classes with important differences of rights does not occur in the Smriti of Yajnavalkya on which the Mitakshara is founded. The task of the Hindu expositor was thus made easier, since, taking Yajnavalkya as his guide, he construed the other Smritis with reference to this as the chief, but it forced him to go to other sources for the determination of the right of an adopted son to succeed collaterally (*f*). This is established on the authority of Manu (*g*), in whose list, as well as in Baudhayana's (*h*), the adopted son is placed in the higher class of sons and heirs (*i*).

Yajnavalkya II. 129—133 enumerates twelve kinds of sons as capable of continuing the succession in a Hindu family. These are: (1) the aurasa or ordinary son; (2) the putrika-putra, or son of an appointed daughter; (3) the kshetraja or son begotten by an appointed kinsman; (4) the gudhaja, or one furtively produced in the husband's house; (5) the kanina, the love-child of a damsel taken with her when she is married; (6) the paunarbhava, or son of a twice-married woman; (7) the dattaka, or son given by his father, by both father and mother, or by the mother alone with the father's assent, in his absence or after his death; (8) the krita, or the son bought (*k*); (9) the kritrima, or orphan taken with his own assent only; (10) the svayamdatta, or son self-given either on losing his parents or being abandoned by them; (11) the sahodhaja, or son of a bride pregnant at the time of her marriage; (12) the apaviddha, or son cast out by his father and mother and taken as a son by a protector.

(*f*) Comp. Col. Dig., Book V., T. 277, Comm.

(*g*) Mit., Chap. I., sec. 11, paras. 30, 31.

(*h*) Baudh., Pr. II., Adh. 2, Kandika 3, paras. 20, 31, 32.

(*i*) See Col. Dig., Book V., T. 277, Comm.

(*k*) The sale of children by their parents was a recognized institution amongst the Romans. The gradual spread of Christian ideas made such sales disreputable, but the attempts to prevent them as illegal caused so much infanticide under the form of abandonment, that Constantine allowed sales in cases of distress. Justinian, after much hesitation, at last prohibited all alienations of children. They were still seized and sold by the Roman "revenue department" for some time after private sales had been forbidden. The person who preserved an exposed child (on the exposure of infants at Athens and Rome, see Petit, Leg. Att., p. 144), with its parents' knowledge might keep it either as a son or as a slave (Maynz, Dr., Rom. § 328), and infants might be given in adoption, but arrogation was till a late period limited to those who had attained the age of puberty and discretion (Tomkins and Lemon, Gaius, p. 96).

It will be seen that in the case of the first six there was either an actual connection by blood with the legal father or at least a strong probability of it. In the case of the last six this connection subsisted if at all only accidentally. The son by gift and acceptance stands at the head of this second class, and as the gradual purification of manners brought the other substitutionary sons into discredit, the son lawfully begotten and the son by adoption have now become the only ones recognized by the general Hindu Law. Thus the Hindu Law of the present day (*l*) does not recognize the putrika-putra (*m*) or any kind of subsidiary son (*n*) except the dattaka (*o*), and in some districts the kritrima (*p*). The latter mode of affiliation is still allowed in the Mithila region (*q*), but it does not appear to be much in use (*r*).

(*l*) See Vyav. May., Chap. IV., sec. IV., para. 46; Smr. Chand., Chap. X., para. 5; 2 Str. H. L. 82; Col. Dig., Book V., T. 279, 280, 420, Comm.; Smriti Chandrika, Chap. X., para. 6.

(*m*) It is to be observed that the putrika-putra is not found in Manu's list of subsidiary sons, IX. 159, 160. But vv. 132 ss. leave no doubt that either the appointed daughter herself or else her son took the place of a son to the appointing father. Comp. 2 Str. H. L. 199.

(*n*) Many of the smritis allot to the substitutionary sons various specific aliquot parts of the father's estate. All such rules are inoperative, the Madhaviya says, in this Kali Yuga. See Madhaviya by Burnell, pp. 21, 22, 24.

(*o*) Steele, L. C. 43; Datt. Mim., sec. I. 64; MS. 1633; Col. Dig., Book V., T. 280; Vyav. May., Chap. IV., sec. IV., para. 46.

(*p*) *Nursing Narain* v. *Bhutton Lall*, Sutherland's Rep. for 1864, p. 194. As to the Kritrima adoption, see Col. Dig., Book V., Chap. IV., sec. X. note; *Wooma Daee* v. *Gokoolanand*, I. L. R. 3 Cal. 587 (P. C.) S. C., L. R. 5 I. A. 49, referring at p. 51 to *Ooman Dutt* v. *Kunhia Sing*, 3 C. S. D. A. R. 144; and see the cases under note (*q*) *infra*.

As to the classes (9) and (10), see *Balvantrav Bhaskar* v. *Bayabai*, 6 Bom. H. C. R. 83 O. C. J., deciding that an orphan cannot be adopted, though self-given or given by his brother; *Bashettiappa* v. *Shivalingappa*, 10 Bom. H. C. R. 268; *Subbaluvammal* v. *Ammakutti Ammal*, 2 Mad. H. C. R. 129.

(*q*) *The Collector of Tirhoot* v. *Huropershad Mohunt*, 7 C. W. R. 500; *Mussamut Shibo Koeree* v. *Joogun Singh*, 8 *ibid.* 155; *Baboo Juswant Singh* v. *Dooleechund*, 25 *ibid.* 255; *Wooma Daee* v. *Gookhoolanund Dass*, I. L. R. 3 Cal. 587 (Pr. Co.); Tagore Lect. 1880, p. 527.

(*r*) In 2 Str. H. L. 155 ss. there is an interesting discussion between Colebrooke and Ellis on the legality in the present age of the Krita form of adoption by purchase. Ellis contends that in the South of India usage has sanctioned this form, and that the standard authorities, at any rate in the shape in which they have there been received, do not prohibit it. Sir T. Strange referred the question to the Court of Tanjore, and there thirteen Sastris were unanimous in pronouncing against the validity of such an adoption. In the same discussion

Amongst some of the lower castes the levirate still prevails (*s*) as a source of offspring received as legitimate. In Orissa the usage, once general (*t*), is becoming restricted to the lower orders (*v*). With these exceptions and those arising from the peculiar marriage customs of some of the non-Aryan tribes (*w*), adoption may now be regarded as the only legal means of satisfying the need of a son when natural offspring fails or has perished.

A Svayamdatta, the Sastri said, was not to be recognized in the Kali Yuga, so that though a man of fifty and having children might be deemed apt for adoption, yet he could not be adopted if his parents did not survive to give him away (*x*).

Colebrooke admits that an appointed daughter may take the place of a son, as provided in the Mit., Chap. I., sec. II., para. 23; but the Sastris do not assent to this. They insist that in this Kali Yuga "the competency of any son other than that of the body and one given in adoption is repealed," and that the prohibition extends to all the castes. *Op. cit.*, pp. 188, 189. See to the same effect the Sastri, *ibid.*, p. 82.

(*s*) Above, pp. 395 ss.

(*t*) Col. Dig., Book V., Chap. IV., sec. X. note. The practice in Orissa of raising seed to one deceased is recognized by Jagannatha, Col. Dig., Book V., T. 300, Comm. *ad. fin.*

(*v*) Comp. 2 Str. H. L. 164.

(*w*) These have gained a partial recognition in various parts of India from the Brahmans, who in return have imposed their own doctrines, and especially that of their own superiority, on the classes below them. Proofs of these statements in the province of law we are now considering may readily be found in such works as Buchanan's Mysore, and Wilks's South of India. Mr. Ellis thought that the Krita or son bought was forbidden to Brahmans only, but he was contradicted by Colebrooke and the Sastris. See 2 Str. H. L. 149 ss.

(*x*) MS. 1755; Vyav. May., Chap. IV., sec. V., para. 6. See Col. Dig., Book V., T. 275; the *Maharaj Case*, 1 Borr. 202 (No. 43); *The Collector of Surat* v. *Dhirsingji Vaghbaji*, 10 Bom. H. C. R. 235; *Balvantrao Bhaskar* v. *Bayabai*, 6 Bom. H. C. R. 83; *Subbaluvammal* v. *Ammakutti Ammal*, 2 Mad. H. C. R. 129; *Jogesh* v. *Nritya*, I. L. R. 30 Cal. 965.

The word "putra" employed in the Smriti passages to express "son" see *ex. gr.* Col. Dig., Book V., T. 273, does not properly include an adopted son. Hence these passages cannot be literally cited to justify the gift in adoption of an adopted son, or generally such a gift by a grandfather or other head of the family. Custom conforms to these restrictions, as may be gathered from the absence of cases of attempted gift of the kind in question in the records of the High Courts. Disinheritance is a different thing, and so is separation. See Steele, L. C. 185; Col. Dig., Book V., T. 264; above, pp. 547 ss. It is the parents or the father who must needs give in adoption, and to a father in person or represented by his wife or widow. See Col. Dig., Book V., T. 275 Comm.

The influence of a growing refinement of feeling is seen in the ascription to

A section of the Mitakshara (*y*) is devoted to the subject of the dvyamushyayana, or son of two fathers. As a means of reconciling the texts of Manu which allow and condemn the procreation of a son by a substitute (*z*), Vijnanesvara expounds them as permitting this in the case of a widow who has only been betrothed, not in the case of one whose marriage has been completed. The brother of the deceased husband may beget one son on the widow, who is to be formally married to him for this purpose, and the son thus produced belongs to the husband deceased, unless the procreator is himself destitute of male issue, in which case or by special agreement the son becomes a dvyamushyayana, capable of offering oblations to both fathers and of inheriting from both. Vijnanesvara thus mitigates the coarseness of the ancient rule (*a*).

The raising up of seed in the manner here contemplated being disallowed in the present age (*b*), it is impossible that there should be a dvyamushyayana of the original type. But the sense of the term has been extended by the commentators on the Mitakshara (*c*) so as to include the only son of one man given in adoption to another on an agreement that he shall retain his filial relation to the giver at the same time that he assumes it to the donee. The Vyavahara Mayukha fully accepts this doctrine, and deals at length with the double relationships that arise from such an adoption (*d*).

Vishnu of the text by which the sons of uncertain origin were to be excluded from the funeral oblation and succession to the estate. See Mit., Chap. I., sec. XI., p. 27, note; Vishnu, Chap. XV., Datt. Mim., sec. II. 61.

The influence of the older on the development of the newer institutions is well seen in the story of Sunahsepa on which the Samskara Kaustubha, by a characteristic argument, founds a justification for the adoption of a man already initiated in his family of birth. The "given son," it is said, must include the son "self-given." Sunahsepa was self-given. It is not to be supposed that he had not been initiated. The transaction in his case cannot be questioned, as it rests on Vedic authority. Hence initiation does not impede "self-gift" nor consequently gift by parents in adoption. The story of Sunahsepa is relied on as an instance of a svayamdatta. See Col. Dig., Book V., T. 300, Comm., which immediately afterwards pronounces against any such substitutionary son in the present age. *Ibid.*

(*y*) Chap. I., sec. X.

(*z*) Comp. Baudh., Pr. II., Kand. 2, para. 12.

(*a*) See Baudh., *loc. cit.*; Narada, Pt. II., Chap. XIII., paras. 14, 23; and Yajn. I. 68, 69.

(*b*) Datt. Mim., sec. I., para. 66.

(*c*) See Mit., Chap. I., sec. X., para. 32, notes.

(*d*) See Vyav. May., Chap. IV., sec. V., para. 21 ss. The translation of Rao Saheb V. N. Mandlik is here greatly superior to that of Borradaile. *Krishna* v. *Paramshri*, I. L. R. 25 Bom. 537.

The giving of a son as dvyamushyayana is recognized by the Judicial Committee as allowed by the existing Hindu Law (*e*). In the case of an only or eldest son it is said the presumption is that his father would not break the law by giving him in adoption otherwise than as a son to both fathers. "This latter kind of adoption would not sever the connection of the child with his own family" (*f*).

The Madras Sadr Court ruled (*g*) that the dvyamushyayana son is not to be recognized in the present age, but from personal en quiries it appears that he is not at all unusual in the Southern districts of Bombay. For this Presidency the Sastris have held that an agreement may be made between the father of a boy and the man receiving him in adoption that he shall represent both as a son (*h*). In a case in which a Brahman had adopted a boy of a gotra different from his own it was said that the boy was to be regarded as a dvyamushyayana. As he would be subject to certain disabilities in his family of adoption, supposing his tonsure had taken place in his family of birth, the Sastri seems to have given him the benefit of a presumption like that relied on by the Judicial Committee in the case referred to (*i*).

It follows that for the Bombay Presidency the answer given to Sir T. Strange (*k*), rigidly limiting succession to the aurasa or the dattaka son, cannot be regarded as an accurate statement of the law. Steele (*l*) includes amongst the rules of the customary law one to the effect that a boy adopted by his father's brother is to perform the Sraddhas of both and to inherit the property of both. subject as to his real father's estate to a prior right of heirship down to a brother's son. This means simply that he is reduced to the rank of a son of his adoptive father; but the Vyav. May (*m*)

(*e*) See *Wooma Daee's Case*, above, p. 806 (*p*).

(*f*) *Nilmadhub Doss* v. *Bishumber Doss*, 13 M. I. A., at p. 100; *Gurulinga Swami* v. *Ramalakshmamma*, L. R. 26 I. A. 116; S. C., I. L. R. 22 Mad. 398.

(*g*) *Oonnamala Awchy* v. *Mungalum*, Mad. S. D. A. R. for 1859, p. 81.

(*h*) MS. 1692; see Steele, L. C. 47. In the case of an adoption by an uncle the boy inherits from him, from his real father also, failing heirs down to brother's sons, *i.e.* to his own fictitious relation to his real father. *Ibid.* This agrees with what Colebrooke says at 2 Str. H. L. 121, that the son of such an adopted son belongs to the family of his father's upanayana (investiture) and consequent grotraship. This form of adoption, and that of an only son, are held valid among the Lingayats, *Chenava* v. *Basangavda*, I. L. R. 21 Bom. 105; *Basava* v. *Lingangauda*, I. L. R. 19 Bom. 331.

(*i*) MS. 1675. In the Datt. Mim. it seems to be assumed as of course that a brother's only son taken in adoption becomes a son of two fathers. See below.

(*k*) 2 Str. H. L. 82.

(*l*) L. C. 47.

(*m*) Chap. IV., sec. V., para. 25.

makes him heir to his real father immediately on failure of other sons, at the same time that he ranks as heir to his adoptive father, though subject to be reduced to a quarter share by the birth of a begotten son.

The son of such an adopted son belongs, Colebrooke says, to the family in which the dvyamushyayana received his investiture of the sacred thread (*n*). In the Bombay Presidency the dvyamushyayana celebrates the sraddhas of both fathers, but his son, it seems, those of the grandfather by adoption only, not of his natural grandfather (*o*). Whether any right of inheritance to the latter passes to him on his father's predecease has not been decided (*p*).

It will be evident from the foregoing discussion how throughout the gradual narrowing of the field of choice a sense of the absolute necessity of a son, actual or representative, has never lost its hold on the Hindu mind (*q*). This central impulse has persisted through every variation of detail and must be recognized as due to the deepest-lying principles of the national character. That character is reverential, affectionate, and speculative, but always or nearly always within narrow limits and with a certain meagreness of thought (*r*). In the family with its roots and its branches extending beyond the present world the Hindu mind has found its appro-

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(*n*) 2 Str. H. L. 122. He receives his own investiture in that family. Any adoption after investiture is an irregularity which causes the son of the person thus adopted to return to his father's gotra, if different from that of his adoptive family. Such an irregularly adopted son is called anityadatta. *Ibid.* The adoption would probably not be recognized in Bombay. See Steele, L. C. 43.

(*o*) This statement rests on oral information as to the general practice. As to this, however, and the right of succession, see Col. Dig., Book V., T. 262, 263 Comm.

(*p*) As an only son he should not be given, and his succession in his family of birth would be excluded by brothers.

(*q*) The man of perfect life ought, at the close of his "householder" stage, to become a hermit, and hand over his temporal interests to his son. See Tiele, Outlines, &c., p. 128. The craving for a son to celebrate sacrifices is very widely spread. In China it is said that one half the families have adopted children. Only a sonless man can adopt. Nephews are to be taken by preference. The form is that of a sale which may be real or fictitious. See Journal of North China Branch R. A. Soc., Pt. XIII., p. 118.

(*r*) As *ex. gr.* Baudh., Pr. II., Kand. 14, paras. 9, 10; Kand. 15, paras. 1—6. See Tiele, Anc. Rel. 123. On the mixed intellectual character even of the Brahmanas, see Whitney, *op. cit.*, p. 68.

priate centre of interest, in the material perpetuation of the sacra, an intelligible and fit connection to their mutual advantage amongst all the members of the family line (*s*). To it in its vulgar type an interchange of influence between the seen and the unseen is inconceivable except through the palpable connection of sacrifices (*t*). They are indispensable, as the material chain was to Newton for the transmission of physical activity (*v*). The purpose of the interchange that is sought is not of an elevated character, it is not spiritual expansion and enlargement of being (*w*), but rather such limited and prosaic ends (*x*) as may conceivably be furthered by an humble type of divinities (*y*). From the Vedic hymns downwards, boasts of sacrifices offered have been made the ground for never-ending claims to aid in the sordid exigencies of ordinary life (*z*). Those of the family the son can best understand; he by his initiation becomes born again into the unseen family (*a*); he has the traditional formulas and sacred names. Without these little or no material good can be hoped for; failing a son by birth, a substitute must be found to gain it (*b*): fertile fields, long life (*c*), success in lawsuits, continuous male offspring (*d*), and ruin of enemies. The nobler craving for an object of special affection, the desire to perpetuate one's name (*e*) and worldly influence (*f*), the wish to educate a youth who may rule a chief's subjects kindly—all these motives no doubt operate on occasion with more or less strength in inducing adoption, but the persistent cause and basis of the institution is the

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(*s*) See Gaut., Chap. IV., 30 ss.; Chap. V. 3, 5, 9.

(*t*) See Thomson's Bhagavad Gita, p. 7, and note 36.

(*v*) See Baudh., Pr. II., Kand. 5, paras. 2, 3, 18; Kand. 9; Kand. 11, paras. 2, 3; Kand. 12, paras. 11—15; Kand. 14, para. 12; Kand. 15, para. 12.

(*w*) See Phil. of the Upanishads, p. 266.

(*x*) See Rig. Veda, I. Hymn 9. Apast., Pr. II., Pat. 7, Khand. 16, paras. 24, 26 ss., show the former prevalence of animal sacrifices.

(*y*) See Philosophy of the Upanishads, pp. 10 ss.

(*z*) See Rig. Veda, I. Hymns 12, 14; II. Hymns 4, 12.

(*a*) Manu II. 172.

(*b*) Capable therefore of gaining it or of receiving the requisite qualification by (tonsure and) the sacred thread. 2 Str. H. L. 100; Col. Dig., Book V., T. 273 Com.; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. 364.

(*c*) Baudh., Pr. II., Kand. 14, para. 1; Pr. IV., Adh. II., para. 11; Apast., Pr. II., Pat. 7, Khand. 16, paras. 7 ss.

(*d*) Manu III. 262, 263, 277; Vishnu LXXVIII. 9, 19.

(*e*) See Apast., Pr. II., Khand. 24, para. 1; Datt. Chand., sec. I. 3.

(*f*) Col. Dig., Book V., T. 312.

conception of spiritual gain (*g*), an other-worldliness of a special variety (*h*).

It is in this sphere of thought that the procreation of a son is regarded as imperative on a Hindu of the higher castes, or at least an endeavour to that end (*i*). In the event of incapacity or failure it becomes a religious obligation (*k*) to adopt a son in order that the sacrifices may not fail (*l*). The stringency of this religious obliga-

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(*g*) Col. Dig., Book V., T. 304, 313.

(*h*) "Fathers desire offspring for their own sake, reflecting 'this son will redeem me from every debt whatsoever due to superior and inferior beings.'" Narada, Pt. I., Chap. III., para. 5. Spiritual benefits, however, are not the only reason for adoption. The Jains recognize adoption though they have no sraddha or paksha ceremonies, *Sheo Singh Rai* v. *Musst. Dakho*, L. R. 5 I. A. 87; *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R. 261; *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67; *Manik* v. *Jagat*, I. L. R. 17 Cal. 518; *Asharfi* v. *Rup*, I. L. R. 30 All. 197.

Regard being had to the immeasurable benefits to be secured by the adoption of a son, it may be a matter of surprise that any Hindu should, except through accident, die childless. The hope of a begotten son, however, is not readily resigned. The widow can be instructed to adopt. In poor families the expenses caused by an adoption both for the ceremonies and the subsequent maintenance of the adopted son cannot easily be met. In families of wealth and position the natural parents are brought into an intimacy that is not perhaps quite welcome, and there is always a chance of the attachment of the adopted son to his mother and his family of birth making him comparatively indifferent to the one he has entered by adoption. There is room for fear even of his plotting against his adoptive father and endeavouring to get him set aside. Many Hindus, being lukewarm and dilatory, faintly intend to adopt but do nothing. Hence it happens that adoption is less practised than might be expected, and the right of selecting an heir to a chiefdom or a great estate often devolves on the widow. The interest which, in such cases, the representatives of the junior branches have in a good choice has gained general acceptance for the doctrine that their assent is requisite to the validity of the adoption, though this is not by all the Marathas perhaps regarded as absolutely essential. The widow, left to herself, is generally inclined to adopt. She thus in an undivided family gains consideration, and she is anxious to provide not only for her husband's Sraddhas but for her own and her father's, the celebration of which is a duty of the son, though not an absolutely indispensable one. See Vyav. May., Chap. IV., sec. V., paras. 17, 36; Mit., Chap. I., sec. XI., para. 9; Steele, L. C. 47, 48, 187, 394; Viram. Transl., p. 116; *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R., at p. 265; *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Gopal* v. *Naro*, 7 Bom. H. C. R. XXIV. App.; Col. Dig., Book V., T. 273, 275 Comm.

(*i*) See above, p. 789; Baudh., Pr. II., Kand. 16, paras. 10—14; Pr. IV., Adh. I., paras. 17—19; and Manu IX. 137; Col. Dig., Book V., T. 270.

(*k*) 2 Str. H. L. 194, 198

(*l*) Datt. Mim., sec. I., para. 5; Manu IX. 180.

tion is strongly insisted on by Mitter, J. (*m*). It was in the case referred to made a ground for upholding an authority to adopt given by a minor as being an act at once obligatory and beneficial to him. This deduction may be doubtful, and a merely religious obligation is not one that Civil Courts can enforce. Colebrooke says (*n*): "Passages of law recommend, but do not enjoin, adoption for the oblation, the obsequies, and the honour of his name" according to a text said to be of Manu. The sense of the religious obligation felt by a true Hindu raises a presumption of fact which is of weight in cases of conflicting testimony, yet, as has been said by the Judicial Committee: "Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindus die daily without having fulfilled this obligation or made provision for its fulfilment after their death" (*o*).

Were the duty to adopt a son more than a merely moral obligation it would follow apparently that a power to adopt given to a widow (*p*) must be promptly executed. So long as a man lives he may in most cases reasonably hope for offspring, but with his life the possibility ceases, and the duty resting on his widow becomes imperative (*q*) and urgent lest she too should die without adopting. The Judicial Committee, however, approved the judgment of the Sadr Court of Bengal that the "fact of an authority to adopt being possessed by a widow, does not supersede and destroy her personal right as a widow" (*r*), and "the claim of a widow duly authorized to adopt to claim under any circumstances her personal rights until she does adopt is not affected by a consideration of what might be the proper course if she could be proved to have violated any clear and positive legal obligation" (*s*). The widow must fulfil in good faith the direction given to her (*t*), but she is

(*m*) *Rajendro Narain Lahoree* v. *Saroda Soonduree Dabee*, 15 C. W. R. 548.

(*n*) 2 Str. H. L. 83

(*o*) *Nilmadhub Doss* v. *Bishumber Doss*, 13 M. I. A., at p. 100.

(*p*) *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 414.

(*q*) This is more particularly the case when an express direction has been given by the deceased husband than where he has left the widow merely to fulfil the duty as her own conscientiousness and prudence suggest. *Musst. Subudra Chowdryn* v. *Golooknath Chowdree*, 7 C. S. D. A. R. 143.

(*r*) So *Musst. Tareenee* v. *Bamundoss Mookerjee*, 7 C. S. D. A. R. 533.

(*s*) *Bamundoss Mookerjee* v. *Mussamut Tareenee*, 7 M. I. A., at pp. 178, 190.

(*t*) A testator may bequeath property to a boy designated by him for adoption, and the widows must adopt the boy. They are not allowed to defeat the bequest by not adopting. "Widows" should for Bombay be "the elder

allowed a discretion as to time and choice unless restricted by the terms of the power (*v*). In the Bombay Presidency and in Madras a widow may adopt without an express power (*w*), but this is not held to lay her under a positive legal obligation, or to prevent her husband from forbidding an adoption (*x*). Nor are coparceners of the deceased husband, whose assent is generally necessary, compelled to assent to an adoption, as, were this a legal duty, they apparently must do (*y*). The conclusion seems to be that "though it may be the duty of a Court of Justice administering the Hindu Law to consider the religious duty of adopting a son as the essential foundation of the law of adoption and the effect of an adoption upon the devolution of property as a mere legal consequence" (*z*), yet it is only a duty of imperfect obligation to which no right corresponds in any person who can enforce it at law (*a*). Even in the case of a widow authorized, and therefore morally bound to adopt, it was said that "no suit of that kind can be maintained" (*b*).

The adoption of a son being prescribed in order to supply the place of a son begotten (*c*), the duty does not arise until the birth of a son becomes very improbable (*d*). The existence of a son or

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widow," unless she refuses, and then the younger, Steele, L. C. 187; *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*, L. R. 3 I. A. 253.

(*v*) *Sreemutty Deeno Moyee Dossee* v. *Doorga Pershad Mitter*, 3 C. W. R. 6 Mis. Rul.

(*w*) Mit., Chap. I., sec. XI., para. 9; *The Collector of Madura* v. *Moottoo Ramalinga Satthupatty*, 12 M. I. A. 397. The Pandit at 2 Str. H. L. 115 does not seem to have thought any sanction essential; Colebrooke did; Ellis thought it might possibly be needless amongst Sudras, *ibid.*

(*x*) *Bayabai* v. *Bala*, 7 Bom. H. C. R. 1 App.

(*y*) The Datta Kaustubha, as construed by the Sastris, see above, pp. 783, 795, says their assent is not essential.

(*z*) Pr. Co. in *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R. 3 I. A. 191.

(*a*) One does not look for entire consistency in works composed like the Smritis, and thus we find in Manu "many thousands of Brahmans, having avoided sensual pleasures from their youth up, and having left no issue, have nevertheless ascended to heaven." Thus the ground of a compulsory duty is cut away by the highest authority, and salvation pronounced accessible by asceticism as well as by procreation or adoption. See Manu V. 159.

(*b*) *Musst. Pearee Dayee* v. *Musst. Hurbunsee Kooer*, 19 C. W. R. 127. Comp. *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. 169, 190.

(*c*) Datt. Mim., sec. I.; 3 Col. Dig., Book V., T. 312.

(*d*) Steele, L. C. 43, 182. An adoption by an unmarried man, though improper, is not deemed void. Col. Dig., Book V., T. 273, Comm. But a stricter rule prevails in the Southern Maratha country, Steele, L. C. 182. In *Jamoona* v. *Bamasoondari*, L. R. 3 I. A. 72, it is taken for granted that the age at which a male may adopt is that of discretion according to his law. See

grandson makes an adoption not only needless but illegal (*e*). Loss of caste by the only son or the sole grandson, through an only son deceased, would, according to Hindu authorities, justify an adoption (*f*). The son being bound to perform the funeral ceremonies of his father and the annual Sraddhas to ancestors, besides the daily domestic sacrifices, and the many periodical and occasional celebrations incumbent on a Hindu householder (*g*), the sinful taint attending exclusion from caste makes it impossible that he should fulfil these primary duties. They are all of a religious character and cannot be performed with the intended spiritual effect by one in a state of impurity (*h*). But the outcast son or grandson may be restored to caste (*i*). In some extreme cases it has been held that a father may disinherit his son (*k*); it may be that when this step is taken the father may replace the son thus degraded by adopting another (*l*), but it seems very doubtful whether an adoption would be valid while a son by birth still holds

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also *Musst. Anundmoyee* v. *Sheeb Chunder Roy*, 9 M. I. A. 287, and *Rajendro Narain Lahoree* v. *Saroda Soonduri Dabee*, 15 C. W. R. 548.

Under the Roman Law males only had the capacity for a true adoption, as they only could exercise the patria potestas under which the child was brought. (Gaius, I. 104.) An imitative institution grew up by which women adopted heirs. The Emperor Galba was thus adopted, and the law was widened so as to recognize the fictitious relation thus created for purposes of succession. (Maynz, Dr., Rom. § 328.) The rights of succession were mutual, but no agnatic relation was created. (Tomk. and Lem., Gaius, p. 98.) Comp. 2 Str. H. L. 128.

(*e*) Steele, L. C. 42; Datt. Mim., sec. I., paras. 3, 5, 45, 47; Dat. Chand., sec. I. 6; Manu IX. 168. A son is to be adopted only to prevent a failure of obsequies, Manu IX. 180; Col. Dig., Book V., T. 301, Comm. But Jagannatha contends that though a son is to be adopted for this particular purpose only, subject to the condition, yet for other purposes he may be adopted though a begotten son exist. This converts the condition imposed by Manu into a mere specification of purpose in a particular case. Kulluka's remark is more cogent, who says that when a temporal consequence (invalidity of the adoption) is deducible from the text, it is an illegitimate process to deduce only a moral one, *i.e.* the impropriety of adoption when a son already exists, while such an adoption may still be regarded as legal.

(*f*) Steele, L. C. 42, 181, 381.

(*g*) Manu IX. 180; Steele, L. C. 225; above, p. 549.

(*h*) See Steele, L. C. 42; Col. Dig., Book V., T. 319, 328, Comm.

(*i*) Steele, L. C. 381, 382.

(*k*) See above, p. 549; Col. Dig., Book V., T. 278 Comm.

(*l*) A grandson takes his father's place on the exclusion of the father, see above, p. 549; Steele, L. C. 224; and his existence prevents adoption; see Datt. Chand., sec. I. 6.

the status of a son, even though expelled from caste (*m*). Should the father die in these circumstances he will have sufficiently intimated that he did not wish to deprive his son, and it would probably be held that the widow could not supplant the son by an adoption. The sacra follow the inheritance (*n*). The non-performance of them, however reprehensible, does not deprive the heir of his estate (*o*). The loss of caste, which formerly operated as a bar to inheritance, no longer has that effect. Competence to perform the sacrifices cannot therefore be deemed a condition precedent to the complete vesting of the estate in the son at the moment of his father's death, and the estate once vested cannot be taken away from him (*p*). An adoption, even if made, would thus not affect the estate; in practice it does not occur. It is said no doubt that total loss of caste is equivalent to death, and may validate a second adoption when the first has in this way become abortive (*q*), but it is clear that the statute law has on this point profoundly modified the Hindu Law (*r*). Full effect must be given to the intentions of the Legislature, and though this may be consistent with a power of disinheritance for good reasons left to the father as a remnant of the patria potestas (*s*), it is obviously inconsistent with a capacity in any one to supersede the heir, become owner, on a ground declared insufficient to prevent his succession.

The disability to inherit arising from loss of caste having been abolished, there is a certain inconsistency in retaining the disqualifications arising from personal defects. These cannot, according to Hindu notions, put the sufferer from them into a worse position than would expulsion from caste (*t*). They have not, however, been touched by legislation, and as we have seen they are still recognized. Sir T. Strange (*v*) thought that in such cases adoption was competent to the father who could not derive spiritual benefit from the incapable son; but by the customary law of Bombay it is said that the insanity of a son by birth is not generally a valid

(*m*) The practice of the castes was indulgent except when the inheritance was to a sacred office, Steele, L. C. 225.

(*n*) Manu IX. 142; Vyav. May., Chap. IV., sec. V., para. 21.

(*o*) Steele, L. C. 62, 226.

(*p*) See above, p. 552.

(*q*) Steele, L. C. 45.

(*r*) *See Narayan Ramchunder* v. *Luxmeebaee*, 1 Morr. 61.

(*s*) See above, p. 270.

(*t*) See Col. Dig., Book V., T. 321, 323.

(*v*) 1 H. L. 77.

cause for adoption (*w*). It is consistent with this, that the blindness or dumbness of a son should not justify adoption (*x*). The marriage of Hindu children is a contract made by their parents; the children themselves exercise no volition, so that insanity does not necessarily prevent marriage. Marriage having been once contracted, the son of the disqualified person may take his place down to the partition of the inheritance (*y*); and should he be incapable of adopting, his wife may, according to the Bombay authorities, do so in his stead (*z*). His assent is implied where dissent has not been signified, and the act is one regarded as necessarily beneficial.

The same spirit of foresight which makes the sonless man adopt a son makes him who has but a few sons anxious not to reduce the number (*a*), lest in the end he who stood so well for happiness in the other world should, through improvidence, incur the penalty of endless destitution. If he have but one son, the gift of that one (*b*) is everywhere reprobated as a grave spiritual crime. In every case the parting with a son, like the acceptance of a son, is too serious a step to be taken without the assent of the father (*c*) who so depends on him for all his future. Allowance is made too for maternal love, and thus it is said that both parents ought to concur in giving away a son (*d*). Should no parents survive, a Sastri said an adoption could not be made because they alone could make the ceremonial gift (*e*). A rule almost as strict has been laid down by the

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(*w*) Steele, L. C. 42, 181; comp. *ibid.* 224.

(*x*) The caste rules vary as to insanity. The only case in which they all concur is that of loss of caste, which as it cannot now affect a son's right of inheritance would probably be held not to make adoption possible during his life. See Steele, L. C., pp. 225, 381.

(*y*) Above, p. 599.

(*z*) Steele, L. C. 182.

(*a*) One of but two sons ought not to be given according to the Datt. Mim. and Datt. Chandrika. See below, p. 818.

(*b*) See 2 Str. H. L. 88, 107. There are some legendary stories of such a gift, but these are of no authority as law.

(*c*) Col. Dig., Book V., T. 273, 274, 275, Comm.; Viram. Transl., p. 115; Vyav. May., Chap. IV., sec. V., paras. 16, 17; Mit., Chap. I., sec. XI., para. 9; Datt. Mim., sec. IV., paras. 10 ss. Balambhatta allows the gift by a mother in distress or after her husband's death, without special authorization. See note to Mit., *loc. cit.* *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom. 377, citing *Narayan* v. *Nana*, 7 Bom. H. C. R. 153 A. C. J., *Ibid.* App. *Bashetiappa* v. *Shivlingappa*, 10 Bom. H. C. R. 268, 271.

(*d*) Vyav. May., Chap. IV., sec. V., para. 16; Steele, L. C. 45. The mother's assent is not indispensable, Mit., Chap. I., sec. XI., para. 9.

(*e*) MS. 1755.

High Court of Bombay (*f*), but the customary law has in some few instances been construed as allowing the head of a family to give away a junior in adoption (*g*).

At Madras (*h*), Allahabad (*i*) and Bombay (*k*) it has been held that the gift of an only son is valid, the prohibition being only directory, or on the principle of *factum valet*, and such was Sir T. Strange's opinion (*l*). The Pandits who have maintained the validity of such a transaction have not denied that it was directly opposed to their scriptures, but they have relied on there being "no express provision for setting aside an adoption made with due ceremonies" (*m*). Ellis, too, on whom Sir T. Strange relied, seems to have thought "that if the act be duly completed it cannot be reversed" (*n*). The doctrine of *factum valet* has been discussed by H. H. Wilson in a passage already quoted (*o*). Ellis thinks the exigency which warrants such an adoption must be distress of the giver, but he thinks the ceremony once performed is effectual, as in the case of marriage. In *Radha Mohun* v. *Hardaï Bibi* (*p*) the Judicial Committee have held that the adoption of an only son is not null and void under the Hindu Law. Amongst the Lingayats the adoption of an only son is valid (*q*), and so it is according to the Vyav. May. in Gujarat (*r*).

In the case of *Haebutrao* v. *Govindrao Mankur* (*s*), the question was submitted to the Sastris of whether the gift in adoption of both of two sons could be valid. The impossibility of undoing an adoption once completed is insisted on in the answers, but the gift really in question was that of the sole remaining (and the eldest) son to the widow of the donor's brother. In such a case the passages

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(*f*) *Bashetiappa* v. *Shivlingappa*, 10 Bom. H. C. R. 268; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at p. 376, and the cases therein cited.

(*g*) MS. 1645. Comp. Panj. Cust. Law, vol. II., p. 155.

(*h*) *Chinna Gaundan* v. *Kumara Gaundan*, 1 Mad. H. C. R. 54; *Singamma* v. *Vinjamuri Venkatacharlu*, 4 *ibid.* 165.

(*i*) *Hanuman Tiwari* v. *Chirai*, I. L. R. 2 All. 164; Turner, J., dissenting.

(*k*) *Vyas Chimanlal* v. *Ramchandra*, I. L. R. 24 Bom. 367.

(*l*) 1 Str. H. L. 87.

(*m*) MS. 1695. *Arunachallam Pillai* v. *Ayyasvami Pillai*, 1 Mad. Sel. Dec. 156, quoted 1 Mad. H. C. R. 56.

(*n*) 2 Str. H. L. 108.

(*o*) Above, p. 737.

(*p*) L. R. 26 I. A. 113.

(*q*) *Basava* v. *Lingangauda*, I. L. R. 19 Bom. 428.

(*r*) *Vyas Chimanlal* v. *Ramchandra*, I. L. R. 24 Bom. 367.

(*s*) 2 Borr. R. 83.

which declare that by the existence of a son of one of several brothers all are made fathers, have been variously applied by Hindu lawyers to support the approval and the disapproval of an adoption. Nanda Pandita in the Datt. Mimamsa (*t*) devotes an elaborate argument to proving that where there is a son of a full brother available for adoption, he and no other ought to be taken (*v*). Even the son of a half-brother ought not to be chosen if the nearer relative can be had. And the injunction he contends has such force that even the only son of a brother may be and ought to be adopted (*w*). Without adoption he is not a son in the required sense to his uncle, and is indeed provided for as heir after his uncle's widow, his daughter and her son, while by adoption he does not lose his faculty of ministering spiritually to his real father and the ancestors who are equally ancestors of his adoptive father.

It is obvious that in such a case the manes of progenitors will not be left destitute by the transfer of the boy to another family, while if filial relation to one of a group of brothers involves a similar relation to all, the real father must still benefit, though in a less degree, through the sacrifices of the son adopted by his uncle. The boy becomes in fact a dvyamushyayana (*x*) who will perform his real father's obsequies and take his estate if that father should not have any other son. The Mitakshara and the Vyavahara Mayukha do not discuss this particular case, but as they recognize the dvyamushyayana and the theories connected with his double relations, the adoption of an only son of a brother is permissible (*y*).

The eldest son, if living, should be retained in his family of birth for the celebration of its sacra and the discharge of the father's obligation to his ancestors. This son alone, Manu says (*z*), is begotten from a sense of duty, and on this he grounds a rule of primogeniture which is soon after qualified (*a*), and which, as we

(*t*) Sec. II.

(*v*) So Steele, L. C. 182.

(*w*) The possibility of adopting the only son even of a brother is doubted by the Judicial Committee in *Srimati Uma Reyi* v. *Gookoolanand Das Maheeputra*, L. R. 5 I. A. 49, 53. The customary law of Bombay favours this particular kind of adoption, though generally opposed to the adoption of an only son; see Steele, L. C. 183.

(*x*) Datt. Mim., sec. II. 36; above, pp. 808, 809.

(*y*) This was Colebrooke's view, see 2 Str. H. L. 107, where he cites Mit., Chap. I., sec. X., para. 1, and sec. XI. para. 32. So too Sutherland, Synopsis, Head II.

(*z*) IX. 107; see Dayabhaga, Chap. I., para. 36; 2 Str. H. L. 105.

(*a*) IX. 111.

have seen, has not, except in special cases, been retained in the law of inheritance (*b*).

In the case of an eldest son, though the importance of him to his family of birth is so strongly insisted in the earlier authorities, yet more recent writers have in some instances pronounced the gift effectual, though censurable (*c*). After such a gift there is still a son left to perform the father's obsequies, and no one supposes that if an eldest son dies a second son is not perfectly competent to take his place. Why not then when the eldest is removed from the family by gift? This may not be a satisfactory answer to an unqualified prohibition exacting obedience apart from the reasons that may be assigned for it, but it may have influenced the Sastris in forming the opinion now and then expressed (*d*), that the gift of an eldest son out of several is not invalid. The giving, it is said, in such instances is prohibited, but not the taking (*e*). In Bombay it has recently been decided that such a transaction is legally valid (*f*).

As in the absence of a son by birth an adopted son takes his place in relation to the adoptive father (*g*), the same principle which prevents the adoption of a son while a begotten son exists (*h*)

(*b*) See above, pp. 65, 676; Dayabhaga, Chap. I., para. 37. It is pronounced a sin for a younger brother to precede the elder in offering a Srauta sacrifice or in marrying, Baudh., Pr. IV., Adh. 6., para. 7.

(*c*) Vyav. May., Chap. IV., sec. V., paras. 4, 5; 2 Str. H. L. 105. It is not opposed to Hindu notions that a man should benefit spiritually by moving another to an act which in him is sinful. See *ex gr.* Baudh., Pr. IV., Adh. 8, para. 10 and note; Mit., Chap. I., sec. XI., para. 10; Vyav. May., Chap. IV., sec. V., paras. 13, 14.

(*d*) MS. 1612, 1621. So *Janokee Debea* v. *Gopaul Acharjea*, I. L. R. 2 Cal. 365. See 2 Str. H. L. 105.

(*e*) MSS. 1682, 1684.

(*f*) *Kashibai* v. *Tatia*, Bom. H. C. P. J. 1883, p. 40; S. C. I. L.R. 7 Bom. 225. So *Abaji Dinkar* v. *Gangadhar Vasudev*, 3 Morris, 420.

(*g*) Steele, L. C. 47; 2 Str. H. L. 218.

Under the Roman Law the adoptive father could give his adopted son in adoption to another. (Gaius, I. 105.) This was by the earlier law. Justinian deprived an adoption of any one but a descendant of most of its legal effects, especially subjection to the patria potestas, so that an adopted son could not be given away again, nor was it worth while to give him away seeing that the adoptive father was under no particular obligation to him. In the case of sons taken by "arrogation" many safeguards were enacted to prevent their being defrauded by the adoptive fathers. (See Maynz, *op. cit.*, § 328 *ad fin.*) The latter was obliged to leave to his adopted son at least one-fourth of his estate.

(*h*) *Joy Chundra Raee* v. *Bhyrub Chundra Raee*, M. S. D. A. R. for 1849, p. 461.

equally forbids the adoption of a second while a first adopted son is living (*i*). In the important case of *Rangamma* v. *Atchamma* (*k*) the Sastris of the Provincial Courts of Madras pronounced in favour of multiple adoptions. They relied on a passage quoted by Jagannatha to the effect that many sons are to be desired, as the father will get the benefit of the religious acts performed by any one of them, and maintained that several adoptions were as laudable as the procreation of several sons. They are supported no doubt by some of the treatises on adoption which take the passage in this sense (*l*), but Jagannatha appears to limit its meaning to the allowance of taking in adoption sons of the various descriptions—that is, by the several modes of substitution or such as would spring from wives of the different castes (*m*). This cannot be regarded as more than a speculative licence, seeing that a marriage out of a man's own caste, or a substitution otherwise than by adoption, is no longer permitted (*n*), but Sir T. Strange sets forth a double adoption as valid (*o*). The doctrine, however, is entirely opposed to the Dattaka Mimamsa, which allows only the sonless man to adopt (*p*). In Bengal the passage as to several sons had already been limited to sons by birth (*q*), though a second adoption was under peculiar circumstances, and perhaps wrongly, upheld. Sutherland pronounced strongly against the attempted extension of it (*r*), and a similar opinion was expressed by Sir W. Macnaghten (*s*).

(*i*) *Nursing* v. *Khooshal*, 1 Borr. 88; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. 364; H. H. Wilson, Works, vol. V., p. 57; *Gopee Lall* v. *Musst. Sree Chundraolee Buhoojee*, L. R. I. A. Supp. 131; *Mohesh Narain* v. *Taruk Nath*, L. R. 20 I. A. 30.

The Athenian laws had such care for the adopted son that they did not allow an unmarried man who had adopted to marry without a special permission from the Judges. (See Petit, Leges Atticæ, p. 141.)

(*k*) 4 M. I. A. 1. See the discussion, 2 Str. H. L. 194.

(*l*) It is taken from the Karma Purana, and being quoted by Hemadri is from him copied by Kamalakara in the Nirnayasindhu.

(*m*) Col. Dig., Book V., T. 408, Comm.

(*n*) See, however, 4 M. I. A., at pp. 95, 96.

(*o*) 1 Str. H. L. 78.

(*p*) Datt. Mim., sec. 1, paras. 3, 6. So also Datt. Chand., sec. 1, para. 3.

(*q*) *Gouree Prosad Raee* v. *Joymala*, 2 C. S. D. A. R. 136, in 4 M. I. A., at p. 67.

(*r*) 2 Str. H. L. 85.

(*s*) P. & P. H. L., vol. I., p. 80. A simultaneous adoption of two sons is not effectual as to either, *Gyanendro Chunder Lahiri* v. *Kalla Pahar Haji*, I. L. R. 9 Cal. 50, referring to *Sidessurry Dossee* v. *Doorga Churn Sett*, 2 In. Jur. N. S. 22; see *Ibid.* 24.

The Judicial Committee on a consideration of the authorities determined, in the case just referred to, that a second adoption during the subsistence of the first was not to be allowed (*t*). This decision, which has recently been reaffirmed (*v*), agrees with the customary law of Bombay (*w*); and the existence of a son's son equally with that of a son makes adoption impossible (*x*), as in the absence of a son his son represents him both in rights and in religious duties towards the family (*y*). In *Surendra Keshav Roy* v. *Doorgasundari Dassee* (*z*) the Judicial Committee has recently held that it is settled law that a Hindu simultaneous adoption is invalid.

The purpose of adoption being such as we have seen, it would seem that consistency with the theory of the institution should have prevented an unmarried man from adopting a son (*a*). Such a man can but seldom be able to say that he cannot have a begotten son (*b*), and at any rate he is bound to marry (*c*). The Dattaka Mimamsa and Chandrika do not contemplate adoption by a bachelor, nor in the rule laid down in the Vyavahara Mayukha (*d*) is there the express provision in favour of a bachelor's capacity that might have been expected, had there been an intention to recognize his right to adopt. Jagannatha, however, (*e*) says there is no law forbidding adoption by an unmarried man, and Sutherland (*f*) thinks such an adoption ought to be admitted. The Sastris have in one or two instances said that a bachelor can adopt (*g*), and the

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(*t*) *Rangama* v. *Atchama*, 4 M. I. A., at p. 102; *Gopee Lall* v. *Musst. Sree Chundraolee Buhoojee*, L. R. I. A. Supp. 131; *Mohesh Narain* v. *Taruk Nath*, L. R. 20 I. A. 30.

(*v*) *Gopee Lal* v. *Musst. Sree Chundraolee Buhoojee*, L. R. S. I. A. 131.

(*w*) Steele, L. C. 42, 45, 183, 387.

(*x*) Steele, L. C. 42.

(*y*) In *Virbuddra* v. *Baee Ranee*, 2 Morr. 1, the question arose of whether an adopted son could renounce his adoption and return to his family of birth. The Sastri, relying on Manu IX. 142, said he could not, but that he could resign his rights in the family of adoption on which the adoptive mother became free, with the consent of the near relatives, to adopt another son in his place.

(*z*) L. R. 19 I. A. 108.

(*a*) See Steele, L. C. 43.

(*b*) See Steele, L. C. 182.

(*c*) *Ibid.* 25; above, p. 790.

(*d*) Chap. IV., sec. V., para. 36.

(*e*) Col. Dig., Book V., T. 273, Comm.

(*f*) Note iv.

(*g*) MS. 1670.

Sdr Court of Bombay upheld a similar rule as a local usage (*h*). In Madras the question of a widow's capacity to adopt without trying the effect of remarriage has twice been resolved in the affirmative (*i*). In the latter of the two cases an opinion was expressed in favour of the validity of adoption by a bachelor, but this was extra-judicial, and rested entirely on the authorities already discussed. It has been held by the Bombay High Court that a bachelor (*k*) can make a valid adoption. So can a widower (*l*) or a minor (*m*), or a childless Hindu (*n*), although at the time of adoption his wife may be pregnant. In no case the possibility that a son may afterwards be born invalidates the adoption.

It seems probable that adoption in the full sense has been but recently introduced amongst most of the lower castes (*o*)—recently, that is, in comparison with the establishment amongst the twice-born (*p*). It is the Brahmana, not the man of inferior race, who is born with the triple debt to the gods, the manes, and the rishis (*q*). The Vedic study due to the last is forbidden to the Sudra (*r*). The religious ceremonies, the celebration of which is the first duty of a Brahman's son, do not exist for the Sudras, and Vachaspati contended that a Sudra could not affiliate because he could not offer the requisite sacrifice and prayers. The Datt. Mim. refutes this by reference to a text of Saunaka (*s*), which distinctly recognizes the adoption of a Sudra by a Sudra with liberty to take a daughter's or a sister's son—a liberty which the Vyav. May. makes a duty when such a son is available (*t*). The authority (Parasara) relied on by

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(*h*) *Gunnappa* v. *Sankappa Deshpande*, Sel. Rep. 202 (2nd ed. 229). See Steele, L. C. 182, which states a contrary rule for the Southern Maratha Country.

(*i*) *Nagappa* v. *Subba Sastri*, 2 Mad. H. C. R. 367; *N. Chandrashēkarudu* v. *N. Brahmanna*, 4 Mad. H. C. R. 270.

(*k*) *Gopal* v. *Narayan*, I. L. R. 12 Bom. 329.

(*l*) *Nagappa* v. *Subba*, *supra*.

(*m*) *Jamoona Dassya Chowdhrani* v. *Bamasoonderai Dassya*, L. R. 3 I. A. 72; *Rajendro* v. *Saroda*, 15 W. R. 548.

(*n*) *Hanmant Ramchandra* v. *Bhimacharya*, I. L. R. 12 Bom. 105.

(*o*) As to the gradual extension of the Aryan influence, see Whitney's Or. and Ling. Studies, 2nd Series, p. 7.

(*p*) Vasish, II., pp. 1—4.

(*q*) Vasish. XI. 48; Phil. of the Upanishads, Chap. IV.

(*r*) Vasish, XV. 11; XVIII. 12-14; Baudh., Pr. I., Adh. 11, para. 15; Adh. 10, para. 5; Manu II. 115, 116, 173; IV. 81; Apast., Pr. I., Khand. 1, para. 5.

(*s*) Datt. Mim., sec. I. 26; sec. II. 74.

(*t*) Vyav. May., Chap. IV., sec. V., para. 11.

Nilkantha says that the requisite sacrifice may be offered by a Brahmana on behalf of the Sudra, and is effectual for the latter, though a sin in the former. Adoptions by women are made effectual by similar vicarious celebrations of the ceremonies (*v*).

In a passage at 2 Str. H. L., p. 89, Ellis refers to a Dattaka Mimamsa of the Madhaviya in which it is said there is no adoption for a Sudras (*w*). The ceremonial adoption cannot, he shows, be properly performed by Sudras (*x*) who are incapable of celebrating the fire sacrifice (Datta-homam) with the requisite Vedic texts (*y*). But the Sudra having no gotra, the transfer of a boy of that caste from one to another gotra cannot take place, and this transfer it is the purpose of the Datta-homam to effect. He concludes, not that an adoption is impossible, but that the ceremonies necessary in the case of one of the twice-born may be dispensed with and replaced by public acknowledgment.

The Maithila doctrine seems to disallow adoption by a Sudra on the ground of his incapacity to offer the Homa sacrifice and recite the sacred formulas (*z*). The Datt. Mim. (*a*) refutes this by reference to the text of Saunaka; and Ellis, *loc. cit.*, says that a public avowal amongst Sudras takes the place of the ceremonial prescribed for the other castes. Thus amongst Sudras a formal gift and acceptance are sufficient, and may be established by inference. The Datt. Mim., sec. I., 27, says that the express ascription of the power of adoption to Sudras and to women who cannot pronounce the formulas necessarily implies that these may in their case be dispensed with, contrary to the Vivada Chintamani (*b*), and a Sastri said that a Gosavi of the Sudra class could adopt but should omit the Vedic formulas (*c*).

In Bengal it was at one time held (*d*) that even amongst the Sudras the ceremonies of adoption could not be dispensed with. The services of a Brahman it was said were to be obtained to do

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(*v*) Vyav. May., Chap. IV., sec. V., paras. 12-15; Steele, L. C. 46.

(*w*) Comp. Gaut., Chap. IV. 25—27.

(*x*) See the extracts from the Sudra Kamalakara and from Vyasa at p. 433 of Rao Saheb V. N. Mandlik's Vyav. May.

(*y*) See 2 Str. H. L. 218.

(*z*) 2 Str. H. L. 131. See also the Vyav. May., Chap. IV., sec. V., paras. 12, 13.

(*a*) Sec. I. 26; sec. II. 74.

(*b*) Transl., p. 88.

(*c*) MS. 1678.

(*d*) *Bhyrubnath Tye* v. *Mohesh Chunder Bhadooree*, 13 C. W. R. 168.

what the Sudras themselves could not do towards the completion of the sacrifices (*e*). But on a further consideration of the matter a Full Bench, upheld on appeal by the Privy Council, determined (*f*) that no ceremonies were essential except the giving and taking of the child. It is certain that Sudras cannot recite the prescribed mantras (*g*); the question really was whether their incapacity in this and other respects did not exclude them altogether from the institution (*h*). This has been resolved in favour of their competence (*i*). The purposes of adoption have been widened so as to embrace objects in which the Sudra is interested equally with the Brahman, and besides the kriya and the sraddhas the Samskara Kaustubha insists on the necessity of preserving the renown of a deceased by alms, by feasts to Brahmans, and by pilgrimages (*k*). A son too must assist his father in old age (*l*). These duties a Sudra's adopted son can perfectly well perform, and it is easy to understand how, as they are conspicuous, they should with many come to appear the most important. The desire to imitate the higher castes (*m*) has been gratified, and the impossibility of satisfying the ceremonial conditions has led to their sometimes being dispensed with (*n*), or regarded as not essential (*o*), not only in the case of Sudras but of the higher castes (*p*). Where there has been

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(*e*) So 2 Str. H. L. 130.

(*f*) *Beharee Lall Mullick* v. *Indur Mohinee Chowdhrain*, 21 C. W. R. 285; S. C. L. R. 7 I. A. 24; S. C. I. L. R. 5 Cal. 776, P.C.

(*g*) Steele, L. C. 46.

(*h*) Vyav. May., Chap. IV., sec. I., para. 14.

(*i*) Ellis at 2 Str. H. L. 149, points out that the "twice-born" really means in the present age the Brahmans, and the Sastris in some of their replies say that the Kshatriyas and Vaisyas have disappeared as distinct castes. The application of the law of adoption thus restricted would be of comparatively very small extent.

(*k*) Steele, L. C. 42.

(*l*) *Ibid.* 181.

(*m*) See above, p. 403.

(*n*) Manu regarded the sraddhas apparently as not competent to Sudras, Manu IV. 223; but this need not prevent a laukika adoption, *i.e.* one for mundane purposes, unless the latter are to be deemed purely incidental. The customary law approves and requires the celebration of the sraddhas by nearly all castes, as may be seen by reference to Steele's L. C. 27, 42, 181, 380.

(*o*) See Ellis in 2 Str. H. L. 131.

(*p*) See Col. Dig., Book V., T. 273 Comm. The Sastris usually insist on the regular ceremonies as indispensable, but they do not define which was essential. See Steele, L. C. 184, and the section below on the METHOD OF ADOPTION. The castes annul irregular adoptions, Steele, L. C. 388. The Hindu authorities

a formal giving and acceptance the adoption is, for all classes in Bombay as in Madras, to be regarded as complete (*q*), as the

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generally regard a boy defectively adopted as a das or slave of the highest class; see below, "CONSEQUENCES OF ADOPTION." *Tilak* v. *Tai Maharaj*, L. R. 42 I. A. 135.

(*q*) Steele, L. C. 184. See *V. Singamma* v. *Vinjamuri Venkatacharlu*, 4 Mad. H. C. R. 165. In *Kenchava* v. *Ningappa*, S. A. 645 of 1866, 10 Bom. H. C. R. 265, the parties were not Brahmans but apparently Lingayats. Jagannatha in Col. Dig., Book V., T. 273 Comm., dwells at great length, if not with invincible logic, on the oblation to fire as being not essential. In *Crastnarav* v. *Raghunath*, Perry O. C. 150, the safe opinion is expressed that where the essential ceremonies have been performed the omission of unessential ones does not invalidate an adoption. Colebrooke more definitely pronounces the sacrifice not essential, 2 Str. H. L. 126, 131. *Chiman Lal* v. *Ramchandra*, I. L. R. 24 Bom. 473; *Tilak* v. *Tai Maharaj*, L. R. 42 I. A. 135; *Valubai* v. *Govind*, I. L. R. 24 Bom. 218; *Govindayyar* v. *Dorasami*, I. L. R. 11 Mad. 5; *Ranganayakammav* v. *Alwar Setti*, I. L. R. 17 Mad. 219; *Atma Ram* v. *Madho Rao*, I. L. R. 6 All. 276, the case relates to the Dakhai Brahman.

In *Sree Narain Mitter* v. *Sreemuthy Kishen Soondory Dassee*, L. R. S. I. A. 157, the Judicial Committee say: "The most important issue in the cause was whether there was a formal gift of the child . . . whether there was an actual delivery of the child in addition to the execution of the deeds." That was a Bengal case, but the parties were Sudras; the decision is conclusive of the sufficiency of actual giving and receiving to constitute adoption in that caste in every province. Corporeal gift and acceptance are again pronounced necessary and sufficient in *Mahashoya Shosinath Ghose* v. *Srimati Soondari Dasi*, L. R. 7 I. A. 250. In *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R. 241, Sir M. Westropp, C. J., after pronouncing Jains subject generally to the Hindu law of inheritance, discusses an alleged adoption by gift to a man and his wife deceased. This his Lordship held to be impossible, but from what is said in the course of the judgment (see p. 257), it may be gathered that a gift accepted by the adoptive parents would have been thought enough.

Lakshman v. *Malu*, Bom. H. C. P. J. 1875, p. 186, was apparently a case between Marathas, and there it was decided that there must be strict proof of the gift as well as of the acceptance.

These last two cases, though they point to the general sufficiency of a gift accepted, in so far as they do not dwell on any distinction of caste, yet do not precisely establish the validity of an adoption amongst Brahmanas without the prescribed religious ceremonies. The Sastris generally insist on these as indispensable, but in one case at least, that of *Jagannatha* v. *Radhabai*, S. A. 165 of 1865, it seems to have been held by the High Court of Bombay that no particular religious ceremony is absolutely necessary even in the case of Brahmans. It will be seen that there is hardly authority for laying down a proposition as to this caste with perfect confidence. The ceremonies are by all Brahmans thought important, and in practice the omission of them would throw such suspicion on an alleged adoption as to impair very seriously the proof of an alleged giving and taking with the requisite expression of intent.

performance of the ceremony of the Datta-homam may be delegated to a priest or a relation (*r*).

The custom in some castes, as Jains and Talabda Kolis, of adoption without regard to the spiritual benefits to be obtained through the adopted son, forms a point of transition to a custom in other castes by which adoption is not recognized at all, or only under certain circumstances (*s*), and with incidents different from those of ordinary adoption. The mere " celebrity of the name " (*t*) of the adoptive father hardly affords a sufficient basis in the absence of the intimate spiritual connection for so important a part of the family law as adoption, and the lower castes have in many instances proceeded but a short way in their imitation of the Brahmanical institution. It seems probable, indeed, that such adoption as they recognize is of independent natural growth, and giving effect merely to an instinctive craving, stands on a principle quite apart from the adoption commanded by religion and primarily serving religious purposes. In the continued associations of the lower orders with the Brahmans their ideas on this as on other subjects have been coloured, sometimes quite changed, but in other cases they remain in substance what they have been from the first. Regarding such classes as dissenters from orthodox Hinduism, the recognition of their own customs as binding on themselves is still consistent with the Hindu Law (*v*).

It will have been noticed that in several cases in the earlier parts of this work rights were set up by men claiming as palaka-putras, or foster sons of one deceased. A similar instance occurs in

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(*r*) *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590; *Subba* v. *Subba*, I. L. R. 21 Mad. 497; *Vadavalli* v. *Mangamma*, I. L. R. 27 Mad. 538, 539.

(*s*) In one case a thakur (a Rajput Raja) seeking to exclude from succession his half-brother (elder) and his brother (younger), devised his estate (called a raj) to his daughter-in-law. The Sastri pronounced this valid, and he said that the daughter-in-law could not adopt while the brothers of her deceased husband survived; MS. 281. This must have been an instance in which a son of an elder wife had taken precedence of an elder son by a junior wife, a modification accepted in some families of the rule favouring mere seniority of birth, see above, pp. 65, 74; Steele, L. C. 40, 60, 63, 178, 229. It is plain that the male kinsmen were opposed to the adoption, and that being so the case must probably be reduced to one in which a widow could not adopt for want of the requisite assent of the kinsmen, see Colebrooke in 2 Str. H. L. 92; Mit., Chap. I., sec. XI., para. 9, note. It does not appear that in the class in question the mere existence of male heirs makes adoption legally impossible.

(*t*) Datt. Mim., sec. I. 9.

(*v*) Above, p. 558.

Bhagvan v. *Kala Shankar* (*w*), and it seems likely that the case at 2 Str. H. L. 113 was one of the same kind (*x*). These instances point to a custom pretty widely prevalent amongst the lower castes by which a sonless householder assumed the guardianship of a boy, and either forthwith or afterwards declared him his heir, whereby without further ceremony he was vested with the rights of a son subject to partial defeasance only on the birth of a begotten son (*y*).

The replies of many castes in Gujarath to Borradaile's enquiries show that the foster son was as well recognized amongst them as the son by regular adoption. In many cases adoption was not at all practised (*z*), in some no foster son was taken. Especially where the remarriage of a widow was allowed it was said that no adoption or fostering by her was possible. "Yet," it was answered, "if the Sastras allow adoption we cannot presume to

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(*w*) I. L. R. 1 Bom. 641.

(*x*) See also Sp. App., No. 74 of 1851, M. S. D. A. D. for 1852, p. 62, referred to in *V. Singamma* v. *Vinjamuri*, 4 Mad. H. C. R. 165.

(*y*) Steele, L. C. 184. The Palaka-Kanya amongst the dancers was an imitation which implied the pretty wide prevalence of the institution copied. See Steele, L. C. 186. In one case the Sastri said a foster son of a temple dancer was her heir to an allowance from the temple estate. A foster-son, he said, may be heir by custom, MS. 1707, though according to the case above, Q. 4, p. 339, he can ordinarily take even by gift from the foster-father only so much as may be becoming and usual where there is a real son.

The adoption of a person *sui juris* under the earlier Roman Law was a very solemn proceeding, to which effect could be given only by a decree of the people in the Centuria Curiata. (See Poste's Gaius, I. 107, Comm.) It was preceded by an enquiry and declaration of the Pontiffs that there was no religious objection, and being formally voted by the assembly after formal public questioning of the parties, was hence called "*Arrogatio.*" (See Gaius I. 99.) It was accompanied by a formal renunciation of the sacra of the family of birth. These formalities were gradually disused, and at length adoption and arrogation were allowed by will as a mere means of constituting an heir who would preserve the testator's name. The adopted son retained his place in his family of birth while he acquired in that of his adoption merely a right of intestate succession to his adoptive father (Maynz, Dr., Rom. § 328). His position was thus very like that of the palaka-putra amongst many Indian castes.

(*z*) Thus adoption is not recognized amongst the Kumbhars at Surat (Borr. MSS. G. Koombhar 10). In some castes, as the Bhatele, the Sastri said adoption is not allowed while there is a male kinsman surviving, MS. 405 The non-recognition of adoption was found to prevail amongst some of the Dekhan castes also, see Steele, L. C. 181, 381. This might be regarded as a survival of the objection to giving or taking a son recorded by Apast., Pr. II., Khand. 13, para. 11; but the classes who reject adoption are probably for the most part non-Aryan in origin.

set them at naught" (*a*). This indicates how adoption of the Brahmanical type has gradually superseded the looser tie of mere fosterage (*b*). The latter had the advantage that the foster son did not lose his right of inheritance in his family of birth, and that it fitted the needs and habits of castes to whom the elaborate system of adoption could not be adapted without violent distortions of the institution itself and of the customs amongst which it was introduced (*c*). The foster son, however, has always been frowned on by the Sastris (*d*). He has failed to get recognition from the Courts (*e*), and the member of a lower caste who now desires to benefit a nephew or the son of a friend has to adopt him in order to give him rights which will avail after the adoptive father's death (*f*). The iron tie thus forged often becomes irksome to one

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(*a*) Hujjam Kahnoomiya, Book F., p. 130. In the case of fifty-six castes at Poona it was said that ancient usage established by evidence and a vote of the caste constituted the law. But in cases of unusual difficulty Brahmans were called in and a decision made according to the Dharmasastra. It is obvious that as transactions and affairs grow more complicated this must give to the Sastras a continually widening influence as law. It is not thought necessary to conform to the Sastra in every particular, but submission to it is considered as at least proper and desirable. See Steele, L. C. 122, 126. A Sastri said that the different opinions held on the subject of adoption ought to be applied to any case according as they agree with the custom of the community, and in the case of a Brahman with the doctrines of the Shakha to which he belongs, MS. 405.

(*b*) The manasaputra in *Abhachari* v. *Ramchandrayya*, 1 Mad. H. C. R. 393, was probably taken with an idea derived from a similar kind of fosterage at one time recognized in Madras. The Pandits said that the manasaputra was not known to the Hindu Law, but the High Court held the *quasi*-father bound by the deed of general donation in favour of the manasaputra.

(*c*) Many classes called Ati-Sudras rank below the recognized Sudras themselves, who have been brought fairly within the Brabmanical system.

(*d*) A man having purchased or otherwise obtained a boy, brought him up as a foster-son, and bequeathed part of his property to him. The Sastri upheld the bequest, but held that the legatee's title did not extend any further as against the blood relatives of the testator, as there had not been a formal adoption, MS. 122.

In another case it was said that nephews, though separated, inherit before a mere foster-son, MS. 119.

(*e*) See *Nilmadhab Das* v. *Biswambar Das*, 3 B. L. R. 27, 32 P. C.

(*f*) An intermediate case in which the Brahmanical law of adoption has been partially accepted is that of the Talabda Kolis of Surat. The son is not taken for the same spiritual purposes as in the higher castes. His adoptive or foster father is to dispose of his property; but failing such disposition the foster son succeeds, and his rights in his family of birth are extinguished. Meanwhile

or both parties, but the easier connection has been so discredited that it cannot apparently be restored except by an act of the Legislature.

The adopted son, according to Manu's rule (Chap. IX. 168, 169), must be "sadrisam" (=adequate, alike). This Medhatithi in his commentary explained as meaning of appropriate family and character (*g*). But Yajnavalkya (Book II. v. 133) says the adopted or other subsidiary son must be of equal class with the father, and resting on this, Nilakantha adopts Kulluka's interpretation of Manu to the same effect. It was a natural process, as marriage of a wife of lower caste became unlawful (*h*), that adoption should be similarly restricted. It was part of the imitation of nature which has influenced the whole institution that when a Kshatriya son of a Brahman became impossible, or one of intermediate caste, the adoption of such a son should become impossible also. The different construction given to the text of Manu under these different circumstances is a good instance of a process to which the smritis have frequently been subjected in adapting their precepts to the needs of the age.

A boy bestowed in adoption is usually given before the tonsure (*i*), which amongst the twice-born takes place at three,

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he does not take his adoptive father's name as a true adopted son should do. These particulars are gathered from the papers in Sp. App., No. 64 of 1874.

The influence of imitation and a desire to rank higher in the social and religious scale, strong as it is, has done less in late years towards the assmilation of the lower classes to the Brahmanical pattern than the action of the Courts. The law of the Dharmasastra being taken as the common law of the Hindus, exact proof has been required of deviations from it, and on such proof failing through the ignorance or misapprehension of those concerned, one rule after another of the Brahmanical Code has been established as the law of the lower castes. Bold generalizations, too, have been ventured on, which by ignoring the distinctions of caste tend to uniformity at the cost of usage. A good instance of this is the broad statement in *Pandaya Telaver* v. *Puli Telaver*, 1 Mad. H. C. R. 478, that connubium subsists amongst the sub-divisions of each of the four historical castes. This is manifestly incorrect, as shown above, p. 709, however desirable it may be to get rid of restrictions on the choice of a wife.

(*g*) See Col. Dig., Book V., T. 285, Comm. So under the Roman Law an adrogatio was allowed only after an inquiry "qua causa . . . sit adoptionis quae ratio generum ac dignitatis, quae sacrorum." Cic. Pro. Domo. XIII. 34; see Aul. Gell. V. 19; Willems, Dr. P., Rom., p. 84.

(*h*) Col. Dig., Book V., T. 173.

(*i*) As to the second birth of initiation see Vishnu XXVIII. 37—40; XXX. 44; Vasishtha XI. 49—51; II. 3; Baudh., Pr. I., Adh. 2, Kand. 3, 6, 12; Gaut. Chap. I., paras. 5—14; Manu II. 35, 36. The difference in status arising

four, or five years of age (*k*). The general opinion of Hindu lawyers is against the validity of an adoption after this ceremony into any other gotra than that of birth (*l*) and of dedication of the boy (*m*). Within the same gotra, using the same invocations, an adoption at a later age is deemed permissible (*n*). Amongst the lower castes the limitations resting on gotra relations in the stricter sense have no place (*o*). In these cases, as marriage is the only initiatory rite giving an advanced status to the Sudra (*p*), some lawyers would pronounce married men unfit for adoption (*q*). This opinion has not been generally accepted (*r*). Men of all ages up to fifty have been adopted when no change of gotra (*s*) was involved. Even this change has been held not to be an obstacle (*t*), as the tonsure and even investiture may be annulled (*v*), but it may be doubted whether this licence ought to be

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from the performance of the earlier Samskaras is indicated by the funeral ceremonies and the ceremonial impurity provided for in Manu V. 67 ss.

(*k*) Steele, L. C. 43; Col. Dig., Book V., T. 182, 183, Comm. The genuineness of the text is doubted by Nilkantha, Vyav. May., Chap. IV., sec. V., para. 20, and some others.

(*l*) *P. Venkatesaiya* v. *M. Venkata Charlu*, 3 Mad. H. C. R. 28; 2 Str. H. L. 104, 109.

(*m*) Col. Dig., *loc. cit.* See the Smritis quoted above as to initiation. The Sudras are expressly excluded from it and from Vedic study, Apast., Pr. I., Pat. I., Khand. 1, paras. 5, 8, 20, 21.

(*n*) Vyav. May., Chap. IV., sec. V., para. 19; Steele, L. C. 44. *Sri Brijhookunjee Maharaj* v. *S. G. Maharaj*, 1 Borr. R. 202.

Under the Roman Law an adoption could not be attended with a "term" postponing its operation or with a condition making its existence insecure. (Maynz, Dr., Rom. § 328; above, p. 187.)

(*o*) Such relations as are contemplated in Vishnu XXII. 21—24 cannot now be found. *Quasi*-gotra, *i.e.* blood relationships, are recognized amongst the lower castes, though not to the same distance of connection as amongst the Brahmans.

(*p*) Col. Dig., Book V., T. 122; Rao Saheb V. N. Mandlik's Vyav. May., p. 431. As to women, Vishnu XXII. 32. Various ages are prescribed by caste custom, Steele, L. C. 182.

(*q*) 2 Str. H. L. 87; Steele, L. C. 44, 383, 384.

(*r*) *Raje Vyankatrao* v. *Jayavantrao Ranadive*, 4 Bom. H. C. R. 191 A. C. J.; *Nathaji Krishnaji* v. *Hari Jagoji*, 8 Bom. H. C. R. 67 A. C. J. See Steele, L. C. 384; *Dharma Ragu* v. *Ramkrishna*, I. L. R. 10 Bom. 80. Among Jains a married man may be adopted, *Asharfi* v. *Rup*, I. L. R. 30 All. 197.

(*s*) Steele, L. C. 43. Within the same gotra no ceremonies other than gift and acceptance are essential. Steele, L. C. 46. Comp. Col. Dig., Book V., T. 275, Comm.

(*t*) Datt. Chand., sec. II. 26 ss.

(*v*) Datt. Mim., sec. IV., 50—52.

recognized in Bombay (*w*). The Sastris are generally opposed to it: the High Court seems in one case to have looked on it with favour (*x*), but the case was one between Sudras, in whose case there could be no initiation by tonsure and investiture to undo (*y*).

In the case even of an adult the giving by his father or mother cannot be dispensed with (*z*). The adopted son's own assent is equally necessary when he has reached years of intelligence (*a*).

(*w*) See *Balvantrav* v. *Bayabai*, 6 Bom. H. C. R., at p. 85.

(*x*) *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. 364, 371.

(*y*) There is no Sraddha even, in the proper sense, for a Sudra. It involves ceremonies which the Sudra cannot perform. See above, pp. 790, 823.

(*z*) *Bashetiappa* v. *Shivalingappa*, 10 Bom. H. C. R., at p. 271; *Collector of Surat* v. *Dhirsingji Vaghbaji*, *ibid.* 235; *Subbaluvammal* v. *Ammakutti Ammal*, 2 M. H. C. R. 129; *Balvantrav* v. *Bayabai*, 6 Bom. H. C. R. 83 O. C. J. The formula pronounced by the giver is appropriate only to the father, see 2 Str. H. L. 218. Hence, as the cases decide, an orphan cannot be given by his brother. In Steele, L. C., p. 46, it is incidentally noticed that an elder may adopt a younger brother. This may have been established in some castes by custom, but instances of the custom have not occurred in the superior Courts, or have been so rare as to escape particular observation. It is opposed to the generally received principle of a possibility of union between the real mother and the adoptive father, but this principle is not regarded amongst Sudras.

A woman (widow) cannot adopt until she attains puberty and therefore could be a mother. Steele, L. C. 48. A man *ought* not to adopt prematurely. *Ibid.* 43.

Under the Roman Law the imitation of nature was held to prevent the adoption of any one who was not at least eighteen years younger than the adoptive father (Maynz, Dr., Rom. § 328). In case of arrogation of one *sui juris* the adoptive father was required to be sixty years of age. Fifty is the age prescribed in the French and the Italian Codes.

Gaius says it was still disputed in his time whether any one could adopt a person senior to himself; but this was afterwards settled so as to require a seniority of eighteen years in the adoptive father. (Poste's Gaius, I. 106, 107, and Comm.)

(*a*) Col. Dig., Book V., T. 275, Comm.

Under the Roman Law of the XII. Tables a father could transfer his child by manicipation (see Cod. Li. VIII. Ti. 48 l. x.), which in the case of a son given in adoption had to be performed thrice (Maynz, Dr., Rom. § 326), though for a *noxœ datio*, in which a son was given up to escape damages incurred on his account, a single ceremony was sufficient. Justinian replaced this ceremony by a declaration made before a public officer (*op. cit.* 328). In the case of a boy *sui juris* his "arrogation" or gift of himself had to be preceded by an enquiry whether this would be advantageous to him. (Gaius I. 102.) His express assent was required (Gaius, I. 99) as well as that of his guardian if he had one. An ordinary adoption could not be made against the consent of the boy adopted, but in the absence of protest the gift of his father or other person exercising the patria potestas was sufficient, and at the same time indispensable.

The son, though a man's own, is not a chattel to be given away without his own consent (*b*), and the rule of Baudhayana (*c*) which exacts this in the case of a Kritrima adoption is equally applicable to any case where the person adopted is old enough to have a will and judgment of his own (*d*). While he has no discrimination his father may part with him, but only, according to the religious law, under the pressure of some great exigency (*e*). Parents are to bestow their son with anxious care (*f*) on one to whom he has an affectionate feeling (*g*).

Jagannatha, relying on the fact that the Smriti texts speak only of the adoption of sons (*h*) denies altogether that a daughter can be adopted. The Datt. Mimamsa, sec. VII., has an elaborate argument to establish that an adoption of a daughter may be admitted by analogy to that of a son. The argument would have been needless had the sacred writings afforded any direct authority for Nanda Pandita's position. He supports it by several instances drawn from the Puranas, but whatever weight may be due to these they have not led to any general imitation which would constitute a custom. When we consider the main purpose and the history of adoption it is plain that the admission of a daughter within the scheme would be quite anomalous. Even the appointed daughter taking in her own person the place of a son was centuries ago found incongruous with the general Hindu system, and no local law seems to have preserved or invented such an exaggeration of a discarded rule as would be involved in recognizing a substitutionary daughter bound as a daughter to leave the family by marriage.

An "arrogation" was under the later law completed by a rescript under a petition to the Emperor. (Maynz, Dr., Rom. § 328.)

(*b*) Vyav. May., Chap. IV., sec. I., paras. 12, 13; Datt. Mim., sec. IV. 47.

(*c*) Col. Dig., Book V., T. 284.

(*d*) See Datt. Mim., sec. IV. 47; Balambhatta on Mit., Chap. I., sec. XI., para. 9.

(*e*) Mit., Chap. I., sec. XI., para. 10; Vyav. May., Chap. IV., sec. I., paras. 11, 12, 15; Chap. IX., para. 2.

(*f*) Vyav. May., Chap. IV., sec. V., para. 1.

(*g*) Manu IX. 168.

(*h*) Col. Dig., Book V., T. 420, Comm.

Women could not originally be adopted under the Roman Law, and it is obvious that they could not serve the intended purpose of maintaining the family sacra. But as this purpose was gradually superseded by considerations of another kind, the adoption of daughters as well as of sons was allowed. (Gaius, I. 101.)

It was said, indeed, that the adoption by a woman of a daughter given by her mother might be recognized if conformable to the caste rules (*i*), and there are no doubt several venerable legends which state or imply the giving of daughters. On these a system of female adoption might have been built, but it must have been the embodiment of a theory essentially distinct from that which has in fact prevailed in the law of adoption. The process must be looked on as merely imitative, and having no other jural efficacy than may be given to it by some special usage. It does not appear that any caste rules in the Bombay Presidency allow such an adoption, in the sense of giving a particular status to the adopted daughter (*k*). In *Gangabai* v. *Anant* (*l*), a case under the Vyav. May., it has been held that a Brahman cannot adopt a daughter conferring on her the status of a real daughter.

The relation of a Guru and his disciple is said to be similar in many respects to that of adoptive father and son (*m*). It is a relation recognized by the Sastras, but the connections subsisting amongst ascetics of the lower castes and their disciples are governed entirely by the custom of the class or of the institution to which they belong (*n*). Some gosavis buy boys to bring up as

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(*i*) MS. 1681.

(*k*) See 2 Str. H. L. 217. In the case of an adoption by a Kalavantin (temple woman) the Sastri replied that no rules for such an adoption were to be found in the Sastras, MS. 1651. In Steele's Law of Caste, adoptions by dancing women are incidentally recognized as possible, p. 183. But the adopted girl is called a palak-kanya (foster-daughter), p. 186, and the (so-called) adoption may be annulled at the pleasure of the foster-mother, p. 185, while a true adoption cannot be annulled, p. 184. It is therefore merely an imitative institution which can be supported on the custom of the class only if the class are as such capable of making binding rules for their members. This is denied in the *Naikin's Case* (*Mathura* v. *Esu N.*, I. L. R. 4 Bom. 545) as opposed to public policy and to the general customary law of the Hindus as constituted by present usage. The purchase of children by dancing women was once common. Such children ranked as slaves, 2 Str. H. L. 225, 229. Ellis, at 2 Str. H. L. 128, says that women have no right to adopt even for the transmission of their separate property. "No spiritual benefit," he says, "results to a woman from adoption." But then sraddhas are performed by their sons, whether real or adopted. The incapacity must be placed on other grounds, such as those stated in the text.

The Roman Law seems not to have allowed an arrogation of a female prior to Justinian's legislation. Ort. Inst. § 140.

(*l*) I. L. R. 13 Bom. 690.

(*m*) Steele, L. C. 192, App. B., para. 12.

(*n*) 1 Str. H. L. 150; above, pp. 516 ss.; Steele, L. C., App. B. A Sastri replied in one case that all classes, gosavis included, can adopt with the due

their disciples and successors (*o*). More frequently they take them by gifts as pupils and spiritual sons without the ceremonies of adoption (*p*), the theory of which, indeed, is opposed to the ranking of such boys as adopted sons. It is the grihastha or householder (*q*) in the stage of life when he may properly attend to worldly affairs who is bound to provide a son for the continuation of the family (*r*). A man retired from the world has no such duty. The ascetic who renounces ordinary affairs (*s*) as a young man, ought to do so effectually, and look to spiritual fatherhood (*t*) as the only one open to him for the future (*v*). The relations of the gosavi and his disciple differ widely, as has been seen, from those of the ordinary father and son, and though some of the ceremonies of adoption are imitated in taking a *chela*, the latter does not in any practical sense become an adopted son (*w*).

The effect of adoption is to sever the boy adopted entirely from his family of birth (*x*). His proper residence is with his adoptive parents (*y*). He exchanges "the gotra" of his real father for that of the adoptive father as a woman enters her husband's gotra by marriage (*z*). He learns the sacred invocations in his family of adoption, and in the absence of a son by birth completely takes his place (*a*). His right of inheritance as the son of his real father

ceremonies. Gosavis, he said, must be considered Sudras, and in adopting omit the recitations from the Vedas, MS. 1678.

(*o*) Colebrooke points out that the practice of gosavis and sannyasis in this particular is analogous to adoption by purchase, which is itself obsolete, 2 Str. H. L. 133.

(*p*) *Op. cit.*, para. 26 ss.

(*q*) Vasishtha, VIII. 1, 11.

(*r*) Apast., Pr. 1., Pat. I., Khand. 1, para. 19. He escapes this duty if he proceeds immediately from his studentship to a life of ascetic meditation. See Phil. of the Upanishads, Chap. IV.

(*s*) Vasishtha, Chap. X.

(*t*) Apast., Pr. II., Pat. 9, Khand. 21, paras. 8, 10, 19.

(*v*) See Mit., Chap. II., sec. VIII., paras. 2, 8; 2 Str. H. L. 248.

(*w*) See Steele, L. C., App. B.

(*x*) Datt. Chand., sec. II. 32, IV. 1 ss.; Vyav. May., Chap. IV., sec. V., para. 21; Steele, L. C. 47. An adoption once concluded is indefeasible. Amongst Brahmans the homa sacrifice marks the completion of the ceremony. Steele, L. C. 184. *Sreenarain Mitter* v. *Kishen Soondery Dassee*, 11 Beng. L. R. 171, P. C.; S. C. L. R. I. A. Supp. 149.

(*y*) *Lakshmibai* v. *Shridhar Vasudeo Takle*, I. L. R. 3 Bom. 1.

(*z*) Smr. Chand., Chap. X., paras. 13, 14.

(*a*) Vyav. May., Chap. IV., sec. V., para. 21. An adopted son fully represents his father in a partition of property after the father's death. Smr. Chand., Chap. X., para. 18.

perishes (*b*), at the same time that he acquires the same right as son of his adoptive father (*c*), and succeeds both lineally and collaterally (*d*) though his adoption does not have a retrospective effect (*e*). Yet in the latter capacity his right is so far defeasible that the birth of a son reduces him to one-fourth of a share (*f*), as compared with the full share taken by the begotten son (*g*) of the same father. An adopted son of a coparcener is entitled on partition to the same share as the natural son in competition with a son of another coparcener (*h*).

According to most of the authorities (*i*) the severance of the boy from his own family is effected according to the Hindu Law by the requisite ceremonies, even though on account of a difference of caste or some other insuperable obstacle he cannot be initiated in the family of adoption (*k*). In such a case he is regarded like a child uninitiated as being only of the rank of a dasa (slave) or a sudra (*l*). He is entitled to maintenance, but does not inherit (*m*). The caste customs are more liberal than the books to the boy defectively adopted. Where an adoption has failed, either through the unfitness of the persons or defect in the process, they simply annul the relation supposed to have been constituted, with the effect apparently of restoring the adopted son to his family of birth (*n*). It might be supposed that in some cases difficult

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(*b*) Steele, L. C. 186; Smr. Chand., Chap. X., paras. 14, 15.

(*c*) Vyav. May., Chap. IV., sec. V. 21—23; Steele, L. C. 47, 407.

(*d*) *Kali Komul Mozoomdar* v. *Uma Shunkur*, L. R. 10 I. A. 138; *Pudma Coomari Debi* v. *Court of Wards*, L. R. 8 I. A. 229; *Sumbhoo Chunder Chowdhry* v. *Narain Dibeh*, 3 Knapp, 55.

(*e*) *Bhubaneswari Debi* v. *Nilkomal*, L. R. 12 I. A. 137.

(*f*) Vasishtha XV. 9; Vyav. May., Chap. IV., sec. V., para. 25; Steele, L. C. 47. The proportions vary according to caste custom, *ibid.* 186, 387.

(*g*) See above, p. 347. The begotten son takes precedence, and where primogeniture prevails is entitled to the advantages of the firstborn, Steele, L. C. 186, 387.

(*h*) *Nagindas Bhugwandas* v. *Bachoo Hurkissondas*, L. R. 43 I. A. 56; S. C. I. L. R. 40 Bom. 270.

(*i*) Vyav. May., Chap. IV., sec. V., para. 16.

(*k*) Steele, L. C. 46.

(*l*) Baudh. I. Khand. 3, 6, 12; Col. Dig., Book V., T. 182, 273, Comm. See below "CONSEQUENCES OF ADOPTION."

(*m*) Datt. Mim., sec. III. 3.

(*n*) Steele, L. C. 388.

According to the Roman Law an adopted son became a member of the group of agnates to which his adoptive father belonged. This was because agnation rested on a conceivable dependence on a single head of the family. Cognation,

questions would arise out of the legal relations that had intermediately grown up, but the records of the Courts do not show that these have in practice produced litigation of any importance.

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on the other hand, rested essentially on connection by blood. Hence the adopted son retained his cognate relation to his family of birth and did not acquire such a relation to his family of adoption except the agnates. The husband was an *affinis* of his wife's cognates and she to his, but the cognates had no affinity *inter se*. The adopted son acquired no affinity to his adoptive family : much less, therefore, did he gain any such relation to the family of his adoptive mother. "In adoptionem datus, aut emancipatus, quascunque cognationes adfinitatesque habuit, retinet : adgnationis jura perdit. Sed in ea familia, ad quam per adoptionem venit, nemo est illi cognatus præter patrem eosque quibus adgnascitur : adfinis autem ei omnino in ea familia nemo est." Dig. Lib. XXXVIII. Tit. X. Fr. 4, § 10.

As the Roman wife married by the ancient forms came under the "manus" or full authority of her husband, she and her children were co-agnates. The free form of marriage was in the end the only one used, and then there was no agnation between her and her children; much less, therefore, between her and her adopted son. Mutual rights of inheritance between a mother and her children were established by special laws, and Justinian placed cognates on the same footing generally as agnates; but this did not extend the connection of the adopted son. Adoption indeed, as we have seen, was by the same legislator reduced almost to a form which left the adopted son still a member of his family of birth. (See Maynz, Dr., Rom. § 15, 304, 338.)

The influence of the Church made itself felt in this as in other spheres. It became customary to obtain a religious sanction to adoptions by a ceremony performed by a priest. This was supposed to induce such a relation that the impediments to marriage in the case of a real son were regarded as subsisting equally for the adopted son. This position was reached by successive steps like the other prohibitions which gained recognition in the early centuries of the Christian Church. The original significance of adoption was in the meantime continually declining, and at last Leo the Philosopher allowed even eunuchs and women to adopt at pleasure without the petition and endorsement which had previously been required. (See Zach. Jus. Græc. Rom. §§ 4, 23.) But when the former legal importance of adoption died out the old associations connected with it died out too, and it fell into comparative desuetude until reconstituted under altered conditions in recent times as a means for satisfying the parental instinct. Codice Civile, Lib. I. Tit. VII.; Code Nap. § 343 ss. Comp. Civ. Co. of New York, Chap. II.

The nomination of grandsons or others as heirs by such documents as the one preserved by Marculfus (see Canciani, Leg. Barb. v. II., p. 228) had little or no connection with the ancient law of adoption; and when the Feudal system was established, kings and over-lords naturally discountenanced adoptions which would deprive them of the advantages of reversion. In India adoption was too intimately connected with religion to be extinguished, but the ruling powers have usually insisted on their sanction being taken and on receiving reliefs in the form of nuzzarana or salami in return for recognition of the adopted heir. The right is recognized as belonging generally to grantors of inams. See Steele, L. C., pp. 182, 183, 386.

The blood connection of the adopted boy with his family of birth is still recognized for the purpose of prohibiting marriage with a relative within seven degrees (*o*). Some have maintained that the same restriction arises in the family of adoption (*p*), but the more general opinion perhaps is that this extends to only three degrees (*q*), though for purposes of inheritance a connection is recognized to seven degrees (*r*) or even as far as in the case of a begotten son (*s*). The adopted son takes that position relatively to the wife of his adoptive father as well as to the adoptive father himself (*t*). Whether a connection arises between him and his adoptive mother's family of birth such as to engender mutual rights of inheritance has been controverted. The prevailing opinion is in favour of the existence of such rights (*v*).

The change of status induced by adoption cannot be renounced (*w*). The adopted son may, if he will, give up his right of inheritance, and if he positively declines to fulfil the duties of a son, the widow, it was said, may adopt another in his place (*x*). But this does not restore him to his family of birth (*y*). A complete adoption amongst the twice-born implies initiation as the adoptive

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(*o*) Datt. Chand., sec. IV. 7, 8, 9; Vyav. May., Chap. IV., sec. V., para. 29; Steele, L. C. 27, 47. The prohibition extends to his great-grandson. *Ibid.*

(*p*) Vyav. May., Chap. IV., sec. V., paras. 32, 35.

(*q*) Datt. Mim., sec. VI. 32.

(*r*) Vyav. May., Chap. IV., sec. V. 34.

(*s*) The Samskara Kaustubha and the Dharmasindhu limit the connection by the Samskaras performed in each family. A full connection to seven and five degrees exists where the upanayana plus the preliminary rites have been performed; where only the one or the other, a connection extending to but five and three degrees. See above, pp. 108, 109, and Rao Saheb V. N. Mandlik's Vyav. May., p. 352. A sister succeeds to her brother by adoption as to one by birth; *Mahantappa* v. *Nilgangawa*, Bom. H. C. P. J. 1879, p. 390.

(*t*) Datt. Mim., sec. VI. 53; Steele, L. C. 188.

(*v*) *Pudma Coomari Debi* v. *The Court of Wards*, L. R. 8 I. A. 229; where, however, the term "relations" may perhaps be confined to blood relatives through the adoptive father.

(*w*) *Ruvee Bhudr* v. *Roopshankar*, 2 Borr. 713, cited and approved by Sir M. Westropp, C.J., in *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at p. 388; *Mahadu* v. *Bayaji*, I. L. R. 19 Bom. 239.

At Athens an adopted son was allowed to return to his family of birth, but only on condition of his leaving a son to represent him in the family of adoption. See Petit, Leges Atticæ, p. 141.

(*x*) *Verbadru* v. *Baee Ranee*, 2 Morr. 1, 3.

(*y*) Comp. Manu IX. 142; *Sreemutty Rajcoomaree Dosee* v. *Nobcoomar Mullick*, 2 Sevestre 641 n.

father's son (*z*) and a consequent severance from the sacra of the family of birth, which must devolve on the same person who takes the estate (*a*).

An adopted son, like a real son, may take a share or compound for it, and part from his adoptive father. He thus becomes separated, but he does not lose his rights of inheritance (*b*).

SECTION III.—THE CAPACITY TO ADOPT AND THE CIRCUMSTANCES UNDER WHICH IT MAY BE EXERCISED.

A. 1.—ADOPTION BY MALES.

The first duty of the married Hindu householder is to beget a son. The nature and the stringency of this obligation have been

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(*z*) Col. Dig., Book V., T. 183 Comm.

(*a*) Vyav. May., Chap. IV., sec. V., para. 21.

(*b*) Steele, L. C. 185. See above, pp. 56—57, 324, 342.

We gain a more vivid conception of the extreme antiquity of the Vedas, and the social life of which they afford glimpses, by considering that the stages in the constitution of the family which they and even the post-vedic literature present as still existing facts, had already for the most part been passed through by the Greeks and Romans at the remote beginnings of their history. Adoption had then already superseded amongst them the other modes of continuing the family, which at a still earlier time they had no doubt shared with the Brahmanic branch of the race. In Sparta it is said that down to a comparatively late age the eldest brother taking the patrimony became lord of his brethren after the fashion commended by Manu, and sharing the scanty produce of a small estate with them, took one wife also for the whole group. (Polyb. Excerpt. Vat. XII. 6; Schöm, Ant. Gr., p. 214.) Sparta was the asylum of archaic traditions. Poverty was given as a reason for this custom, but the reason was probably one invented to account for what had existed from time immemorial, and which affords a mark by which to track the Greeks back to a time before the dispersion of the Aryan nations.

The legend of Draupadi is referred to in the Datt. Mim. sec. II. 49, to show that there is nothing anomalous in a boy's being the son at the same time of several fathers. This confirms the suggestion made above, p. 396 (*x*), which is also supported by such stories as the one recorded in Datt. Mim., sec. II. 45. The limited polyandry thus indicated was itself an amelioration of that implied in the female gentileship of Sudras asserted by Saunaka in Datt. Mim., sec. V. 18, and made a basis for the doctrine of the eligibility amongst the Sudras of a sister's or daughter's son for adoption.

The survival of the more primitive institution in Malabar is referred to by Ellis in 2 Str. H. L. 167. In Puffendorf's Law of Nature, Book VI., Chap. I., will be found several references on this subject to the early travellers in India.

discussed in the preceding Section (*c*). But failing a son by birth, adoption becomes a duty incumbent on all males except ascetics and members of those castes which, as to this institution, have remained without the pale of ordinary Hindu Law. The duty implies a capacity to adopt, and this is a general attribute of a Hindu, subject only to such qualifications and exceptions as arise from particular circumstances of mind, body, or estate, such as will presently be considered. The desire to make sure of a successor has led to several infringements of a purely logical development of the first principles of the law, and the faculty of adopting has been widened far beyond the religious need, for which its main purpose is to provide. Such irregularities occur in almost every system of law, and have to be dealt with in detail, as in the following paragraphs gathered from the native sources and the decisions of the Courts.

It has been observed (*d*) that the duty to adopt a son does not arise until the birth of a son becomes very improbable. It is not quite consistent with theory that the authority should exist without strict regard to the need, but custom has settled this point the other way, and it may be said that any sonless male, married or unmarried, if capable of legal acts, may adopt (*e*).

"In the ancient rule the adopter is spoken of only in the masculine (*f*). A woman cannot perform a ceremony prescribed by the Vedas, and adoption requires the recitation of hymns. The Samskara Kaustubha allows a woman to adopt (*g*), the Vyavahara Mayukha does not, except with the permission of her husband or of his relatives" (*h*).

"The different opinions held on the subject of adoption should be applied to any case as they agree with the custom of the community, and with the Sakha to which a Brahman belongs" (*i*).

(*c*) See above, p. 812.

(*d*) Above, p. 814.

(*e*) See above, p. 822. *Gopal* v. *Narayan*, I. L. R. 12 Bom. 329; *Hanmant Ramchandra* v. *Bhimacharya*, I. L. R. 12 Bom. 105.

(*f*) See above, p. 790. A husband putting away a worthy wife must endow her with one-third of his property, or if poor maintain her; but one element of her worth is that she have borne "an excellent son." Vyav. May., Chap. XX., para. 2.

(*g*) *See Bayabai* v. *Bala Venktesh Ramakant*, 7 Bom. H. C. R. xiii. App.; above, pp. 783, 795.

(*h*) MS. 405.

(*i*) MS. 405. From the same answer it appears that in some castes (the Bhatele) adoption is not allowed while there is a male kinsman surviving.

"A man may adopt a boy in his lifetime, or authorize his widow to do so after his death" (*k*).

Adoption is for the husband and not for the wife (*l*), except by delegation as shown below. Adoption is primarily resorted to for the sake of securing a performance of the funeral rites of a man having no male issue, and to perpetuate his name. Inheritance follows, but it is a secondary consideration (*m*). The religious obligation or the spiritual benefit raises a strong probability in an appropriate case in favour of an adoption (*n*). The celebrity or perpetuation of the family name of the adopter is, however, recognized as a sufficient motive for adoption, even though there be in the caste a disbelief regarding the spiritual motives for an adoption (*o*).

In one case it was ruled that an irregularly adopted son cannot adopt his wife's sister's son, so as to defeat the reversionary rights of a daughter and daughter-in-law of his adoptive father, who are alive. Otherwise it was said the adoption of such a relation may be made (*p*). The first adoption, however, being of a daughter's son, was invalid. The additional reason given that the adoptive father had a daughter was unfounded in law. His having a daughter-in-law would, according to some, indeed most, opinions, make an adoption by him improper if not impossible, even had there been no other objection. The pseudo-adopted son thus pretended to be taken into the family acquired no position in it, and an adoption made by him could not affect the devolution of the property. As a really adopted son he could undoubtedly have adopted so as to defeat the expectations of other heirs.

(*k*) *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.

(*l*) *Chowdry Padom Singh* v. *Koer Udaya Singh*, 12 C. W. R. P. C. 1; S. C. 2 Beng. L. R. 101 P. C.; S. C. 12 M. I. A. 350; *Bykant Mony Roy* v. *Kristo Soondery Roy*, 7 C. W. R. 392; *R. V. Venkata Krishna Row* v. *Venkata Rama Lakshami Narsayya*, L. R. 4 I. A. 1; *Puttu Lal* v. *Parbati Kunwar*, L. R. 42 I. A. 155; *Jai Singh* v. *Bijai Pal*, I. L. R. 27 All. 417.

(*m*) *Rungamah* v. *Atchummah et al.*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.

(*n*) *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.

Extreme old age, a wife past child-bearing, the apparent adoption of a boy, his death in the family of adoptive father, the need of such a son in a religious point of view, are, it was said, considerations that tend, when evidence is conflicting, to prove the fact of adoption.

(*o*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67; the parties in this case were of the *Talabda Koli* caste; Datt. Mim. I. 9; Datt. Chand. I. 3.

(*p*) *Baee Gunga* v. *Baee Sheoshunkur*, Bom. Sel. Rep. 73.

Adoption *pendente lite* is valid (*q*), though made to defeat a gift previously made. The adopter, it was held, was not under an obligation to the donee not to adopt. Even if a contract to this effect had been made, it was doubted whether such contract would affect the validity of the adoption (*r*).

Adoption by an unmarried person, even though he may be a minor (*s*), is not prohibited by Hindu Law (*t*).

" A Brahmachari (*v*) can adopt and transmit his heritable rights to his adopted son (*w*).

" An unmarried Brahman may adopt " (*x*).

" A sonless widower may adopt " (*y*).

The decisions of the Courts agree with this opinion. Thus it was ruled that an adoption by a widower is valid (*z*).

Conversion either to Islam (*a*) or to any other religion, *e.g.*, Brahma, has no effect upon the capacity of the convert to give his son in adoption (*b*).

A. 1. 2.—In Relation to Paternity.

A second son cannot be adopted during the life of the one first adopted (*c*) except by special custom (*d*), unless the son has

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(*q*) *Lahiri* v. *Lahiri*, I. L. R. 11 Cal. 43.

(*r*) *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 631. This ruling is not inconsistent with the legal principle that no son can set aside a valid alienation made prior to his birth or adoption. The adopted son was held bound by the donation.

(*s*) *Jumoona Dassya* v. *Bamasoonderai Dassya*, L. R. 3 I. A. 72; S. C. I. L. R. 1 Cal. 289.

(*t*) *N. Chandvasekharuda* v. *N. B. Eahmana*, 4 Mad. H. C. R. 270. See above, p. 814, note (*d*). *Gopal* v. *Narayan*, I. L. R. 12 Bom. 329.

(*v*) A Brahmachari is a professed student of the sacred writings.

(*w*) *Gunnapa Deshpandee* v. *Sunkapa Deshpandee*, Bom. Sel. Rep. 202, 229 (2nd edn.); Suth. Syn. Note 4; Col. Dig., Book V., T. 273.

(*x*) MS. 1670. As to adoption by an unmarried man, see above, p. 922.

(*y*) MS. 1677. *Nagappa* v. *Subha*, 4 M. H. C. R. 367.

(*z*) *N. Chandvasekharuda* v. *N. B. Eahmana*, 4 Mad. H. C. R. 270; *Nagapa Udapa* v. *Subba Sastry*, 2 Mad. H. C. R. 367.

(*a*) *Sham* v. *Santa*, I. L. R. 25 Bom. 551.

(*b*) *Kusum* v. *Satya*, I. L. R. 30 Cal. 999.

(*c*) Datt. Mim., sec. I., para. 6; Steele, L. C. 45; 2 Macn. H. L. 200; 2 Str. H. L. 85; *Daee* v. *Motee*, 1 Borr. R. 75; *Yachereddy Chinna Basapa et al.* v. *Y. Gowdapa*, 5 C. W. R. 114 P. C.; *Rungama* v. *Atchama*, 4 M. I. A. 1; *Gopal Lall* v. *Musst Sree Chundraolee Buhoojee*, L. R. I. A. Supp. 131; *Surendra-*

been expelled from caste (*e*). The expulsion even of a begotten son is held to warrant an adoption in his place.

The following opinions of the Sastris fully recognize this principle.

"No one having a lawfully begotten son can adopt (*f*). Nor one having an adopted son living" (*g*).

The adoption of a son, while a son is living and retains the character of a son, is invalid (*h*).

In Madras, a person having adopted a son married a second wife, and in conjunction with her adopted a second son, the first adopted being still alive. The second adoption was held valid (*i*). But this cannot now be considered as law except where supported by special custom: the Judicial Committee, indeed, have said that it is settled law that a man having an adopted son living cannot adopt another (*k*).

The Dattaka Mimamsa, it is said, allows the adoption of a second son, the first living, with the consent of the first (*l*). But the author plainly disapproves the doctrine though he cannot deny the instances afforded by the Puranic writings, and it cannot now be considered part of the law.

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keshav Roy v. *Doorgasundari Dassee*, I. L. R. 19 I. A. 108; *Mohesh Narain* v. *Taruck Nath*, L. R. 20 I. A. 30.

(*d*) Steele, L. C. 181, 183.

The Peshwa, it is said, received a present of some lakhs of rupees on one occasion for allowing a double adoption. *Ibid.*

The existence of a daughter makes no difference. See *ex. gr.* the appointment in *Sri Raghunadha* v. *Sri Brozo Kishore*, L. R. 3 I. A., p. 156.

(*e*) Steele, L. C. 42.

(*f*) MS. 1659.

(*g*) MS. 1637. As to the invalidity of a plurality of sons sought by adoption, see above, p. 821. Yet one or two castes allow an adopted son for each wife, and traces of the same custom are pretty widely spread. See note (*e*).

(*h*) *Joy Chundro Raee* v. *Bhyrub Chundro Raee*, 1 M. S. D. A. R. 1849, p. 461. A grandson obstructs adoption equally with a son. See above, pp. 814, 821, 822.

(*i*) *See Rungamah* v. *Atchummah et al.*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.; Datt. Mim., sec. I., paras. 6, 12; Col. Dig., Book III., T. 295.

(*k*) *Gopeelal* v. *Musst. Chundraolee Buhajee*, L. R. I. A. Supp. 131; S. C. 11 B. L. R. 391 Pr. Co., 19 C. W. R. 12 C. R. approving *Rangamma* v. *Atchamma*, 4 M. I. A. 1. See above, p. 821. In 1 Str. H. L. 78 a second adoption is allowed, subsisting the first, but this is denied by Sutherland (2 Str. H. L. 85), though Jagannatha allows adopted sons of the several castes (various descriptions), Col. Dig., Book V., T. 308 Comm. *Mohesh Narain* v. *Taruck Nath*, L. R. 20 I. A. 30.

(*l*) MS. 1657. Passage not cited, but obviously Datt. Min., sec. I., para. 12.

The death of the son first adopted does not render the adoption of a second son made in his lifetime a valid one (*m*).

A second adoption on the death of the first adopted son without issue is good (*n*), as a son in the situation of the first adopted son could not exhaust the whole of the spiritual benefit which a son was capable of conferring on his deceased father (*o*).

A wife's pregnancy, though known, does not, it was said, prevent an adoption (*p*).

" A second son may be adopted in place of one whose adoption was illegal " (*q*).

A. 1. 3.—Fictitious Cesser of Paternal and Filial Relation.

" The insanity of a man's son enables him to adopt (*r*), or that of his adopted son " (*s*).

(*m*) *B. Camumah* v. *B. Chinna Venkatasa*, M. S. D. A. R. 1856, p. 20; *Veraprashyia* v. *Santanraja*, M. S. D. A. R. 1860, p. 168.

(*n*) *Rungamah* v. *Atchummah et al.*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.; *Shamchunder* v. *Narayani Dibeh*, 1 C. S. D. A. R. 209; *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. 71 P. C.; *Musst. Bhoobyn Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; *Ramabai* v. *Raya*, I. L. R. 22 Bom. 482.

(*o*) *Ram Soondur Singh* v. *Surbanee Dossee*, 22 C. W. R. 121. The adopted son simply takes the place of the begotten son, and his death is attended with the same consequences as that of the begotten son.

(*p*) *Nagabhushanam* v. *Seshamma Garu*, I. L. R. 3 Mad. 180, contrary to *Narayana Reddi* v. *Vardachala Reddi*, M. S. D. A. R. for 1859, p. 97. This decision is opposed to the general principle of adoption being a merely supplementary process to provide against orbation, but practice, as will have been seen, has diverged from first principles in many instances. *Hanmant Ramchandra* v. *Bhimacharya*, I. L. R. 12 Bom. 105.

(*q*) MS. 1665. " Illegal " here means void. Comp. *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at p. 393, 397.

(*r*) MS. 1654; comp. Manu IX. 169, and see above, pp. 814 ss.

(*s*) MS. 1702. The father is regarded as virtually sonless, seeing that the lunatic son cannot perform the requisite ceremonies for ensuring his repose in the other world, or satisfy the debt to the father's ancestors, see above, pp. 150, 544 ss. For the rules of the customary law as to the disqualifications of a son which justify adoption, see above, pp. 816, 817. It may perhaps be doubted whether under the present law expulsion from caste of itself causes such a moral death that the father of a man so expelled can adopt another, see above, p. 815; Steele, L. C. 185. The outcast may be restored, and unless there has been a formal and valid act of disinheritance (above, p. 549) he would claim the succession against the adopted son.

A. 1. 4.—EXISTENCE OF A WIDOW OF A SON OR GRANDSON.

" A father-in-law (son deceased) may adopt notwithstanding the existence of the daughter-in-law; but she cannot adopt without his permission (Brahman) " (*t*).

" A father-in-law is competent to adopt after his son's death notwithstanding the existence of his daughter-in-law, but the preferable course is to allow her to adopt " (*v*). " The son adopted by her, indeed even after an adoption by her father-in-law, succeeds to her property and that of her husband," though not apparently in the Sastri's opinion to that of the husband's father (*w*).

A. 1. 5.—CAPACITY IN RELATION TO AGE.

Though there is no exact restriction as to the adopter's age, it is inferred that he should not adopt until no hope remain of begetting a son (*x*). But this cannot be regarded now as more than a simply moral precept; the age is really unlimited by law (*y*), provided only it exceed that of the adopted son (*z*) in case of a male adopter (*a*), and the adopter has reached years of discretion (*b*). The last restriction is uncertain. In the *Mankar Case* (*c*) the Sastris were asked at what age a man hopeless of offspring might adopt. One says at sixteen, another at twenty. Others say no precise time is fixed by the Sastras, whence, probably, one replies that he may adopt when he pleases. Three of the nine sages insist strongly on all possible measures being first used to remove the disability, and one says that hope must

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(*t*) MS. 1668. The daughter-in-law is obviously the proper person to adopt a son to her deceased husband and herself. According to the authorities which give her the right to adopt, the competence of her father-in-law would introduce rival claimants to succession and sacra. But her dependence makes the assent of her father-in-law necessary to her performance of a religious act, such as adoption. *Vithal* v. *Bapu*, I. L. R. 15 Bom. 110; *Collector of Madura* v. *Mootho Ramalinga*, 12 M. I. A. 396.

(*v*) MS. 1660. See below.

(*w*) MS. 1666. *Lakshmi* v. *Vishnu*, I. L. R. 29 Bom. 410.

(*x*) Steele, L. C. 43. See above, pp. 812, 813, 814.

(*y*) *Ibid.* 182, 383.

(*z*) *Ibid.* 384; compare Cic. Pro. Domo. Ch. 13. 14.

(*a*) *Gopal* v. *Vishnu*, I. L. R. 23 Bom. 250.

(*b*) See above, p. 814, note (*d*); *Jumoona Dassaya* v. *Bamasoonderi Dassaya*, L. R. 3 I. A. 72.

(*c*) 2 Borr. R., at p. 102.

not be abandoned or a son adopted until the proposed father has reached old age.

The principle stated above (*d*), as to the imitation of nature, should prevent the adoption of a son at any rate by a boy under puberty; but this can hardly be stated with certainty as a rule of the positive law. Mr. Shamacharn, in the Vyavastha Darpana, seems to think that an adoption by a child between 8 and 15 may be good for religious, but not for civil, purposes; but the proposed severance seems inconsistent with the principles of the law of inheritance. It is opposed too to the principle laid down by Holloway, J., and apparently approved by the Privy Council (*e*), that the validity of an adoption is to be deduced by spiritual rather than by temporal considerations, that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent distribution of property a mere accessory to it.

Bengal Reg. X. of 1793, § 33, says that an adoption shall not be competent to a minor (*f*) of whose estate possession has been taken by the Court of Wards. The Sadr Court of Bengal held that this prevented the minor equally from giving a power to adopt (*g*). In other cases the power to adopt may be given at the ordinary age of discretion (*h*). The judgment last referred to discusses the evidence as to minority but does not expressly say that adoption by a minor is generally incompetent. No provision on this subject is made by Act XX. of 1864, which provides for the care of minors and the administration of their property in the Presidency of Bombay. Act IX. of 1875, fixing the age of majority in ordinary cases at eighteen, but in that of wards at twenty-one, does not affect capacity in relation to marriage or adoption.

"A man aged twenty may adopt" (*i*).

(*d*) Page 798 (note).

(*e*) *Sri Viradi Pratapa Raghunada* v. *Sri Brozo Kishoro Patta Deo*, 7 Mad. H. C. R. 301; I. L. R. 1 Mad. 69; 25 C. W. R. 291 (C. R.); L. R. 3 I. A. 154, 193.

(*f*) Under 18, Reg. XXVI. of 1793, sec. 2.

(*g*) *Anandmoyee Chowdrain* v. *Sheebchandar Roy*, S. D. A. R. for 1855, p. 218.

(*h*) *Jumoona Dassya* v. *Bamasoonderi Dassya*, 25 C. W. R. 235, I. L. R. 1 Cal. 289 (P. C.); S. C. L. R. 3 I. A. 72, citing *Rajendro Narain* v. *Saroda Soondaree Debia*, 15 C. W. R. 548. Whether adoption by a minor without consent of the Court of Wards is wholly void is questioned in *Musst. Anundmoyee Chowdhoorayan* v. *Sheeb Chunder Roy*, 9 M. I. A. 287.

(*i*) MS. 1623. See above, p. 814, note (*d*).

A. 1. 6.—Capacity in Relation to Intelligence.

An insane man may, it is said, adopt with the consent of his kinsmen. The adoption is generally made by his wife under an assumed authority sanctioned by the kinsmen or the caste (*k*).

An adoption by a person in a state of insensibility (*i.e.* disturbed mind) from dangerous illness, by verbal declaration, without performance of the prescribed ceremonies, was held invalid (*l*). The transactions of sick and dying men always call for close scrutiny, and the Judicial Committee have said that in a case of adoption or will by a dying man the jealous requisitions of the law as to the proof of acts of persons done *in extremis* are fully to be complied with (*m*).

"The adopter must be able to ask for the son, to accept him, and to smell his head" (*n*).

A. 1. 7.—Capacity in Relation to Bodily State.

A person disqualified to inherit cannot adopt, and thus secure to a stranger the right to a share which is allowed to the natural-born son (*o*).

In case No. XX., under the head of Adoption in Macnaghten's Hindu Law (*p*), the Sastri says a leper is incompetent to adopt. In case No. XXI. the Sastri thinks competence may be regained by penance, and with this Macnaghten agrees; but unless leprosy is of a virulent form, it does not act as a disqualifying element either in inheritance (*q*) or in adoption (*r*). An impotent man it

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(*k*) Steele, L. C. 43, 182, 382.

(*l*) *Bullubkant Chowdree* v. *Kishenprea Dassee*, 6 C. S. D. A. R. 219.

(*m*) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A. 429, 437.

(*n*) MS. 1662. The authority for the last-mentioned ceremony is not quoted. In performance it resembles the uttering of a prayer or formula in a whisper. The smelling of the head (aghrana), however, is a mode of salutation used in receiving a child or younger brother after any prolonged absence. It is practised amongst some of the South-Sea Islanders. It may have become a part of the ceremony through a real or supposed capacity thus to distinguish a member of one's own gotra. As to the extreme olfactory sensibility of some races, see Tyler's Anthropology, pp. 2, 70, and Letourneau's Sociology, p. 75.

(*o*) Mit., Chap. 2, sec. 10, para. 11; above, p. 795.

(*p*) Vol. 2, p. 201.

(*q*) See above, pp. 541, 544.

(*r*) *Mohunt Bhagwan Ramanuj Das* v. *Das*, L. R. 22 I. A. 94.

is said cannot adopt, at least until his incapacity has been proved by marriage (*s*). His religious duty no doubt is to beget a son if he can; but the allowance of adoptions by bachelors and widowers shows that the religious obligation is not accompanied by a legal incapacity. A man who is blind, deaf, dumb, or diseased may adopt (*t*).

A. 1. 8.—Capacity in Relation to Religious State.

Adoption by one who has renounced the world and devoted himself to a life of study and asceticism ought not, according to theory, to be possible, but the restriction is now only speculative (*v*).

Pollution from the death of a relative incapacitates during its continuance for adoption (*w*).

"A person *in extremis* is not so affected with impurity by a death in the family as to be incompetent to adopt" (*x*).

A. 1. 9.—Capacity in Relation to Caste Connection or Exclusion.

A man degraded from caste cannot adopt (*y*) during his exclusion.

The Mitakshara denies the capacity to adopt generally to a man himself disqualified for inheritance (*z*), and specifies loss of caste in particular as a cause of disinherison. This extends equally to women as to men (*a*). The only persons who can take the father's place in such cases are the legitimate issue and the son begotten

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(*s*) Steele, L. C. 43.

(*t*) Steele, L. C. 43.

(*v*) See above, pp. 524, 537, 835; Apast., Pr. II., Pat. 9, Kh. 21, para. 19, Kh. 23.

(*w*) *Ramalinga Pillai* v. *Sudasiva Pillai*, 1 C. W. R. 25 Pr. Co. The periods of pollution vary with the caste and the nearness of relationship, as noticed above, p. 478. For Brahmans the extreme time is 10 days, for Kshatriyas 12, for Vaisyas 16, for Sudras 30 days.

(*x*) MS. 1674.

(*y*) Steele, L. C. 43, 182, 382.

(*z*) Mit., Chap. II., sec. X., para. 11; see above, p. 880.

(*a*) *Loc. cit.*, paras. 8, 9.

on the wife by a kinsman (*b*). The latter is not now recognized, so that the man born blind or deaf is deprived of all resource. Loss of caste is now declared by statute not to involve loss of inheritance, and by analogy the out-cast ought perhaps to have power to adopt, but the whole position of the out-cast retaining his heritable rights is so anomalous that no very confident opinion can be offered on this subject (*c*). The questions that can arise out of it must be very few, as an out-cast could scarcely obtain a son in adoption.

A. 1. 10.—In the Case of Particular Castes.

In the case cited above, p. 827, the Sastri said that a daughter-in-law could not adopt while the brothers of her deceased husband's father survived (*d*).

A. 1. 11.—Vaisyas.

A Vaisya who has undergone the ceremony of *vibhut vida* is capable of adopting a son. The Hindu Law does not expressly prohibit it. A contrary custom is to be proved by satisfactory evidence (*e*).

A. 1. 12.—Sudras.

" An unmarried Sudra may adopt " (*f*).

A. 1. 13.—Jains.

The Jains generally submit to the Hindu law of adoption though denying important doctrines. Their capacity to adopt in the

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(*b*) Col. Dig., Book V., T. 334.

(*c*) Comp. the remarks above, pp. 815, 816, and Manu. IX. 125, as to the precedence of the first-born son.

(*d*) MS. 281, but on this see the note *loc. cit.*

(*e*) *Mhalsabai* v. *Vithoba Khandappa*, 7 Bom. H. C. R. App. 26. "Vibhut vida " is a renunciation of worldly affairs and interests analogous to that prescribed by the Smritis for Brahmanas, see Manu VI.; Gaut. III.

(*f*) MS. 1653. See above, pp. 824-5.

absence of custom is therefore governed by the ordinary rules (*g*). They can, however, adopt a daughter's son, and their widows enjoy the right of adoption without the permission of their husbands or the consent of their heirs (*h*).

A. 1. 14.—Bhateles.

"The custom of the Bhatele caste prevents adoption when there is a kinsman in existence" (*i*).

A. 1. 15.—Garasias.

In the Hindu caste of Chudasama Gamati Garasias adoption is recognized (*k*).

A. 1. 16.—Sannyasis and Gosavis.

"All classes may adopt with due ceremonies, Gosavis included" (*l*).

A married Gosavi took a boy (Talabda Koli) in adoption, on a promise to settle property on him. This was carried out by his widow about thirty years after the husband's death, and was disputed by his relatives, but was held sufficient (*m*).

A. 2.—Adoption by a Male—By Delegation.

A. 2. 1.—By Means of Wife.

"A woman may adopt with her (living) husband's order (*n*).

(*g*) See above, p. 924, note (*h*); below, sec. III. A. 3. *Chotay Lall* v. *Chunnoo Lall*, L. R. 6 I. A. 15; *Amava* v. *Mahadgauda*, I. L. R. 22 Bom. 416; *Ambabai* v. *Govind*, I. L. R. 23 Bom. 257.

(*h*) *Sheo Singh Rai* v. *Musst. Dakho*, L. R. 5 I. A. 87; S. C. I. L. R. 1 All. 688.

(*i*) MS. 405.

(*k*) *Verabhai* v. *Bai Heraba*, I. L. R. 27 Bom. 492.

(*l*) MS. 1678. See 2 Str. H. L. 133. Instances will be found below of adoptions by Prabhus, by Lingayats, and others; and also above, p. 347 ss.

(*m*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*n*) Reply of a Sastri in the *Mankar Case*, 2 Borr. R., at p. 102.

It is not lawful for her to do so without the permission of her husband" (*o*).

If the husband's death approaches the wife may obtain his permission and afterwards adopt as a widow (*p*).

A. 2. 2.—By Means of Widow.

If a man begins the ceremonies of adoption, and dies before completing them, his widow might complete them (*q*).

A. 2. 3.—By Means of Daughter-in-Law.

In case of lunacy of a husband the wife of the lunatic may adopt with her father-in-law's sanction (*r*).

The Sastri in one case held a "daughter-in-law bound by her father-in-law's engagement that she should adopt" a specified sapinda (*s*). This was after the father-in-law's death. It is not clear whether the adoption was to be to the promisor or to his deceased son. If to the former he could not properly thus deprive his dead son of his due sraddhas, and the delegation was altogether questionable if meant to operate during the father-in-law's life; equally questionable as an attempt to bind the widow of his son after his death.

(*o*) Reply of Sastris of the Sadr Court in *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. R., at p. 211. See the Viramitrodaya and the Dattakakaustubha to the same effect, quoted in *Narayan* v. *Nana*, 7 Bom. H. C. R., at p. 159, and Col. Dig., Book V., T. 273 Comm. Also Vasishtha XV. 5.

(*p*) 2 Str. H. L. 88; MS. 1661. Such cases as these, though sometimes regarded as instances of delegation, are more properly referred to implied authority to adopt given to the widow.

(*q*) 2 Str. H. L. 88; MS. 1661. Such cases as these, though sometimes regarded as instances of delegation, are more properly referred to implied authority to adopt given to the widow. *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590; *Subbaraya* v. *Subbammal*, I. L. R. 21 Mad. 497.

(*r*) See above, sec. III. A. 1. 6. As to adoption by a wife on behalf of a disqualified person, as an insane husband incapable of appointing her, see above, p. 817. She ought to adopt to her husband in the case in the text. Comp. *Ramjee Hurree* v. *Thukoo Baee*, 2 Borr. R. 485; *Vithoba* v. *Bapu*, I. L. R. 15 Bom. 110; *Lakshmibai* v. *Vishnu*, I. L. R. 29 Bom. 410.

(*s*) MS. 1682; *Y. Venka Reddi* v. *G. Soobha Reddi*, M. S. D. A. Dec. 1858, p. 204.

A. 3.—Restrictions on Adoption to Persons Deceased.

Spiritual benefits are not the only ground of adoption. The Jains recognize adoption though they do not practise the Sraddha or Paksha ceremonies (*t*). Adoption rests generally on the advantage of having a son to perform funeral rites, which the Jains deny. But though the Hindu law of succession is applicable to them, yet it cannot be further extended so as to allow adoption to dead parents or sanction the exercise of a power of adoption by another to dead persons (*v*) through a fictitious gift.

A son cannot, it was said, be adopted to the great-grandfather of the last taker after the lapse of several years, when all the spiritual purposes of a son, according to the largest construction of them, should have been satisfied (*w*). This, however, is the law in the Bombay Presidency. In the case of *Kannapalli* v. *Pucha Venkata* (*x*) the Judicial Committee have approved of the view expressed by Mitter, J., in *Ram* v. *Surbana* (*y*), that a married son did not exhaust all the spiritual benefit which a son could confer on his father.

A. 4.—Qualifications of the Power to Adopt Arising from Family and Political Relations.

A. 4. 1.—Consent of Wife.

A wife's consent to adoption by her husband is not indispensable to the validity thereof (*z*). Adoption is the act of the husband alone. The wife may join in it (*a*), and ought to do so for a full compliance with the religious law (*b*). Her association, however,

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(*t*) See above, p. 533. *Sheo Singh Rai* v. *Musst. Dakho*, L. R. 5 I. A. 87.

(*v*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R. 241, 265.

(*w*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; Beng. S. D. A. R. 1856, p. 122; *Ramkrishna* v. *Shamrao*, I. L. R. 26 Bom. 526. A narrower limitation exists as held in the case of Jains. See above.

(*x*) L. A. 33 I. A. 145, 154.

(*y*) 22 W. R. 121, 123.

(*z*) *Alank Manjari* v. *Fakir Chand*, 5 C. S. D. A. R. 356.

(*a*) *See Rungamah* v. *Atchummah et al.*, 4 M. I. A. 1; S. C. 7 C. W. R. 57 P. C.

(*b*) Colebrooke says that according to the Mitakshara, though the mother's consent may perhaps be essential to the gift, it is not to the taking of a son in adoption. Mit., Chap. I., sec. XI., para. 9, note. See below, sec. V., as to the gift.

is not indispensable, and an adoption is valid even when it takes place against her express wishes. After her husband's death, she can give her son in adoption provided there is no express prohibition by the husband (*c*).

The Poona Sastris replied in the *Mankar Case* (*d*) that the husband ought to consult his wife on a proposed adoption, but that the right belongs to him alone.

A. 4. 2.—Family Relations—Kindred.

The existence of brothers or other kinsmen does not affect a man's capacity to adopt. It is said, indeed, that in a few castes the parents or an undivided brother (*e*) may object to a particular adoption, and in many the assent of near relatives must be asked (*f*), but it is not provided that their disapproval shall invalidate the adoption (*g*). They must be invited to take part in the ceremony, and a son of a brother or other near relative is to be chosen by preference, but these obligations are of a simply religious character.

A. 4. 3.—Pupillage.

The sanction of the Court of Wards is necessary to an adoption by a minor under its care (*h*). Act XX. of 1864 makes no provision on this subject. It provides for the guardianship of a minor's person and the administration of his estate, but does not declare him generally incapable of jural acts. In the Bombay Presidency therefore a boy under guardianship, but capable of religious acts, may possibly adopt or marry, though he may not deal with his property (*i*).

(*c*) *Jogesh* v. *Nritya*, I. L. R. 30 Cal. 965.

(*d*) 2 Borr. R., at p. 102.

(*e*) Steele, L. C. 385, 386. The consent may be a necessary restriction when a minor proposes to adopt—especially the consent of his parents.

(*f*) Steele, L. C. 183, 385.

(*g*) Steele, L. C. 45.

(*h*) See above, sec. III. A. 1. 5, p. 845. *Jumoona Dassya* v. *Bamasoonderi Dassya*, L. R. 3 I. A. 72.

(*i*) See above, A. 1. 5; and below, B. 3.

A. 4. 4.—CONSENT OR ACQUIESCENCE OF THE SOVEREIGN.

"The writing of documents is insignificant (not essential). The Sastras do not require the permission of Government to be obtained for an adoption" (*k*). But "they enjoin that a proposed adoption should be notified to the Government" (*l*). "The object of applying to Government is that it may continue to the adopted son Watans, &c., held from it. When the seat of Government is distant intimation may be made to the local officer" (*m*). Even notice to the ruling power is not necessary to validate an adoption (*n*), but it is so usual that an omission of it in an important case casts suspicion on the transaction. A want of sanction by the ruling power is not sufficient to invalidate adoption duly made with sufficient ceremonies (*o*). The sanction of the ruling power to an adoption by a Kulkarni or his widow, or by a coparcener in Kulkarniship or his widow, is not necessary to give it validity, nor has Government a right to prohibit or otherwise intervene in such adoption (*p*).

In several cases it seems to have been supposed that the sanction of the Government was necessary to an adoption by a widow where it would not have been essential to an adoption by her deceased husband (*q*). The authorities, however, on which the widow's power rests impose no such condition on its exercise.

Bombay Act II. of 1863, sec. 6, cl. 2, as to the non-recognition of adoption by a Court relates only to a question of assessability of land when raised between Government and the claimant by adoption (*r*). It is not intended to regulate the enjoyment of an estate as amongst the heirs of the original grantee.

(*k*) MS. 1675.

(*l*) MS. 1677, 1683.

(*m*) MS. 1711; 2 Str. H. L. 87.

(*n*) *Sutroogun Sutputty* v. *Sabitra Dye*, 2 Knapp, p. 287; S. C. 5 C. W. R. P. C. 109.

(*o*) *Bhaskar Buchajee* v. *Narroo Ragonath*, Bom. Sel. R. 25.

(*p*) *Ramachandra Vasudev* v. *Nanaji Timaji*, 7 Bom. H. C. R. 26 A. C. J.; *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd ed.); *Narhar Govind* v. *Narayan Vithal*, I. L. R. 1 Bom. 607; *Huebutrao Mankur* v. *Govinrao Mankur*, 2 Borr. 75, 83 (2nd ed.); *Alank Manjari* v. *Fakir Chand*, 5 C. S. D. A. R. 356.

(*q*) See below, B. 3. 36.

(*r*) *Vasudeo Anant* v. *Ramkrishna*, I. L. R. 2 Bom. 529.

THE CAPACITY TO ADOPT AND ITS EXERCISE.

B.—ADOPTION BY FEMALES.

B. 1.—NO ADOPTION BY A MAIDEN.

The Hindu Law imposes on parents the duty of getting their daughters married. It does not contemplate children as necessary to women on their own account (*s*). Even a married woman or a widow adopts only for her husband, and herself takes but an incidental benefit save under the exceptional custom allowing a kritrima adoption to the woman alone in Maithila. For the unmarried woman there is no adoption; nor in strictness for any woman except to her husband.

B. 2.—ADOPTION BY A WIFE.

A wife only can receive authority to adopt (*t*) either as wife or as widow. *She can adopt only as the representative of her husband, and under a real or assumed authority from him.* This is generally admitted (*v*), and is established by the following cases.

B. 2. 1.—ADOPTION BY A WIFE UNDER EXPRESS DELEGATION.

In *Thakoo Baee Bhide* v. *Ruma Baee Bhide* (*w*) the Sastris quote from Vasishtha—" A husband's commands to adopt are required for a married woman, but for a widow to adopt without such command the permission of the father, or if he be not alive then of the (jnati) relatives must be obtained."

The express authority of her husband is indispensable, if a wife adopts in his lifetime (*x*).

(*s*) See above, p. 790; below, B. 3. 13.

(*t*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R. 241.

(*v*) See *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at p. 501; *Puttu Lall* v. *Parbati Kunwar*, L. R. 42 I. A. 155; *Jai Singh Pal* v. *Bijai Pal*, I. L. R. 27 All. 423.

(*w*) 2 Borr. R., at p. 492.

(*x*) *Narayan* v. *Nana*, 7 Bom. H. C. R. A. C. J. 153, 174; *Bayabai* v. *Bala Venkatesh*, 7 Bom. H. C. R. App. i.; *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom., at p. 380; *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498.

B. 2. 2.—Implied Delegation.

This arises in such cases as those of a husband beginning the ceremonies of adoption with the participation of his wife. In the event of his becoming helpless she may complete the adoption. Any unequivocal indication of his assent would probably be taken as equivalent to an express command. This may be gathered from the cases in the next sub-section.

B. 2. 3.—Conditions of Effective Delegation.

The husband directing his wife to adopt must be in a condition with regard to freedom from loathsome disease, such that he could himself adopt. So also as to his relations to his caste. In case of insanity his assent or command is assumed by the rules of several castes, his place being taken by the kinsmen in controlling the choice made by the wife (*y*).

A husband may authorize his wife to adopt a particular child, named by him, or a child selected by her (*z*).

B. 3.—Adoption by a Widow.

"The permission expressed or implied of her deceased husband is requisite to enable a widow to adopt. An implied permission arises from a known intention of the deceased to adopt. Failing this she must obtain the permission of her father-in-law or other relative" (*a*). This permission is merely substitutive in default of any intimation by the deceased husband of his wishes. When he has clearly signified his wishes, these prevail over the wishes either of the widow or of the relatives, as shown farther on.

The husband's sanction must have been given, according to the Mitakshara, as understood by Colebrooke (*b*), because otherwise the adoption could not benefit him. But Colebrooke says the sanction may be replaced by that of the husband's kindred (*c*).

(*y*) Steele, L. C. 43, 182.

(*z*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91; *Ry Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. S. D. A. Dec. 101.

(*a*) MS. 1662.

(*b*) 2 Str. H. L. 91; so Ellis, *ibid.*

(*c*) *Ibid.*, and Mit., Chap. I., sec. XI., p. 9, notes.

Ellis thinks that the prior assent of the husband may not be necessary amongst Sudras; but it must be either expressed or presumed.

The capacity of a widow to adopt must thus, like that of a wife, be drawn from a real or an assumed authorization on the part of the husband. If he has intimated a wish that there should be no adoption none can be made (*d*). If he has left no direction at all, there can, according to the Bengal Law, be no adoption. According to the law of Bombay his assent may, in such a case, be assumed; but the widow's choice is controlled by the kinsmen, at least in a united family (*e*). The consent or authority of the husband has been pronounced indispensable to an adoption by a widow after his decease, in Bengal (*f*), in the N. W. Provinces (*g*), and in Madras (*h*), but in Madras it may now be replaced by the assent of the undivided members of the husband's family, as in Bombay (*i*). In Mithila the assent of the husband must be given at the time of the adoption, and therefore a widow cannot receive a son in adoption, according to the Dattaka form (*k*).

A Jain widow can adopt without her husband's authority or that of his kinsmen (*l*).

A widow in Bengal on the other hand cannot adopt without her

(*d*) *The Collector of Madura's Case*, 12 M. I. A., at p. 443; *Bayabai* v. *Bala Venktesh*, 7 Bom. H. C. R., at pp. xvii. ss. App.

(*e*) *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at pp. 502, 503; *Collector of Madura's Case*, 12 M. I. A. 397, 442; *Patel* v. *Chunilal*, I. L. R. 15 Bom. 565.

(*f*) *Musst. Tara Munee Divia* v. *Dev Narayan et al.*, 3 C. S. D. A. R. 387; *Huradhun Mookurjia* v. *Muthoranath Mookurjia*, 4 M. I. A. 144; S. C. 7 C. W. R. 71 P. C.; *Sutroogun Sutputtee* v. *Savitra Dye*, 2 Knapp, 287; S. C. 5 C. W. R. P. C. 109; *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; *Juggodumba Debea* v. *Moneruth Mookerjea* C. S. D. A. R. for 1858, p. 834; *Soorodhunnee Debea* v. *Doorgapersad Roy*, C. S. D. A. R. for 1858, p. 995; *Jummoona Dasya* v. *Bamasoondari D.*, I. L. R. 1 Cal. 289; *Musst. Sheboo Koeree* v. *Joogun Singh*, 8 C. W. R. 155 (a case of Kritrima adoption). See the Datt. Mim., sec. I., para. 15; Col. Dig., Book V., T. 273; 2 Str. H. L. 84, 92, 96; 1 Macn. H. L. 66; 2 Macn. H. L. 175, 182, 189; Macn. Con. H. L. 125, 155, 158.

(*g*) *R. Haimun Chull Singh* v. *Koomer Gunsheam Sing*, 2 Knapp, 203; S. C. 5 C. W. R. P. C. 69; *Thakur Oomrao Singh* v. *Tha Mahtab Koonwar*, 2 Agra Rep. 103; *Jairam Dhama* v. *Musan Dhama*, 5 C. S. D. A. R. 3.

(*h*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91.

(*i*) *Shri Raghunadha* v. *Shri Brozo Kishore*, L. R. 3 I. A. 154, 191.

(*k*) *Collector of Madura* v. *Moottoo Ramlinga*, 12 M. I. A. 396.

(*l*) *Sheo Singh Rai* v. *Musst. Dakho*, L. R. 5 I. A. 87; *Asharfi* v. *Rup*, I. L. R. 30 All. 197.

husband's consent, even though his heirs consent to the adoption (*m*).

Similarly an adoption by a widow was set aside for want of proof of authority for the adoption given by her husband (*n*), in the N. W. Provinces. Adoption, without the husband's authority, gives to the adoptee, before or after the widow's death, no right to property inherited by her from her husband (*o*), where this law prevails.

Where a widow had adopted a boy without authority from her husband and the consent of the Sapinda had been obtained to an adoption purporting to be made in pursuance of an alleged authority and had been influenced by undue considerations, the adoption was held invalid for want of authority (*p*).

In the case of *Patel Vandrawan Jakesin* v. *Chunilal* (*q*) it has been held that in the Marhatta country, as well as in Gujrat, a widow was competent to adopt without the consent of her husband's kindred if she received her power *bona fide* for religious purposes, and in *Vithoba* v. *Bapu* (*r*) it has been laid down that the widow of a coparcener can make a valid adoption if permitted by the father-in-law irrespective of the consent of other coparceners.

The rule, however, as to an express authority is, as the Judicial Committee have shown, less exacting than the Dattaka Mimamsa declares (*s*).

The existence of brothers is not an obstacle to adoption under an authority from a deceased husband (*t*). A Hindu may execute an instrument giving authority to adopt when he has attained the

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(*m*) *Raja Shumshere Mull* v. *Ranee Dilraj Konwar*, 2 C. S. D. A. R. 169.

(*n*) *Musst. Thakorain* v. *Mohun Lall*, N. W. P. S. D. R. N. S. Pt. I., 1863, p. 352.

(*o*) *Chowdry Padom Singh* v. *Koer Udaya Singh*, 12 C. W. R. P. C. 1; S. C. 2 Beng. L. R. 101, P. C.; S. C. 12 M. I. A. 350; *Musst. Oodey Koowur* v. *Musst. Ladoo*, 15 C. W. R. 16, P. C.

(*p*) *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala*, L. R. 7 I. A. 173; *Venkamma* v. *Subrahmania*, L. R. 34 I. A. 22.

(*q*) I. L. R. 15 Bom. 565; *Rakhmabai* v. *Radhabai*, 5 B. H. C. R. 191, A. C. J.

(*r*) I. L. R. 15 Bom. 110.

(*s*) See below, B. 3. 1.

(*t*) 2 Macn. H. L., p. 180 (Chap. VI., Case 5); *Sri Raghunada's Case*, *supra*, p. 857 note (*i*); below, B. 3. 1. *Hurkisondas* v. *Mankorebai*, L. R. 34 I. A. 107; S. C. I. L. R. 29 Bom. 81.

ordinary age of discretion (*v*). This the Judicial Committee seem to have considered the age of majority by law, which would now be eighteen years (*w*). But if the capacity to give authority arises at the same time with the capacity to adopt, that would by some Hindu lawyers be fixed at the age when religious ceremonies in general can be fully performed (*x*).

It seems that a state of indivision between a son and his father does not affect the validity of an authority given by the former. In the case of *Gobind Soondaree Debia* v. *Juggodumba Debia* (*y*) the suit was on behalf of a son adopted on an alleged authority from a husband who had died nine years before his father. The authority was discredited, but the discussion shows that the Court thought that if genuine it would be valid. This has an important bearing on the right of the widow, where, as in Bombay, the assent of the deceased husband is presumed.

B. 3. 1.—Adoption by a Widow under Express Authority Given by Act *Inter Vivos*.

An adoption thus authorized needs no sanction by the relatives (*z*). A widow may adopt with the consent of her husband obtained before his decease or with that of his relations thereafter (*a*).

An authority to adopt under the husband's hand, though not complete as a testamentary disposition, is yet evidence of a declaration of fact (*b*).

(*v*) *Jamoona Dasya* v. *Bamasoonderai Dasya Chowdhrani*, L. R. 3 I. A. 72, 78.

(*w*) Act IX. of 1875, sec. 3. The Act does not, however, affect adoption, see sec. 2.

(*x*) See *Rajendro Narain Lahoree* v. *Saroda Sundaree Dabee*, 15 C. W. R. 548. The attempt to postpone the son's capacity beyond his attainment of majority approved in *R. Huroosoondery* v. *Coomar Kristonath*, 1 Fult. 393, would not now be sustained.

(*y*) 3 C. W. R. 66; S. C. 15 *ibid.* 5 Pr. C.

(*z*) See *Bhasker Bhuchajee* v. *Naroo Ragoonath*, Bom. Sel. R., p. 24 (1st ed.); above, B. 3.

(*a*) *Ry Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. S. D. A. R. 101; *Arundadi Ummal* v. *Kupumall*, 3 Mad. H. C. R. 283; *Collector of Madura* v. *Mutu Ramalinga Sathupatty*, 1 Beng. L. R. 1 P. C.; S. C. 12 M. I. A. 397; S. C. 2 Mad. H. C. R. 206; *Mutsaddi Lal* v. *Kundun Lal*, L. R. 33 I. A. 55.

(*b*) *Brojo Kishoree Dassee for Radhanath* v. *Sreenath Bose for Judonath*; 8 C. W. R. 241; S. C. 9 C. W. R. 463; *Mutsaddi Lal* v. *Kundun Lal*, *supra*.

Even in the case of the husband's long absence it was said by the castes in Poona and Khandesh that a wife could adopt only with the written authority of her husband. If the absence was so prolonged as to raise a presumption of death the wife might adopt as a widow (*c*).

Amongst the Poona Brahmans a widow, it was said, must have her husband's order, and must also consult h's kinsmen. In other castes it was said the consent of the relatives and of the caste, in some that the consent of the relatives alone, would supply the place of the husband's order (*d*). The leading doctrines on the widow's substitutionary power of adoption have been thus stated by the Judicial Committee :— " Mr. Colebrooke's note on the Mitakshara (Chap. I., sec. XI., art. 9), which has been much discussed, clearly involves three propositions—First, that the widow's power to receive a son in adoption, subject to some conditions, is now admitted by all the schools of Hindu Law except that of Maithila; second, that the Bengal (or Gaura) school insists that the widow must have the formal permission of her husband in his lifetime; third, that some at least of the other schools admit the adoption to be valid, if made by the widow with the assent of her husband's kindred. The first two propositions are admitted; but it has been argued for the appellants that on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta school, in which the treatise called the 'Mayukha' is the predominant authority. Balam Bhatta, however, whom he cites as an authority for a power of adoption in the widow, wider even than that expressed in the third proposition, was a commentator of the Benares school. And the several notes of Mr. Colebrooke at pp. 92, 96, and 115 of the second volume of Strange's Hindu Law seem to their Lordships to show conclusively that he considered the doctrine embodied in the third proposition to be common to the followers of the Mitakshara in the Benares as well as in the Mahratta school, and as such to be receivable as the law current in the Zillah Vizagapatam, which lies within the Northern or Andra Division of the Dravada Country."

" Again Sir Thomas Strange's statement of the law in his work,

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(*c*) Steele, L. C. 187. A written authority does not seem legally indispensable, see below.

(*d*) Steele, L. C. 47, 187.

vol. I, p. 79, is clear and unambiguous. He says: ' Equally loose is the reason alleged against adoption by a widow, since the assent of the husband may be given, to take effect (like a will) after his death; and according to the doctrine of the Benares and Maharashtra schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians; but it is otherwise by the law that governs the Bengal Provinces " (*e*).

According to the Benares (Mitakshara) law it was said that the authority of a husband to a widow for adoption could not be replaced by that of his heirs after his death (*f*). The Dattaka Mimamsa, the Pandits declared, prevailed over the works which allow a substitutive authority (*g*). Macnaghten held the same view; but Colebrooke maintained the sufficiency of the kinsmen's sanction, and his doctrine was approved by the Judicial Committee in the *Collector of Madura's Case* (*h*).

There is no stereotyped form of authority to adopt (*i*). It may be given either orally or in writing (*k*).

A deed, containing no words of devise, nor intended by testator to contain any disposition of his estate, except so far as that results from adoption of a son under it, is only a deed of permission to adopt, and not of a testamentary character (*l*).

Defects in evidence relating to the execution of a deed authorizing adoption are less material than as to the disposition of a property by will (*m*).

B. 3. 2.—Adoption by Widow Under Authority Given by Will.

A will giving power is sufficient authority (*n*).

A will of a childless Hindu, giving power to adopt, though

(*e*) *The Collector of Madura* v. *Muttoo Ramalinga Sathupatty*, 12 M. I. A., pp. 432—33.

(*f*) *Raja Shumshere Mull* v. *Ranee Dilraj Koonwur*, 2 C. S. D. A. R. 169.

(*g*) See Datt. Mim., sec. I., para. 16; Viramitrodaya, Transl., p. 116.

(*h*) 12 M. I. A., at p. 432.

(*i*) *Pritima Soondaree Chowdrain* v. *Anund Coomar Chowdhry*, 6 C. W. R. 133 C. R.

(*k*) 2 Str. H. L. 95, 96; *Gudadhur Pershad Tewaree* v. *Soondur Koomaree Debea*, 4 C. W. R. 116 P. C.; *Mutasaddi Lal* v. *Kundun Lal*, L. R. 33 I. A. 55.

(*l*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.

(*m*) *Jumoona Dassya* v. *Bamasoondari Dassya*, 25 C. W. R. 235; S. C. L. R. 3 I. A. 72.

(*n*) *Sayamalal Dutt* v. *Soudamini Dasi*, 5 Beng. L. R. 362.

opposed to the interests of the widow or of the next reversionary heirs of the testator, is not inofficious (*o*).

A permission given for adoption of a boy as co-heir with a son cannot be converted into one for adoption after the death of the natural son (*p*). It is really void from the first (*q*).

B. 3. 3.—Positive Command to Adopt.

When a husband has given a positive command, the widow's capacity to adopt appears in its strongest form as opposed to the wishes or interests of the kinsmen who will be affected by the adoption (*r*). The only question that can be raised in such a case is that of whether adoption is compulsory. The duty does not seem to be doubted, but in recent times it has come to be regarded as one that the Courts cannot properly enforce or at least not within any particular time (*s*). A widow directed by her deceased husband to adopt is bound to give effect to his wishes before she can claim under the deed of permission framed chiefly for the benefit of the son she may adopt (*t*).

A direction cannot be carried out contrary to the law, as *ex. gr.* while a son of the husband is living (*v*).

B. 3. 4.—Choice Prescribed.

It is common for a husband authorizing an adoption to specify the child he wishes to be taken (*w*). Should that child die or be refused by his parents the authority would still be held to warrant the adoption of another child unless indeed he had said " such a

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(*o*) *S. M. Sarroda Dossee* v. *Tin Cowry Nandy*, 1 Hyde R. 223.

(*p*) *Joy Chundro Raee* v. *Bhyrub Chundro Raee*, C. S. D. A. R. 1849, p. 461.

(*q*) *See Padma Coomari Debea* v. *Court of Wards*, L. R. 8 I. A. 229; and B. 3. 3. below.

(*r*) See above, B. 3. and 3. 1.

(*s*) See above, pp. 813, 814; and below, Omission of Adoption.

(*t*) *Musst. Subudra Chowdryen* v. *Goluknath Chowdry*, 7 C. S. D. A. R. 143. See above, p. 813; and below, B. 3. 15; B. 3. 37.

(*v*) 2 Macn. H. L., p. 199 (Chap. VI., Ca. 19); *Bhoobun Moyee's Case*, 10 M. I. A. 279.

(*w*) See above, pp. 813, 814.

child and no other." The presumption is that he desired an adoption, and by specifying the object merely indicated a preference (*x*).

A Hindu by will expresses a wish that his wife, after his death, should adopt the second son of a person, who had only one son born alive at testator's death. The widow is not bound to wait indefinitely till the person begets a second son, but may adopt a boy of her own choice under the power (*y*).

When a husband authorizes the adoption of a particular boy named by him, his widow or any of his widows (if there are more than one) cannot adopt any other boy so long as the boy thus designated is alive (*z*), unless his adoption cannot be carried out (*a*).

When authority has been given to a widow to adopt the son of a particular person it is exhausted by his adoption. If he die it will not warrant another adoption to replace him (*b*).

A Hindu cannot authorize any other person to adopt conjointly with the widow or by herself on widow's death. The widow has the right to adopt, but her selection of the boy may be restricted by the choice of others nominated by the husband in his will (*c*).

B. 3. 5.—AUTHORITY GIVING QUALIFIED DISCRETION.

The husband sometimes defines the class out of which the adopted son is to be taken, and failing such, names another class without prescribing the individual to be adopted. The same principles of construction would probably be applied in this as in the last case.

An instance of a qualified discretion is to be found in the deed of permission given in *Musst. Bhoobun Moyee Debia's Case* (*d*).

(*x*) *Kanuapalli Suryanarayana* v. *Pucha Venkata Ramana*, L. R. 33 I. A. 145.

(*y*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91. See above, p. 813, Note (*t*).

(*z*) *Ramchandra* v. *Bapu Khandu*, Bom. H. C. P. J. 1877, p. 42. We may add "and not given in adoption." See below, secs. IV. V.

(*a*) *Lakshmibai* v. *Rajaji*, I. L. R. 22 Bom. 996.

(*b*) *Purmanand Bhuttacharuj* v. *Oomakunt Lahoree and others*, 4 C. S. D. A. R. 318; *Gour Nath Choudhree* v. *Anopoorna Choudhoorain*, C. S. D. A. R. for 1852, p. 332.

(*c*) *Amrito Lal Dutt* v. *Surnomoye Dasi*, L. R. 27 I. A. 128.

(*d*) 10 M. I. A., at p. 281. The same permission is conditional on the death of the son by birth, and provides for successive adoptions.

In this the selection of a son is directed to be made by preference from the executant's own gotra, but alternatively from another gotra.

B. 3. 6.—AUTHORITY GIVING COMPLETE DISCRETION AS TO PERSON.

This is probably the most common form, and it has been held that under it the widow has a large discretion—or even an unlimited one—as to whom she will adopt or whether she will adopt at all (*e*).

Such an unfettered discretion as to the boy to be adopted was granted by the Anumati patra, or authority executed by the husband in the case of *Kashee Chundree Mustofee* (*f*). This is the case most analogous to the assumed permission under which a widow adopts in Bombay.

B. 3. 7.—AUTHORITY TO ADOPT WITH COMPLETE DISCRETION AS TO EXERCISE OF THE POWER.

When a mere permission is given to adopt, should the widow think fit, the authority is complete, but according to the cases no obligation rests on the widow beyond the religious one to further her husband's welfare in the other world (*g*). She cannot delegate this power to adopt to any other person (*h*).

B. 3. 8.—CONDITIONAL AUTHORITY.

According to the Hindu Law, a widow who has received from her deceased husband an express power to adopt a son in the event of his natural-born son dying under age and unmarried, may, on the happening of that event, make a valid adoption.

Thus an authority to adopt, in case the son dies, is valid, it was held, according to the law of Bengal (*i*), and the Judicial

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(*e*) See above, pp. 813, 814.

(*f*) C. S. D. A. Part I. 13 Summ. Cases. The widow, it was directed, was to adopt on attaining maturity.

(*g*) See 2 Str. H. L. 97.

(*h*) *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590.

(*i*) *Musst. Solukhna* v. *Ramdolal Pande et al.*, 1 C. S. D. A. R. 324.

Committee have recently laid down in *Kanuapalli Suryanarayana* v. *Pucha Venkata Ramana* (*k*) that a widow without special power for a second adoption can adopt a second son upon the death of a son first adopted.

In *Purmanand Bhuttacharaj* v. *Oomakunt* (*l*) the authority was an alternative one between a boy named and a Brahman boy in case there was a bar to the adoption of the former, and the widow having adopted a boy under the power, the boy died. She then adopted another boy, not coming within the above description, and the adoption was held illegal, as there was no sanction for the second adoption.

An authority to adopt, in case the son and mother disagree, will not operate (*m*).

B. 3. 9.—Implied Authority.

This arises when a husband has begun an adoption but has been prevented from completing it by death. In Bombay any distinct intimation of his wish for an adoption would probably be held sufficient to support an adoption proper in itself, but the kinsmen have still a right, in an undivided family, to a controlling voice as to the choice of the boy to be adopted (*n*).

The adoption of a brother was begun by a husband, and completed by the widows. The widows were not permitted to question the adoption, nor the right of the adopted son to adopt his nephew as his heir after his death (*o*).

(*k*) L. R. 33 I. A. 145.

(*l*) 4 C. S. D. A. R. 318. The precise contingency specified must happen. *Mohundro Lall Mookerjee* v. *Rookminey Dabey*, Coryton's R. 42.

(*m*) *Musst. Solukhna* v. *Ramdolal Pande et al.*, 1 C. S. D. A. R. 324. Conditional grants are not favoured by Hindu Law, and here the contingency provided for is one that should not be anticipated.

(*n*) *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498.

(*o*) *Ranees Rathore et al.* v. *Q. Khosal Sing*, N. W. P. S. D. R., Pt. II. 1864, p. 465. In the cases quoted above, sec. III. A. 2. 1, p. 952, the widows proceeded to complete the adoptions on an implied authority from their husbands, with whom they had taken part in the initial ceremonies. *Subba* v. *Subbammal*, I. L. R. 21 Mad. 497; *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590.

B. 3. 11.—Adoption by a Widow—Authority Excluded by Prohibition or Dissent of the Husband.

Express Prohibition.

The Judicial Committee, recognizing the substitutionary character of the widow's function in adopting a son, have declared her exercise of it impossible whenever a prohibition was to be gathered from the husband's language or conduct.

"It appears to their Lordships that, inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites" (*p*).

Hence where there is a positive prohibition by the husband a widow cannot adopt (*q*), nor where the husband's assent cannot be implied (*r*).

Such an adoption will not affect his testamentary disposition in favour of his brother (*s*).

(*p*) *Collector of Madura* v. *Mootoo Ramalinga*, 12 M. I. A., at p. 443. "Although some of the Maratha Schools may use the expression that the widow may adopt without the consent of the husband, this means simply without his express assent. The foundation underlying every adoption amongst Hindus is the consent of the husband. The only difference between the Schools is that some require that it should be express, and that others are content with an implied assent, and are ready to imply it if he have neither said nor done anything inconsistent with such an implication." Per Westropp, J., in *Bayabai* v. *Bala Venkatesh*, 7 Bom. H. C. R. xviii. App.

(*q*) *Malgauda* v. *Dattu*, I. L. R. 37 Bom. 107; *Bayabai* v. *Bala Venkatesh*, 7 Bom. H. C. R. App. i.; *Lakshmibai* v. *Sarasvatibai*, I. L. R. 23 Bom. 789; *Patel Vandravan* v. *Chunilal*, I. L. R. 15 Bom. 565.

(*r*) *Narayen* v. *Nana*, 7 Bom. H. C. R. 173 A. C. J.; *Ramachandra* v. *Bapu Khandu*, Bom. H. C. P. J. 1877, p. 42. See the Sastri's opinion below, p. 867, note (*w*).

(*s*) *Janki Dibeh* v. *Sadasheo Rai*, 1 C. S. D. A. R. 197.

B. 3. 12.—Implied Prohibition or Dissent.

"The Maratha School of Hindu Law permits the widow to adopt . . . provided [the husband] has neither said nor done anything which can be regarded as a prohibition to her or a refusal by himself when *in articulo mortis* to adopt." The widow alone has the right to adopt, and a Hindu cannot authorize any other person to adopt for him with or without the widow's participation therein (*t*). She may adopt when her husband has not intimated his dissent, even without the consent of kinsmen, at least according to some of the authorities (*v*), but this is properly limited in Bombay to the case of a divided family (*w*).

Where a husband writes to the Collector that his daughters are his heirs, this may indicate a prohibition on the husband's part to adoption by the widow while the daughters live or their line continues (*x*).

B. 3. 13.—Adoption Under an Assumed Assent of the Husband.

From the preceding cases it will have been gathered that authority from the husband, either express or clearly implied, enables a widow to adopt. On the other hand his prohibition or

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(*t*) Per Westropp, C.J., in *Bhagwandas* v. *Rajmal*, 10 Bom. H. C. R. 257; *Amrito Lal Dutt* v. *Surnomoye Dasi*, L. R. 27 I. A. 128.

(*v*) See above, pp. 783, 796; *Patel Vandravan* v. *Chunilal*, I. L. R. 15 Bom. 565.

(*w*) *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at p. 503.

In the case of *Virubudru* v. *Baee Ranee*, Morris R., Pt. II., p. 1, a question was put to the Sastri of the Sadr Court as follows:

"Can a widow of the Nagar Brahman caste adopt a son without having obtained the permission of her husband?"

The answer was—"If the husband forbade the adoption of a son, the widow could not adopt; but if he did not prohibit it, it must be understood that he assented to it. For it is commanded in the Shastr that a person who has no male issue must adopt a son, and if the widow adopted under such circumstances, in the way required by the Shastr, her act would be valid. Some law-books deny this right to the widow, but the greater number allow it. To give publicity to the adoption, it should be made known to the ruler, though if this was not done the adoption would not be invalid, if otherwise in accordance with the Shastr." See also *Abajee Dinkur* v. *Gungadhur Vasudeo*, 3 Morr. R. 420.

(*x*) *Collector of Madura* v. *Mutu Ramalinga Satherpatty*, 10 C. W. R. 17 P. C.; S. C. 1 Beng. L. R. 1 P. C.; 12 M. I. A. 397; 2 Mad. H. C. R. 206.

dissent, however intimated, so it be decidedly intimated, makes an adoption impossible (*y*). The widow does not, except incidentally, adopt for herself, but for her husband (*z*). The Maratha doctrine of her capacity when no intimation of his will has been given by the husband rests on an assumption of his assent to what would be at once a duty and a benefit to him. The Sastris have in several cases placed the widow's capacity on this very ground (*a*). She continues subordinately the ideal religious existence of her husband (*b*), and when he has not expressed his wishes may express them for him (*c*), though owing to her dependence, subject to the approval and control of the surviving male members of the undivided family (*d*).

The Sastris, to a question put them by the Court in *Thukoo Baee* v. *Ruma Baee* (*e*), replied: "Katyayana also says—'A married woman (naree) certainly must not act without orders,' which we conceive to mean, those of a father, husband, and son. However, a widow has the power of adopting even without the orders of her husband. A widow destitute of all three legal protectors, is mistress in her own right of the power both of giving and receiving."

The Vyavahara Mayukha distinctly declares that the law of Yajnavalkya as to the dependence of women bears on the wife as essentially dependent on her husband and only during her coverture. As a widow she may adopt without the command to which she is subject only as a wife (*f*). In the *Mankars' Case* (*g*) the Sastris said a widow could adopt her husband's brother's son, but no one else, without her husband's authority. Of the nine

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(*y*) See *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R., at p. 257; 2 Str. H. L. 91; *Chowdhry Padam Singh* v. *Koer Udaya Singh*, 2 Beng. L. R., at p. 104 P. C.

(*z*) *Ibid.* Her spiritual interests are fully recognized, but are considered as bound up in his.

(*a*) See above, p. 867, note (*w*).

(*b*) Above, pp. 82, 91.

(*c*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R., at p. 257.

(*d*) *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at pp. 502, 503. The Viramitrodaya contends strongly for the necessity of assuming the husband's assent, while it recognizes that the assent must be had of the brethren on whom the widow is dependent. Transl., p. 116.

(*e*) 2 Borr. 488.

(*f*) Vyav. May., Chap. IV., pp. 17, 18.

(*g*) 2 Borr. R., p. 104.

Pandits consulted in the case (*h*) two say that the rule of the Dattaka Mimamsa requiring the husband's express consent is the one generally followed, but that the Samskarakaustubha and the Vyavahara Mayukha have established for the Marathas that a widow may adopt without her husband's order. Four say the order may be dispensed with. One says the adoption may be made with the consent of the husband's kindred and of the caste, or even without any order or consent at all. To this another adds "provided her husband did not say he wished to have no son adopted." In the two answers of the Sastris which follow, the same vacillation may be noticed.

"A widow without her husband's permission may adopt with the sanction of some senior member of the family" (*i*).

"An adoption by a widow is not invalidated by want of permission from the deceased husband or his brother" (*k*).

Where there is no prohibition, there is a permission on the husband's part for a widow to give but not to take in adoption, according to the Bengal Law (*l*).

The consent or authority of the husband is not indispensable to adoption by a widow:—

In the Dravida country, Madras (*m*).

In the Saraogi Agarvali caste of Jains (*n*).

The Sastras of the Jains authorize a widow to adopt without the sanction of her husband. The age for adoption extends to the 32nd year (*o*).

The Sastris in the Bombay Presidency have usually favoured the widow's unfettered power to adopt, as in the two following instances.

(*h*) 2 Borr. R., at p. 104.

(*i*) MS. 1674; Vithoba v. Bapu, I. L. R. 15 Bom. 110.

(*k*) MS. 1753. In this case the permission of the nearest relative, which in the previous answer was said to be necessary, is pronounced needless. *Lakshmibai* v. *Sarasvatibai*, I. L. R. 23 Bom. 789.

(*l*) *Tarini Charan* v. *Saroda Sundari Dasi*, 3 Beng. L. R. 145 A. C. J.; S. C. 11 C. W. R. 468; see Datt. Chand., sec. I., paras. 31, 32, and sec. V. below.

(*m*) *Collector of Madura* v. *Mutu Ramalinga Satherpatty*, 12 M. I. A. 397; S. C. 2 Mad. H. C. R. 206; see next page.

(*n*) *Sheo Singh Rav* v. *Musst. Dakho*, 6 N. W. P. H. C. R. 382; Mit., Chap. I., sec. XI. 9 note; 1 Str. H. L. 79; 2 Str. H. L. 92, 96, 115; Vyav. May., Chap. IV., sec. V. 17, 18.

(*o*) *Maharaja Govindnath Ray* v. *Gulalchund et al.*, 5 C. S. D. A. R. 276; *Sheo Singh Rai* v. *Musst. Dakho*, L. R. 5 I. A. 87.

"The widow of a member of an undivided family may adopt" (*p*).

"The widows of two brothers may severally adopt" (*q*).

The adoption by a widow under an authority by her husband is valid even though it takes place after the birth of a posthumous child to the other coparcener (*r*). Her authority is of course unfettered when she takes as widow of a separated coparcener (*s*).

"The daughter-in-law may adopt notwithstanding a prior adoption by her father-in-law" (*t*).

"A mother-in-law and then the daughter-in-law adopt different boys. The one adopted by the daughter-in-law is heir to her husband" (*v*).

"There being an adoptive mother and a widow of an adopted son, the former cannot adopt without special reason" (*w*).

In a joint family under the Mitakshara a widow may adopt with the permission of her husband, and so divest his coparceners to some extent of their estate by introducing another sharer (*x*).

Under the law which prevails in the Dravida country, a widow without any permission from her husband may, if duly authorized by his kinsmen, adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband (*y*). The requisite authority in the case of an undivided family must be sought within the family, even though

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(*p*) MS. 1650. This means without sanction.

(*q*) MS. 1750.

(*r*) *Hurkisondas* v. *Mankorebai*, L. R. 34 I. A. 107; S. C. I. L. R. 29 Bom. 51.

(*s*) *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498, F. B. The previous cases are in this fully discussed. See below, 3, 23; 3, 25; 3, 33.

(*t*) MS. 1666; *i.e.* the widow may adopt to her own husband. But the son thus adopted would succeed only to his adoptive father's separate property. The adoptive father's interest in the joint estate merged on his death in his father's. Such at least is the doctrine favoured by the Courts. See references in note (*s*).

(*v*) MS. 1761. See below, sub-sec. 3, 23. *Pudma Coomari Debi* v. *Court of Wards*, L. R. 8 I. A. 229; *Tarachurn Chatterji* v. *Suresh Chunder*, L. R. 16 I. A. 166.

(*w*) Above, p. 384, Q. 22.

(*x*) *Surendra* v. *Sailaji*, I. L. R. 18 Cal. 385; *Bachoo* v. *Makorebai*, I. L. R. 31 Bom. 373, P. C.; *Vithoba* v. *Bapu*, I. L. R. 15 Bom. 110.

(*y*) *Rajah Vellanki Venkata Krishna Rav* v. *Venkatrama Lakshmi*, I. L. R. 1 Mad. 175; S. C. L. R. 4 I. A. 1.

the particular property devolving upon the adopted son is to be held in severalty and not in coparcenary (*z*).

B. 3. 14.—ADOPTION BY A WIDOW, A CONSCIENTIOUS OBLIGATION.

It follows from what has been said that the widow is bound in religion to adopt conscientiously with a view to the benefit of her deceased husband, not capriciously, or so as to spite the husband's family. If a suitable boy can be had she ought to adopt from the husband's gotra, as she is thus most likely to maintain the family sacra (*a*). This obligation is not precisely a legal one (*b*), but if the widow disregards it without reason and seeks to introduce an objectionable member into the family the kinsmen may interfere (*c*). On the other hand they cannot properly refuse their assent to the dependent widow who desires to free her conscience and further her husband's happiness by a fit adoption (*d*).

The obligation to adopt is one that cannot be legally and directly enforced even when an express authority or command has been given by the deceased husband, much less can it be enforced when no direction has been given. The widow is then left to the promptings of her own conscience and judgment alone (*e*).

If a widow in a divided family adopts in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive, the adoption is good in the Maratha country, as well as in Gujrat, though without permission of the husband or consent of his kindred (*f*), or even that of the co-widow (*g*).

(*z*) *Ramnad Case*, 12 M. I. A. 269; *Sri Raghunadha* v. *Sri Brozo Kishoro*, L. R. 3 I. A. 154.

(*a*) 2 Str. H. L. 98.

(*b*) See sec. IV.

(*c*) See *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498.

(*d*) See above, pp. 864, 881; Steele, L. C. 45; *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J.

(*e*) See above, pp. 813, 814. *Mutasaddi Lal* v. *Kundun Lal*, L. R. 33 I. A. 55.

(*f*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R., at p. 257; *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at p. 501; *Thuckoo Baee* v. *Ruma Baee*, 2 Borr. 488 (2nd ed.); *Patel Vandravan* v. *Chunilal*, I. L. R. 15 Bom. 565.

(*g*) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Rupchand Rakhmabai*, 8 Bom. H. C. R. 114 A. C. J. It is as incumbent on the sapindas

The widow adopting must be a free agent. Constraint or undue influence will vitiate the adoption (*h*).

The observations of the Judicial Committee in the *Ramnad* case to the effect "that there should be such evidence of the assent of kinsmen as suffices to show that the act [of adoption] is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive," were explained in the sense that "Nice questions are not to be entertained as to the motives of a widow making an adoption so long as they are not corrupt or capricious" (*i*).

B. 3. 15.—Time for Adoption by a Widow.

The religious obligation under which a widow is placed by a direction to adopt makes it an imperative duty to fulfil her husband's purpose as soon as possible. But though inordinate delay has in one or two cases been considered a cause for preventing widows from reserving to themselves benefits in which they were intended to have only an incidental share, yet it cannot generally be said that promptness in adopting is more than a pious duty. On the other hand the capacity to adopt is not barred by limitation; it may be exercised virtually at any time during the widow's life (*k*).

The sooner adoption is made after the husband's death the better (*l*). "A widow should adopt within a year of her husband's death" (*m*). The non-exercise, however, by a widow of the right of adoption for one year after her husband's death does not entitle his next heir to sue for his share, for during the widow's life he has no right to present possession (*n*).

An adoption, fifteen years after the husband's death, under his

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to allow a widow to appease her husband's manes as it is on the co-widow to join in furthering this pious purpose.

(*h*) *Bayabai* v. *Bala Venktesh*, 7 Bom. H. C. R. 1 App.; *Somasekhara* v. *Subhadramaji*, I. L. R. 6 Bom. 524, 527.

(*i*) *Raja Vellanki* v. *Venkata Rama*, L. R. 4 I. A. 1.

(*k*) *Mutasaddi Lal* v. *Kundun Lal*, L. R. 33 I. A. 55.

(*l*) *Verapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91.

(*m*) MS. 1734.

(*n*) *Ramanamall* v. *Suban Annavi*, 2 Mad. H. C. R. 399.

authority, was held good (*o*), and even an adoption twenty years after the husband's death (*p*).

The presumption against adoption arising from neglect by a widow to adopt for six or seven years after the death of her husband (the Raja of Nattore) was considered not so great as the presumption in favour of the Raja's having given power to adopt (*q*).

B. 3. 16.—Adoption by Widow—Of Husband's Nephew or Other Sapinda.

Religious feeling usually prompts a husband in giving authority to adopt to designate a nephew or a member of his gotra either individually or by class as the person for adoption. He may, however, designate a stranger as he might adopt a stranger, or he may leave the choice to his widow's discretion. In the last case, and in what may in Bombay be deemed the similar case of no particular intimation of his wishes having been given by the husband, the widow, like the husband, ought to adopt from amongst nephews or near kinsmen (*r*). The Sastris, as has been seen, have been disposed to exempt her from control if she should take a nephew, but they have shrunk from pronouncing an adoption of a stranger duly celebrated invalid. The choice, therefore, though subject to control, cannot be deemed legally limited to any particular family so long as it is made within the caste, and outside the offspring of sisters and daughters of the husband (*s*). In *Srimati Uma Deyi* v. *Gokoolanand Das Mahapatra* (*t*) the Judicial Committee have held that the adoption of a very distant relation, not included within the *sapindas* of the adoptive father, made in violation of the preferential right of the son of a brother of the whole blood was valid. The texts which prescribe the preferential adoption of such son have not the force of law.

(*o*) East's Notes, Case 10, 2 Mor. Dig. 18.

(*p*) *Musst. Anundmoyee* v. *Sheeb Chunder Roy*, 9 M. I. A. 287; S. C. Beng. S. D. A. Rep. 1855, p. 218.

(*q*) *R. Chundernath Roy* v. *Kooer Gobindnath Roy*, 18 C. W. R. 221.

(*r*) Above, pp. 800, 818; sub-sec. 3. 13.

(*s*) See further on this subject in the next section.

(*t*) L. R. 5 I. A. 40; S. C. I. L. R. 3 Cal. 587.

B. 3. 17.—Adoption by Widow—Authority in the Case of Two or More Widows.

Where there are two widows the husband may authorize both to adopt. In *Venkata Narasimha Appa Row* v. *Parthasarathy Appo Row* (v) their Lordships of the Privy Council have held that the power given to two widows to adopt jointly cannot be exercised by only one, even though such an adoption has become impossible as by the death of one of them. In the absence of an order they ought both to concur in an adoption. But in case of difference the elder has the superior right; and the younger cannot, it would seem, adopt without her senior's authority, except in case of irregularity on the senior's part causing interference by the caste (w). Thus the Sastris say:

"The eldest of several widows has the right to adopt. On her death or disqualification the right passes to the next widow in order of marriage. She is disqualified by leprosy" (x).

"A man having directed an adoption, the elder widow may adopt against the wish of the junior" (y).

"The senior widow of a Sudra, though married by pat, has a preferential right to adopt over the second though married by 'lagna,' the one ceremony conferring in that caste the same rights as the other" (z).

"The elder of two widows may adopt though the younger has a daughter" (a).

A husband gave directions to each of his two wives to adopt. After his death they divided the property. The elder gave away her share and died. The younger then adopted a son. The Sastri said he might recover the aliened share from the donee (b). In this case if the two widows, as is sometimes supposed, took a joint estate inalienable and vesting on the death of one widow solely in

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(v) L. R. 41 I. A. 51.

(w) Steele, L. C. 48, 187; *Rakhmabai* v. *Rakhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at p. 503.

(x) MS. 1669. See above, p. 390, Q. 36.

(y) MS. 1656. An authority cannot be given to each of two widows to adopt so that there may be two adopted sons at once. See *Gosavi Shree Chundravulee* v. *Girdharajee*, 4 N. W. P. R. 226.

(z) MS. 1655. See above, pp. 391, 394, 404.

(a) MS. 1734. The existence of a daughter does not in any case prevent an adoption.

(b) 2 Macn. H. L. 247, Case XL.

the other, the donee could not of course have taken anything as against the surviving widow (*c*). This does not, however, seem to have been the view of the Sastri. The performance of the Sraddhas ought in his opinion to be provided for by adoption, and the fulfilment of the duty which was incumbent from the beginning of widowhood defeated the gift made at a later time and subject to the duty (*d*).

Where the elder of two widows has assented to an adoption by the other she cannot herself adopt another boy (*e*).

B. 3. 18.—Adoption by Widow—Circumstances in which the Capacity may be Exercised.

These are generally the same as for the husband himself. The obstacles to adoption by the husband operate equally to prevent an adoption by the widow. For instance the existence of a son, either begotten or adopted, or the deceased husband's having died outcast. The circumstances which bar, or are supposed to bar, adoption by a widow are more particularly considered below. Where the elder of two widows has adopted a son the other cannot during his life adopt another (*f*). On the death of a son adopted by the senior widow under authority of her husband, the second widow may adopt a second son upon an independent authority from her husband (*g*). The authority to make successive adoptions is considered below.

B. 3. 19.—Adoption by Widow—Son Deceased Sonless.

An authority to adopt is frequently conditional on the death of a son. It provides sometimes for the event of a first or second

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(*c*) Above, p. 95.

(*d*) The adoption of a son operates retrospectively as a renewal or continuance of the adoptive father's existence as to an estate held solely or jointly by the latter at the time of his death.

(*e*) *Ramchandra* v. *Bapu Khandu*, Bom. H. C. P. J. 1877, p. 43; *Surendrakeshav Roy* v. *Doorgasundari Dassee*, L. R. 19 I. A. 108.

(*f*) Steele, L. C. 48. See p. 874 (*y*); *Rungama* v. *Atchama*, 4 M. I. A. 1; *Mohesh Narain* v. *Taruck Nath*, L. R. 20 I. A. 30; *Ramabai* v. *Raya*, I. L. R. 22 Bom. 482.

(*g*) *Shama Chunder et al.* v. *Narain Debeah*, 1 C. S. D. A. R. 209; contra *Narainee Debeh* v. *Hurkishore Rai*, 1 C. S. D. A. R. 39.

adopted son's replacement in the event of his death. In such cases, it has to be borne in mind, the husband has by no means an unlimited power of future disposition. The son, whether begotten or adopted, by his birth or adoption and initiation, acquires rights and becomes a source of rights, which are regulated and guarded by the family law so as not to be subject to indefinite modification at the will of any individual. The authority to adopt cannot be made a means of upsetting the law on which it rests. Where the husband has given power to a widow to adopt, on the death of a natural son, an adopted son, or one adopted by her, the widow can exercise the authority only when the son dies unmarried, or leaving no child or widow (*h*).

B. 3. 21.—Successive Adoptions by a Widow.

Where the son dies unmarried and without having adopted, full effect can be given to the authority to adopt son after son without the embarrassment of competing rights, which must arise from a series of adopted sons leaving widows, each perhaps entitled to adopt. The difficulty that would arise in the latter case has been perceived by the Judicial Committee. In *R. V. Venkata Krishnarao* v. *Venkata Rama Lakshmi Narasaiyya* (*i*), Sir J. Colville says: "It is not necessary to consider in what way successive adoptions operate. It is sufficient to say that the law has established that they may take place." This right she can exercise despite the fact that the deceased son had attained ceremonial competence by marriage, investiture, or otherwise (*k*).

Where a widow adopted a second son, upon the death of an adopted son, the Court rejected the suit of the deceased owner's brother with reference to the uncertainty of the law, in respect of the right of the presumptive next taker after a Hindu widow, to a decree, declaring her adoption invalid (*l*).

(*h*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; S. C. Beng. S. D. A. R. 1858, p. 122; *Thayammal* v. *Venkatarama Aiyan*, L. R. 14 I. A. 67; *Pudma Coomari Debi* v. *Court of Wards*, L. R. 8 I. A. 229; *Gavadappa* v. *Girimalla*, I. L. R. 19 Bom. 331.

(*i*) L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174.

(*k*) *Venkappa* v. *Jivaji Krishna*, I. L. R. 25 Bom. 306; *Gopal* v. *Vishnu*, I. L. R. 23 Bom. 250; *Payapa* v. *Appanna*, I. L. R. ibid. 327; *Kanuapalli* v. *Pucha Venkata*, L. R. 33 I. A. 145.

(*l*) *Ry Brohmo Moyee* v. *R. Anand Lall Roy*, 19 C. W. R. 419.

When not expressly prohibited, a widow may make a second adoption with the sanction of the kinsmen. If some kinsmen give sanction, and others withhold it from interested motives, and both these are equally related to the deceased, the widow can adopt, acting upon the sanction of those kinsmen who gave it (*m*).

A second adopted son takes the place of the first, but only if the first adopted died without issue (*n*). In an authority to adopt successively the condition "if necessary" must be understood. Where an authority had been given to a wife to adopt five sons in succession, and the son first adopted lived to perform all the sacra, it was held that on his death unmarried his mother could adopt to his father (*o*). This may perhaps be justified on the principle that there was no widow of the adopted son to take a jointure of the sacra, but the retrogression of the right to adopt could not be carried further without introducing confusion (*p*).

B. 3. 22.—Adoption by a Widow—Simultaneous Adoptions.

As the existence of one son makes the adoption of another illegal, the attempt to adopt two sons at once has been pronounced invalid as to both (*q*). It could indeed be no more regarded as generally possible than the simultaneous marriage of two or more wives under a law of monogamy.

(*m*) *Parasara Bhatar* v. *Rang Raja Whatar*, I. L. R. 2 Mad. 202; see also *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R., at p. 191. This shows that the authority to give or withhold sanction is not a right of property, but simply a part of the religious and family law.

(*n*) *Shama Chunder* v. *Narain Debeah*, 1 C. S. D. A. R. 209.

(*o*) *Ram Soondur Singh* v. *Surbanee Dossee*, 22 C. W. R. 121 C. R.

(*p*) See below, B. 3. 23; B. 3. 25.

(*q*) *Akhoy Chunder Bagchi* v. *Kalapahar Haji*, L. R. 12 I. A. 198; S. C. I. L. R. 12 Cal. 406; *Surendrakeshav Roy* v. *Doorgasunderi Dassee*, L. R. 19 I. A. 108; *Gyanendro Chunder Lahiri* v. *Kalla Pahar Hajee*, I. L. R. 9 Cal. 50; *Monemothonauth Day* v. *Ouauth Nauth Day*, Bourke's R. 189; *S. Siddesory Dosee* v. *Doorgachurn Sett*, Bourke 360; *Bhya Ram Singh* v. *Agur Singh*, 1 N. W. P. H. C. R. 203; *Senkol Tevan* v. *Aurlanada Ambalakaran*, M. S. D. A. R. for 1862, p. 27.

B. 3. 23.—Adoption by a Widow—Circumstances which Bar Adoption.

It follows from the delegated or substitutionary character of the widow's authority to adopt (*r*) that the impediments to adoption external to the husband which affect adoption by him equally affect adoption by the widow. And as she has to perform an act of intelligence of sacred import, she must in her own person satisfy the conditions requisite to make such an act effectual. The circumstances in which the power can or cannot be exercised have already been considered. Amongst these might have been placed the existence of vested interests as viewed from the negative side, but this recently developed doctrine having been usually discussed by the Courts with reference to its positive operation as a bar to adoption or as depriving adoption of its usual consequences, will be here treated from the same point of view.

The principle now generally accepted by the Courts that a widow cannot adopt so as to defeat a vested interest (*s*) is not to be found in that form in the Hindu authorities (*t*). It has been taken in two senses: (1) that the adoption under such circumstances is void, and (2) that though not void its regular effects are limited so as not to divest the vested estate. There has been a difference of views also as to whether the husband's authority does or does not make the rule inapplicable. It is almost inevitable that an adoption by a widow should cause some loss to kinsmen or contingent reversioners, and the principle has again been varied so as to make the consent of the parties thus interested or of a majority or of some of them necessary (*v*). In Bengal the widow

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(*r*) See 2 Str. H. L. 88, 91, 92, 94.

(*s*) *Tarachurn Chatterji* v. *Suresh Chunder Mookerji*, L. R. 16 I. A. 166; *Thayammal* v. *Venkatarama Aiyan*, L. R. 14 I. A. 67; *Gopal* v. *Vishnu*, I. L. R. 23 Bom. 250; *Bhimabai* v. *Murar Rao*, I. L. R. 37 Bom. 598; *Payapa* v. *Appanna*, I. L. R. 23 Bom. 327; *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. R. 114.

(*t*) A mere descent cast makes no difference except when a son has taken the estate and left a widow. A right so devolved cannot be displaced by an adoption even under an express authority from the deceased son's father by his mother. See *Bhoobunmoyee Debia's Case*, 10 M. I. A. 279, quoted in *Rajah Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi Narsayya*, L. R. 4 I. A., at p. 9.

(*v*) See *The Collector of Madura* v. *Muttu Ramalinga Sadhupatty*, 12 M. I. A. 397; *Sri Raghunada* v. *Sri Brozo Kishoro*, L. R. 3 I. A. 154, 191, 192; *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498, 501.

takes a life estate though not more even in an undivided family. If she adopts under a licence from her husband she deprives his brethren of the succession. In Bombay she takes the succession only in a divided family, but an adoption by her defeats the estate which otherwise must go to the heirs next in succession at her death. She may have a daughter or a daughter's son taking, according to the prevailing theory, from her deceased husband. It is inconsistent with the theory of her position as not being a source whence succession is derived that she should have a power of defeating at her pleasure that succession which the law approves, but this has by the decisions been conceded to her.

The adoption of a son operates retrospectively (*w*). He is looked on in the light of a posthumous son, and though a widow cannot adopt with the consequence of giving effect to a fraud (*x*), yet there is nothing unreasonable in the loss of an estate divested by an adoption when the estate has from the first been subject to that kind of defeasance. The defeasance arises from what is in theory a deferred act of the deceased adoptive father, who could always have adopted had he lived, and whose spiritual life is continued by his widow.

In *Bhoobunmoyee Debia's Case* the divesting of an estate was put forward by Lord Kingsdown rather perhaps as an illustration of the inconvenience that would arise from adoptions creating new collateral heirs than as a thing in itself impossible under the Hindu Law (*y*). In other cases the inconvenience has been made a ground for a supposed prohibition (*z*). It is true that in many instances the supposed prohibition coincides in its operation with the actual principles of the Hindu Law as drawn from the Hindu sources, but in others it does not. It is desirable therefore that these principles and their bearing on the matter in question should, if possible, be

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(*w*) The common statement has been adopted. Its proper sense is that an adopted son is regarded as a continuator of the adoptive father's personality as to his property and sacra whether separate or in a united family. The adoption is not retrospective for the purpose of enabling the son to take back a property which his father had not, and which between the father's death and the adoption has been given by the law to some other separated relative or branch of the original family.

(*x*) See above, pp. 348, 349.

(*y*) See also *Sri Raghunadas's Case*, L. R. 3 I. A., at p. 193.

(*z*) See *The Collector of Madura's Case*, 12 M. I. A. 397; *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. R. 114; *Kally Prosono Ghose* v. *Gocoolchundra Mitter*, I. L. R. 2 Cal. 307.

ascertained and established. The sacra of a Hindu family are regarded as descending regularly with its estate from father to son for ever. The birth and the initiation of the son make him the joint or the sole depositary of this group of connected rights and obligations. He is bound to provide for his father's sraddhas: he is entitled to the due performance of his own. The proper celebrant is a son begotten or adopted; but if the estate passes to a remoter heir the duty goes with it. The last holder—though no ceremonies are so effectual as those performed by a son—yet receives such benefit as is possible from the actual successor to the property. Now by an adoption higher in the line this blessing is lost. The son adopted, for instance, by the mother of one deceased performs a father's sraddhas for his ceremonial father, but not for his ceremonial brother. The latter is thus, according to Hindu sentiment, placed in a worse position than if there had been no adoption at all. If the deceased have left a widow, it is she alone who, as partner during his life of his sacra, and capable of continuing them after his death, can in accordance with theory adopt a son. The son is her son as well as her husband's. Even in his life both ought to concur in an adoption. The books say nothing of a husband, even in his life, authorizing an adoption by anyone but his wife, and Sir M. Westropp was fully warranted in stating that there is no authority for anyone but the widow to adopt a son to her husband after his death (*a*). She only could legally have joined in procuring the son by birth who is replaced by the adopted son, and the imitation of nature thus points her out as solely endowed with the faculty of adoption when her husband can no longer exercise it.

There are thus strong reasons, though the Sastris seem in a few instances not to have sufficiently adverted to them (*b*), why adoption by a mother to her son should be disallowed (*c*), and why an adoption by her to her deceased husband should not be allowed to supersede the right of the deceased son's widow. The reasons do not at all rest on a devesting of the junior widow's estate, but the preservation of her estate is incident to her exclusive faculty of adoption. If the view here taken is correct, a mother succeeding to her son after the son's investiture (upanayana) is not the more

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(*a*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R., at pp. 257, 258.

(*b*) See 2 Str. H. L. 93, 94, 95. See below, sub-sec. 3. 26.

(*c*) See above, sub-sec. 3. 13; *Krishnarav v. Shankar Rav*, I. L. R. 17 Bom. 164.

capable of adopting a son to him because she devests no estate but her own, but a case to the contrary is referred to below (*d*).

There are cases, however, in which an only son or an adopted son dies unmarried or married without leaving a widow or issue. She may then adopt a second and a third son, even though the first and the second might have attained ceremonial competence by marriage, investiture, or otherwise, provided she does not thereby derogate from any other right (*e*). To this qualification there are four exceptions, viz., (1) when a widow adopts to the detriment of her co-widow (*f*), (2) when a mother succeeds as heir to a son, legitimate or adopted, married but leaving neither a widow nor issue, or unmarried, (3) when an adoption takes place with the full assent of the party in whom the estate has vested by inheritance, *e.g.*, a daughter-in-law adopting with the consent of the father-in-law (*g*), and (4) when there has been ratification by conduct or acquiescence (*h*).

When the deceased husband has died as a member of an undivided family the faculty of adoption is still peculiar to the widow. But as a consequence of her general dependence she cannot exercise this faculty without the approval of the kinsmen (*i*), except where that approval is improperly withheld (*k*). The sanction is not necessary where the husband has given her authority to adopt, and especially where he has himself designated the boy for adoption. In such a case the vested interests of the kinsmen are displaced by the adoption, whether they approve it or not (*l*). This shows that the need of their sanction does not arise

(*d*) *Bykant Monee Roy* v. *Kisto Soonderee Roy*, 7 C. W. R. 392 C. R. See the remarks of Melvill, J., in *Rapchand* v. *Rakhmabai*, 8 Bom. H. C. R., at pp. 118, 123 A. C. J.

(*e*) *Venkappa* v. *Jivaji Krishna*, I. L. R. 25 Bom. 306; *Musst. Bhoobunmoyee Debia* v. *Ramkishore Acharji Chowdhry*, 10 M. I. A., at p. 310; *Rajah Vellanki Venkat Krishnarav* v. *Venkatrama Lakshmi Narsayya*, L. R. 4 I. A. 1; *Vasdeo* v. *Ramchandra*, I. L. R. 22 Bom. 551, F. B.

(*f*) *Bhimowa* v. *Sanjawa*, I. L. R. 22 Bom. 206.

(*g*) *Vithoba* v. *Bapu*, I. L. R. 15 Bom. 110.

(*h*) *Payapa* v. *Appanna*, I. L. R. 23 Bom. 327; *Gopal* v. *Vishnu*, I. L. R. 23 Bom. 250.

(*i*) *Shri Raghunadha* v. *Shri Brozo Kishore*, L. R. 3 I. A. 191.

(*k*) See *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181, 188; above, pp. 783, 796.

(*l*) See *Sri Raghunada* v. *Sri Brozo Kishore*, L. R. 3 I. A. 154, 173; *Dinkar Sitaram Prabhu* v. *Ganesh Shivaram Prabhu*, I. L. R. 6 Bom. 505; *Govind Soondaree Debea* v. *Jugganunda Debea*, 3 C. W. R. 66; 15 I. A. 5.

from their rights in the property but from their family relation to the widow. Their authority may be likened to that sometimes given to a girl's guardian under the English Law to give or to withhold his sanction to her marriage. This, though its exercise may greatly affect his own fortune, is not a right of the guardian which he is at liberty to use for his personal enrichment. He is bound to use it conscientiously, and failing to do so he may be superseded. So the Hindu kinsmen must not withhold their assent to an unobjectionable adoption merely because it will introduce another sharer of the estate (*m*). The widow is bound (at least religiously) to seek a son within the family. When she does so the family is not in any way impoverished by the adoption, but if she is forced to go out of the family for a son the kinsmen have still not a right of property to exert or to forgo, but a faculty to exercise (*n*), which they must use to the advantage of the family at large, but especially of the deceased member. Such a sanction it has been held is sufficient as affords a reasonable guarantee that the widow has acted with moderate prudence and conscientiousness (*o*). If the sanction were a right resting on property the infant co-members would have to be consulted through their guardians, and might have a right to disapprove at a later period what had been improvidently allowed in their infancy, but no provisions to this effect are found in the law books.

The son united with his father may have died childless before him. His joint interest in the property and the sacra then reverts to the father, who may adopt a son and make him heir as he might have begotten a son. In such a case, as the deceased never had an independent right, being unseparated from his still living father, his widow cannot adopt without the sanction of her father-in-law. On the other hand the father-in-law, who has sanctioned an adoption by his son's widow, and thus given himself a grandson, cannot afterwards adopt a son. If he first adopts a son to himself he may still sanction an adoption to his deceased son. If he dies without either adoption having been made it might seem that the

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where the inquiry into the fact of the authority would have been needless unless it would operate if proved. Steele, L. C. 176.

(*m*) Above, pp. 783, 795, 814, 871.

(*n*) See *The Collector of Madura* v. *Moottoo Ramalinga Satthupatty*, 12 M. I. A., at p. 442.

(*o*) See *Gopal* v. *Naro*, 7 Bom. H. C. R. xxiv. App.; and *Rakhmabhai's Case, supra.*

right would pass rather to his widow, should he leave one, than to his daughter-in-law. The replies of the Sastris, however, favour the right of the daughter-in-law even during the father-in-law's life, giving to her adopted son rights equal or superior to those of the son adopted by the father-in-law (p), according to the earlier or later adoption of the latter. On the death of the father-in-law without adoption they prefer to his widow the widow of his son, by whose adoption the manes of both father and son may be appeased (q). A daughter-in-law, the widow of a pre-deceased son, can make a valid adoption with the contemporaneous consent of her mother-in-law, in whom the estate of the last full owner has vested as her heir (r).

Where two or more united brothers have died in succession and sonless the household sacra in which they were jointly interested must have devolved solely on the one who survived the other. In such a case the widow of the last deceased as a sharer, though in a minor degree, of his ceremonial virtue, and having with him in his life a joint capacity to adopt, according to the religious view. is the proper person to adopt to her husband, and so devolve the family sacra centred in herself. The wife of the predeceased united member, however, had with him a joint interest in the family sacra, though this was never so developed by his separation as after his death to give efficacy to her substitutionary acts on account of a new family (s). The common sacra centre on the death of one in the surviving members of the united family: the widow is spiritually and temporally dependent, and cannot adopt without the assent of the brethren. If all have died, the widow of the last has succeeded, so far as a woman can, to the sacra of the family, but she has not a superiority corresponding to that of her husband over the widow of a predeceased member, and enabling her to approve or disapprove an adoption by that widow (t). Such an adoption is, according to one view, no longer feasible when no one is left to give the requisite sanction. Though a widow has the sole faculty of adopting to the deceased husband, this faculty

(p) See above, p. 354, Q. 13, to which the remarks in the text apply, and sub-section B. 3. 13 of the present section.

(q) See a decision to the same effect in sub-sec. 3. 26.

(r) *Siddappa* v. *Ningangavda*, I. L. R. 38 Bom. 724.

(s) See above, p. 338.

(t) That a widow is subject to control only by near male relatives appears from the answer in *Thukoo Baee's Case*, quoted above, p. 868.

cannot be exercised in a united family except with the assent of the male members. On their extinction the faculty is virtually gone.

According to the other and the approved view, the widow, by the death of her husband's former co-members of the family, is merely freed from a control which they might exercise for her good during their lives. She may then adopt at her own discretion, as no controlling power is attributed to the widow of one deceased member over the acts of another (*v*). Nor is she subject to the control of an infant member incapable of discrimination. This view is the one more consonant to the doctrines of the Nirnayasindhu, the Samskarakaustubha, and the Dharmasindhu, admitting that any sanction at all is necessary to adoption by a widow. The Vyavahara Mayukha recognizes the need of a sanction while there are qualified persons present to give or withhold it but not otherwise (*w*).

In a divided family the ties of mutual dependence and support are much less close than amongst united kinsmen. According to the doctrine of the Mitakshara the widow of a separated member takes his estate in full ownership, and becomes herself, though in her husband's family, a new source of inheritance (*x*). According to the now prevailing Bengal doctrine she takes only a life interest, but still during her life the estate is completely vested in her (*y*). Thus there are no immediate interests to impede her freedom as to adoption. But the division of the once united family has been necessarily attended with a separation in the performance of the daily sacrifices and the other periodical rites, community in which is the central point of family union (*z*). The husband who has once been a celebrant of the sacra for himself alone cannot have lost the capacity and the obligation except by the process of reunion. If as usual he has died separated his sacra pass to his son, and in default of a son to his widow (*a*), who in her turn may

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(*v*) See the opinion of the Sastris in *Thukoo Baee* v. *Ruma Baee*, cited above in sub-sec. B. 3. 13.

(*w*) See *Bayabai* v. *Bala Venktesh Ramakant*, 7 Bom. H. C. R. App. xii.; Vyav. May., Chap. IV., sec. V., para. 18.

(*x*) See above, pp. 308, 309, 473, 484, 712.

(*y*) Above, p. 89.

(*z*) See above, pp. 638, 773; *Sri Raghunada's Case*, L. R. 3 I. A., at p. 191.

(*a*) Above, pp. 87, 250.

impart the requisite faculty by adoption. As no one shares the sacra there is no joint interest on which an interference with her discretion can properly be grounded (*b*). A tradition of the necessary dependence of women still exacts from the widow a decent regard for the interests and wishes of the family at large notwithstanding the partition that has taken place, but as on the one hand she cannot urge her connexion as a ground for a right to maintenance in distress (*c*), neither can the kinsmen on the other hand urge it as a ground for legal control of her faculty of adoption (*d*).

These considerations apply to the actual estate of the deceased husband, whether joint or separate. If the deceased husband had no ownership of an estate in question, either as being individually separate or as being a member of a branch separated from the one to which the estate belonged, it is obvious that he had no sacra which that estate was bound to sustain. He might, had he survived, possibly have come in as the nearest collateral on the extinction of the proprietary branch, but when in his absence another has succeeded, that other has assumed the whole of the sacra connected with the estate he has taken (*e*). No participation in them belongs to the widow of the predeceased which she can impart to a son by adoption. One separated collateral cannot therefore be ousted by an adoption made after his succession by another collateral's widow. Much less can any one representing the proprietary branch undivided in itself be thus superseded.

It accords with the views just stated that if a Hindu husband gives to his wife an instrument of permission to adopt, should she be left a widow, and if he has born to him a son, who survives him, and if this son dies leaving a widow in whom the estate is vested, the power of adoption given to the mother-in-law is incapable of execution and is at an end (*f*).

(*b*) See Viramitrodaya, Transl., p. 257.

(*c*) Above, pp. 230, 236.

(*d*) *Ramjee* v. *Ghamau*, I. L. R. 6 Bom., at pp. 502, 503.

(*e*) See the opinion in *Bamundass Mookerjia* v. *Mt. Tarinee*, 7 M. I. A., at p. 188; and above, pp. 63, 350, 554.

(*f*) *Padma Kumari Debi Chowdhrani et al.* v. *Jagatkishore Acharjia Chowdhri*, I. L. R. 8 Cal. 302 P. C.

B. 3. 24.—Adoption by a Widow—Circumstances Barring Adoption as in the Case of a Male.

" A widow cannot adopt while a previously adopted son is alive " (*g*).

A son by her co-wife prevents adoption by a widow equally with one born of herself (*h*).

" The widow cannot adopt two sons, because the adoption of the first creates an immediate change of the essential condition of sonlessness " (*i*).

The existence of an adopted son is a bar to another adoption (though under power from the husband), by a widow, as well as to one by a husband himself (*k*).

A husband abandoned his wife, who became a Moorlee. By his second wife he had a son. The first wife adopted a son. This was held invalid (*l*).

Adoption by a Hindu in concert with his senior wife, it was said, supersedes the original permission given by him to each of his two wives to adopt a son for each, unless after the adoption he expressly confirmed the permission to his junior wife to adopt (*m*).

B. 3. 25.—Adoption by a Widow—Not to Defeat a Vested Estate.

Though the Hindu authorities do not furnish such a rule, it must now be accepted perhaps as a principle established, or at least strongly favoured by the decisions, that adoption cannot be made to devest or defeat an inheritance already vested (*n*), except in

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(*g*) MS. 1664. See above, sec. III. B. 3. 18; B. 3. 19.

(*h*) Above, p. 489.

(*i*) MS. 1671. *Mohesh Narain* v. *Taruck Nath*, L. R. 20 I. A., 30.

(*k*) *Gopee Lall* v. *Musst. Chundraolee Buhoojee*, 4 N. W. P. R. 226; S. C. in Appeal, L. R. Supp. I. A. 131, and 19 C. W. R. 12 C. R.

(*l*) MS. 113.

(*m*) *Goureepershad Raee* v. *Musst. Jymala*, 2 C. S. D. A. R. 136; Macn. Con. H. L. 181, 182; 2 Str. H. L. 61. The permission could not operate while the son actually adopted was alive.

(*n*) *Annammali* v. *Mabhu Bali Reddy*, 8 Mad. H. C. R. 108; *Kally Prosonno Ghose* v. *Gocool Chunder*, I. L. R. 2 Cal. 295; *Rupchand Hindumal* v. *Rakhmabai*, 8 Bom. H. C. R. 114 A. C. J. See the discussion above, sec. III. B. 3. 23; *Gayabai* v. *Shridharacharya*, Bom. H. C. P. J. 1881, p. 145; *Thayammal* v. *Venkatarama Aiyan*, L. R. 14 I. A. 67; *Tarachurn Chatterji* v. *Suresh Chunder Mookerji*, L. R. 16 I. A. 166.

four cases mentioned in *Payapa* v. *Appanna* (*o*) and *Gopal* v. *Vishnu* (*p*). The Hindu rule seems to be this, that when a deceased was an actual co-owner or sharer in interest in an estate in question, his son received in adoption, whether by himself or by his widow, takes his place. When he was separated and the law has given the estate of his deceased relative to some one else, the succession having passed by his line, cannot be recovered, because there is no authority for taking the estate from the hands into which it has fallen. The same principle is applied in the case of a blind or dumb man's son. Such a man cannot be an actual coparcener. There is a rule allowing his son to take his place in a partition, but when once the partition has been made, the son subsequently born or adopted is not remitted to a right which did not subsist in his father (*q*). The particular rule, like that giving an estate to the existing collaterals, is not accompanied by any proviso in favour of subsequently adopted sons. In a united family there is a remitter through the identification in interest of the son with his father who died a co-sharer.

A widow (having legal power to adopt from her husband) (*r*) cannot adopt so as to deprive or defeat an inheritance or interest already vested in a widow of a son, natural or adopted, who survived his father (*s*), or in the son of such a son (*t*), or in the heirs of the adoptee's grand-uncle by adoption, who had succeeded to the grand-uncle's property upon the death of his widow (*v*). Where the estate has come down to the widow of the last male survivor of the husband's family prior to the adoption (*w*), it might seem that an adoption by a widow of a previously deceased coparcener could not be made so as to defeat the vested estate. This, however, will depend on the different views discussed above (*x*). A new line cannot be substituted by adoption to take

(*o*) I. L. R. 23 Bom. 327.

(*p*) I. L. R. *ibid.* 250.

(*q*) See *Bapuji Lakshman* v. *Pandurang*, I. L. R. 6 Bom., at p. 620.

(*r*) *i.e.* where such power is essential.

(*s*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; S. C. Beng. S. D. A. R. 1858, p. 122; *Krishnarav* v. *Shankar Rav*, I. L. R. 17 Bom. 164.

(*t*) *Thukoo Baee* v. *Ruma Baee*, 2 Borr. 488 (2nd ed.); *Ramkrishna* v. *Shamrao*, I. L. R. 26 Bom. 526.

(*v*) *Kally Prosonno Ghose* v. *Gocool Chunder*, I. L. R. 2 Cal. 295.

(*w*) *Gobind Soonduree Debia* v. *Juggodumba Debia*, 3 C. W. R. 66; S. C. 15 C. W. R. 5 P. C.

(*x*) Sec. III. B. 3. 23. And see above, p. 560.

what a natural-born son would not have taken (*y*); but there does not seem to be anything in the Hindu Law to prevent his taking what a natural-born son would have taken at the moment of his birth or of his father's death. In *Bhoobun Moyee Debia's Case* the adoption was in itself invalid, but if it had been made by the widow of one brother or cousin after the estate had descended to the widow of another the right of the former to adopt to her deceased husband, which had always subsisted, would not, according to the prevailing Hindu notions, be extinguished by failure of the male members. It would only be freed from a condition arising from the widow's dependence while they lived. The only theory on which the prohibitive right of the widow of the last full owner can be sustained seems to be that the sacra along with the estate centred in the widow's husband and have centred in her, so that she is religiously bound to continue the family by adoption, and to retain the estate for the benefit of the son to be adopted. His adoption operating retrospectively will make the estate devolve wholly upon him as his adoptive father's heir, and the adoption of a son by the widow of a predeceased member being made subject to the contingency of the adoption of a son to the last deceased may be deemed subject to the approval of the latter's adopted son as the male sapinda on whom she is dependent. The law books and the practice of the people do not, however, support such a theory as this: they rather allow and encourage an adoption by a widow duly authorized without sanction when there is no one to give or to withhold it, though such an adoption made by the widow of a separated collateral after the estate has passed to another collateral, will not serve to create for the adopted son an estate in possession in which his father had no more than a contingent interest. When it has passed to a collateral separated in interest it has passed for good as against a collateral who, when it passed, had no share or interest (*z*). There is in the last case a break in the succession as contrasted with the ideal continuity of interest amongst all the members of a united family (*a*). A right in possession is kept alive by the widow's constant capacity to adopt, so as to blend an additional element retrospectively with the united family, but a mere possibility once extinguished cannot be revived. Thus adoption

(*y*) See *Musst. Bhoobun Moyee Debia's Case*, 10 M. I. A., at p. 311.
(*z*) Comp. above, pp. 545, 554.
(*a*) Above, pp. 63, 561.

in a separated branch cannot divest the estate which the law gave to the then nearest collateral, and which has passed *unshared* to him who has it. But within a group of united brethren the widow of one may adopt so as to devest an estate wholly or in part (*b*). Much more, it would seem, may the widow of one united in interest with the last holder adopt so as to devest the estate that has passed to a mere collateral never united with the deceased (*c*). The latter will necessarily be much more completely represented by a son of a united brother than by a mere collateral, whose own right may be that of an adopted son or have descended through an adopted son. In one case it has been held that the adoption by a widow could not give to the adopted son the position of a co-sharer with a united brother of her deceased husband (*d*). The adoption would certainly need the sanction of the surviving brethren unless this should be improperly withheld (*e*). In the case cited as a precedent (*f*) a son had died before his father but leaving a widow who adopted a son thirty-five years after her father-in-law's death. She had recognized his nephews as members with him of an undivided family, and she could not adopt without their assent unless it were improperly withheld (*g*). On the death of the son before his father his proprietary right had wholly merged in his father's (*h*). He had never had separate sacra, and it might perhaps be contended that therefore the widow never had a right to adopt (*i*). The Sastris, however, recognizing the joint interest of the son in the estate and the sacra, and his claim to the due celebration of his Sraddhas by a son, favour this right of a predeceased son's widow. They do not think it excluded by the existence of a widow or a daughter of the father-in-law, much less by the existence of remoter heirs to whom the estate has passed away from the direct line of the deceased (*k*). In the case of co-sharers standing on an equal footing the Indian lawyers

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(*b*) See *Sri Raghunadha's Case*, L. R. 3 I. A. 154. It is not regarded as devesting any more than a birth after a long gestation would be so regarded. *Hurkisondas* v. *Mankorebai*, L. R. 34 I. A. 107.

(*c*) This competition may arise in the case of a raj or a vatan.

(*d*) *Govind* v. *Lakshmibai*, Bom. H. C. P. J. 1882, p. 12.

(*e*) *Payapa* v. *Appanna*, I. L. R. 23 Bom. 327.

(*f*) *Gayabai* v. *Shridhara Charya*, Bom. H. C. P. J. 1881, p. 145.

(*g*) Above, sub-sec. 3. 13.

(*h*) *Udaram Sitaram* v. *Ranu Panduji*, 11 Bom. H. C. R., pp. 76, 86.

(*i*) See above, B. 3. 23.

(*k*) See above, B. 3. 13, pp. 867 ss.

certainly do not recognize any obstacle to adoption by the widow of one as arising from the estate on his death having vested in the other (*l*), nor apparently would the Judicial Committee (*m*) countenance such a doctrine.

Though a cousin cannot sue, as next heir, to set aside an adoption, he has a right to question it if he takes under a deed such an interest as may be affected by the adoption (*n*).

An estate being once vested cannot, it was said, be devested by a subsequent adoption in a collateral line (*o*) even when the adoption has been prevented by the fraud of him who has taken the estate through the absence of an adopted son.

B. 3. 26.—Adoption by a Widow—Her Capacity as Affected by Her Age.

Generally a widow cannot adopt until she has attained maturity (*p*). This is an instance of the imitation of nature which, however, is in some castes not closely adhered to (*q*). In these there may be an earlier taking, but the celebration is postponed until the time of possible maternity. It shows how adoption is regarded as almost exclusively the husband's affair, that under an authority from him an infant widow may adopt. "A widow of 10 years, unshorn, and not yet arrived at puberty, may, in pursuance of her husband's wish or assent, adopt from another gotra, though there be a non-assenting undivided brother of the

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(*l*) See above. They regard death "without male issue" (see p. 560) as not having occurred until the death of the widow makes adoption impossible.

(*m*) See *Sri Raghunadha's Case, supra.*

(*n*) *Brojo Kishoree Dassee* v. *Sreenath Bose*, 9 C. W. R. 463; S. C. 8 C. W. R. 241.

(*o*) *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri*, I. L. R. 7 Cal. 178, referring to *Keshuv Chunder Ghose* v. *Bishun Pershad Ghose*, C. S. D. A. R. 1860, Pt. II., p. 340; *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee*, 11 Beng. L. R. 171, P. C.; *Kally Prosonno Ghose v. Gocool Chunder Mitter*, I. L. R. 2 Cal. 295; above, pp. 349, 350; and *Sri Raghunadha's Case*, L. R. 3 I. A. 154. In the last case it will be noticed that subsequent adoption deprived of an estate an undivided brother in whom it had fully vested. See also sub-sec. 3. 26 below. *Shri Dharmidhar* v. *Chinto*, I. L. R. 20 Bom. 250.

(*p*) Steele, L. C. 48.

(*q*) Steele, L. C. 187.

husband surviving " (*r*). By the usages of the sect of Sarogees, adoption at the age of nine years is valid, and on the death of an adopted son without issue, during the lifetime of the adoptive mother, the father's right of adoption vests in the widow and not in the mother (*s*).

" A mother-in-law cannot legally compel her daughter-in-law under age to adopt against her will. If she has compelled an adoption by undue pressure the daughter-in-law can adopt again " (*t*). Undue influence indeed invalidates an adoption in every case (*v*).

B. 3. 27.—Adoption by Widow—Capacity as Affected by Intelligence.

Where the husband has given an express direction the cases immediately preceding seem to show that his wishes may be carried out by a child widow. When a discretion has to be exercised general principles would require that a certain degree of understanding should have been attained before the duty is performed, but it does not seem that any precise rule on this point has been laid down in the case of adoption. Where a mental capacity is attained for religious functions in general it seems to be gained for adoption. Such restrictions as are recognized may be referred rather to other grounds than mere defect of understanding unless this should amount to positive lunacy.

B. 3. 28.—Adoption by a Widow—Her Capacity as Affected by Her State as to Body, Mind, Religion, and Caste.

" Leprosy of a virulent type disqualifies a widow for adopting though otherwise competent " (*w*).

(*r*) MS. 1648. A widow under age it was said might adopt under a direction from her husband, though his brothers survived; *Haradhan Roy* v. *Biswanath Roy*, 2 Macn. H. L. 180; *Gopal* v. *Vishnu*, I. L. R. 23 Bom. 250.

(*s*) *Musst. Chimnee Baee* v. *Musst. Guttoo Baee*, 8 N. W. P. S. D. R. 1853, p. 636.

(*t*) MS. 1675.

(*v*) *Somasekhara Raja* v. *Subhadramaji*, I. L. R. 6 Bom. 524, 527.

(*w*) See B. 3. 17, p. 874, as to misconduct. *Mohunt Bhagwan Ramamuj Das* v. *Das*, L. R. 22 I. A. 94.

A woman's want of chastity deprives her acts of all religious efficacy (*x*). An unchaste woman, pregnant in concubinage, is incompetent to adopt (*y*); but after removal of the sin by penance she can adopt (*z*).

A widow under puberty cannot adopt (*a*), except in some castes with the consent of her husband's kinsmen, or of the caste, or of both. But even when the adoption is made by an immature girl the ceremonies should be deferred till after her "shanee" (*b*) or attainment of puberty.

"Widows of Brahmans and of others amongst whom the custom obtains are deemed impure after the attainment of puberty until they undergo tonsure. They are, however, competent to adopt" (*c*).

"A widow who has attained puberty cannot perform any religious act and therefore cannot adopt until she has undergone tonsure" (*d*).

B. 3. 29.—Adoption by a Widow—Capacity Annulled by Her Re-marriage.

Re-marriage is not recognized amongst the higher castes (*e*). Any association called by such a name is a cause of impurity disabling the subject of it from performing religious acts. But even amongst Sudras re-marriage entirely severs the previous family connexion and prevents adoption by the widow who has formed a new alliance. Re-marriage as laid down by the Bombay High Court is no bar to a widow giving her son in adoption if authorized by her husband (*f*). In *Putlabai* v. *Mahadu* (*g*) she is held to have the power to adopt even without her husband's

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(*x*) See *Moniram Kolita* v. *Kerry Kolitany*, L. R. 7 I. A., at p. 125.

(*y*) *Sayamalal Dutt* v. *Saudamini Dasi*, 5 B. L. R. 362.

(*z*) *Thukoo Baee* v. *Ruma Baee*, 2 Borr. 488 (2nd ed.).

(*a*) Steele, L. C. 48.

(*b*) *Ibid.* 187.

(*c*) *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590.

(*d*) MS. 1615.

(*e*) See Act XV. of 1856, already several times referred to.

(*f*) *Panchappa* v. *Sangambasawa*, I. L. R. 24 Bom. 39.

(*g*) I. L. R. 33 Bom. 107.

consent, as her power to adopt proceeds from her position as a mother, and re-marriage cannot deprive her of this right.

"A Sudra's widow having married another person cannot adopt a son to the deceased husband" (*h*).

B. 3. 31.—ADOPTION BY A WIDOW—CONSENT REQUIRED.

The widow's right to adopt under an express authority from her husband is unqualified by any absolute necessity for the consent of relatives (*i*). In the absence of such authority she may, as a junior widow, require the consent of her co-widow, and as a member of her husband's family the consent of his near relatives, provided it be not improperly withheld (*k*).

B. 3. 32.—CONSENT OF CO-WIDOW.

Where there are two widows they ought regularly to concur in an adoption. In case of disagreement the right belongs, as we have seen, to the elder (*l*). "But a second widow may adopt with the consent of the elder" (*m*). A co-widow, however, cannot make an adoption without the consent of the other co-widow in whom the whole estate of her son has vested by inheritance (*n*). In Bengal such an adoption by the junior widow has been held not to divest the estate vested in the senior widow in her capacity as a mother (*o*).

B. 3. 33.—CONSENT OF MOTHER-IN-LAW.

The consent of a mother-in-law to an adoption by her adoptive son's widow seems to have been thought necessary, but was inferred from the absence of a prohibition in *Thukoo Baee Bhide* v.

(*h*) MS. 1749.

(*i*) See above, B. 3. 1 and B. 3. 2.

(*k*) See *Dinkar Sitaram Prabhu* v. *Ganesh Shrivram Prabhu*, I. L. R. 6 Bom. 505. *Padajirav* v. *Ramrav*, I. L. R. 13 Bom. 160; *Mandakini Dassee* v. *Adinath Day*, I. L. R. 18 Cal. 69.

(*l*) Sec. III. B. 3. 17. *Padaji* v. *Ramrav*, *supra*.

(*m*) MS. 1658. The assent was in one case pronounced unnecessary. MS. 1663. See 2 Str. H. L. 94.

(*n*) *Anandibai* v. *Rashibai*, I. L. R. 28 Bom. 461.

(*o*) *Faizuddin* v. *Tincowri*, I. L. R. 22 Cal. 565.

Ruma Baee Bhide (*p*). The necessity for this consent could not, probably, be maintained on the authorities. In *Siddappa* v. *Ningangavda* (*q*) it was held that the widow of a pre-deceased son could make a valid adoption with the consent of her mother-in-law, in whom the estate of the last full owner had vested, as an adoption by such a daughter-in-law during the lifetime of the father-in-law would not devest the estate vested in the mother-in-law (*r*).

B. 3. 34.—Adoption by a Widow—Consent Required of Husband's Kinsmen or Sapindas.

This subject has been much discussed in the judgments in recent years. The law varies in Bengal, Madras and Bombay. It differs according as the deceased husband was undivided or separated from his brethren. In the former case the dependence of the widow and the necessity for the sanction of the kinsmen is recognized by all the systems; in the latter case the Bengal Law is still strict in requiring the husband's sanction (*s*), the Madras Law requires some sanction of the relatives, the Bombay Law practically dispenses with it (*t*).

"A woman cannot adopt without the consent of her husband. If the husband be dead he should have expressed his intentions which the widow may carry out. Failing this she must obtain his father's permission. Failing him she must obtain the assent of the relatives (or caste fellows). Without this the adoption is invalid. A deed transferring her property inherited from the husband to the adopted son is invalid unless countersigned by the relatives" (*v*). "A widow must have her husband's permission;

(*p*) 2 Borr. R. 488, 495. Perhaps the Sastris were influenced by the prevailing idea in Gujarath of the mother's superiority to the wife.

(*q*) I. L. R. 38 Bom. 724.

(*r*) *Gopal* v. *Vishnu*, I. L. R. 23 Bom. 250.

(*s*) *Raja Himun Chull Sing* v. *Koomer Gunsheam Sing*, 2 Kn. P. C. C. 203, 222. The case was one from Etawah in the N.W. Provinces.

(*t*) Jud. Cit., at p. 221. *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at p. 502.

(*v*) MS. 1652. The law here enunciated does not give the widow unbounded discretion. It rather resembles the law prevailing in Madras. See *Appaniengar* v. *Alemalu Ammal*, M. S. D. A. R. for 1858, p. 5; Smr. Chand., Chap. I., paras. 31, 32; 2 Str. H. L. 92.

or that of her father-in-law; or of his widow her mother-in-law " (*w*). The Vyavahara Mayukha dispenses with the assent of the deceased husband of a widow on the ground that the text limiting a woman's power rests on her essential dependence during coverture, and expressly mentions only the assent of a husband to the act of the wife as necessary (*x*). From the same text the Dattaka Mimamsa deduces that the husband's express authority is indispensable. The middle doctrine of the assent of the kinsmen being necessary and sufficient is favoured by the Mayukha (*y*), and this may be considered to have prevailed over both the extremes (*z*), at least in the case of a united family. A Hindu widow, who has not the family estate vested in her, and whose husband was not separated at the time of his death, is not competent to adopt a son to her husband without his authority or the consent of his undivided coparceners (*a*).

As to what assent is sufficient, in default of authority from the husband, in case of adoptions in divided and undivided families, reference may be made to the cases below (*b*). In the first of these it was ruled that what constitutes the consent of kinsmen must depend on circumstances. In a united family a widow adopting without her husband's authority must have the permission of her father-in-law if he is alive; if he is dead the consent of all her husband's surviving brothers (*c*). Where, however, the

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(*w*) MS. 1672. " Among the Brahmins &c. . . . the widow may adopt if ordered to do so by her husband before his death," even where on his decease his share is absorbed in the shares of his brothers. Steele, L. C. 176. *Vithoba* v. *Bapu*, I. L. R. 15 Bom. 110; *Siddappa* v. *Ningangavda*, I. L. R. 38 Bom. 724.

(*x*) Vyav. May., Chap. IV., sec. V., paras. 16—18.

(*y*) *Loc. cit.*, para. 17.

(*z*) See above, B. 3. 13.

(*a*) *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498; *Dinkar Sitaram Prabhu et al.* v. *Ganesh Shivram Prabhu*, I. L. R. 6 Bom. 505. Above, p. 891, note (*r*).

(*b*) *Collector of Madura* v. *Mutu Ramalinga Sathupatty*, 1 Beng. L. R. 1 P. C.; S. C. 12 M. I. A. 397; S. C. 2 Mad. H. C. R. 206; *Sri Varada Pratapa Sri Raghunadha* v. *Sri Brozo Kishoro Patta Deo*, 25 C. W. R. 291 C. R.; 7 Mad. H. C. R. 301; L. R. 3 I. A. 154; I. L. R. 1 Mad. 69; *Sooburnomonee Debia* v. *Petumber Dobey*, 1 Marsh. 221; *R. V. Venkata Krishna Row* v. *Venkata Rama Lakshmi Narasayya*, L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174. In this case it was said that limitation as against one disputing an adoption is to be computed from the time when he became aware of the adoption.

(*c*) " The authority of a father-in-law would probably be sufficient to a widow. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is that there should be such evidence of the

widow succeeds to her husband as owner of a separated estate the consent of her husband's nearest kinsmen is sufficient.

In the second case the High Court of Madras held that the assent of a single sapinda replaced what under the older law would have been a procreation by him (*d*), but from this the Judicial Committee dissent. The law of Madras, their Lordships say (*e*), "in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay," and by that law "a widow not having her husband's permission may adopt a son to him if duly authorized by his kindred." "The requisite authority," they thought, "is in the case of an undivided family to be sought within that family" (*f*). In the particular case the property was an impartible zamindary, and Holloway, J., having held that in such a case, though the family was undivided, the principles applicable to a divided family and a separated estate ought to govern succession and adoption, the Judicial Committee take occasion to intimate their doubt whether such a doctrine is tenable (*g*). It is obviously inconsistent with the principle that "the substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property a mere accessory to it."

The wider law of Bombay referred to by the Judicial Committee

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assent of kinsmen as is sufficient to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive." Privy Council in the *Ramnad Case* (12 M. I. A. 442), on which Sir J. Colville observes (I. L. R. 1 Mad. 190) :

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this Committee in the former case intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband."

(*d*) 7 Mad. H. C. R., at p. 305.

(*e*) L. R. 3 I. A., at p. 191.

(*f*) In earlier Madras cases it had been ruled that the relations whom a widow is to consult for adoption may be her father-in-law or other elders of the family (*Ramasashien* v. *Akyalandumal*, M. S. D. A. R. 1849, p. 115), or her husband's nephew (*Appaniengar* v. *Alemalu Ammal*, M. S. D. A. R. 1858, p. 5). The consent of his nephew as nearest male representative was held sufficient in *N. Chandvasekharuda* v. *N. B. Eahmana*, 4 Mad. H. C. R. 270.

(*g*) See L. R. 3 I. A., at pp. 191, 192.

is that allowing a widow of a Hindu separated from his family to adopt without the sanction of any one in any case in which the husband has not intimated a wish to the contrary (*h*).

In *Raja V.V. Krishnarao's Case* (*i*), reference is made to the *Ramad Case* (*k*) to show that where the deceased had been separate in estate such " assent of kinsmen suffices [as will] show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive." As to this " their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow." Where, as in Bombay, the widow's authority in a divided family is greater, it would obviously be still more dangerous to scrutinize her motives too closely in the light cast on them by the suggestions of interested relatives. The difficulty is removed by dispensing with their sanction. The opinions of the Sastris on this subject have varied somewhat, according to the authorities on which they have relied, but the doctrine of the Samskara Kaustubha has generally prevailed (*l*).

The assent of separated kinsmen will by no means replace that of the deceased husband's undivided brother (*m*). Where the husband of a Hindu widow dies separated, and she herself is the heir, or she and a junior co-widow are the heirs, she may adopt without the sanction of her husband (if he have not, expressly or by implication, indicated his desire that she shall not do so) and without the sanction of his kindred (*n*).

In one Bombay case it was held that the consent of a single sapinda in a family apparently undivided was sufficient to validate an adoption by a widow (*o*), but this cannot now be considered as the received law (*p*). Where assent is needed it is the assent of the

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(*h*) *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at p. 503. See above, pp. 783, 796. *Lakshmibai* v. *Sarasvatibai*, I. L. R. 23 Bom. 789.

(*i*) L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174.

(*k*) 12 M. I. A. 397.

(*l*) See above, pp. 783, 796.

(*m*) *Sri V. P. Raghunadha* v. *Sri Brozo Kishore*, L. R. 3 I. A., at p. 189.

(*n*) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J.; *Ramji* v. *Ghamau*, I. L. R. 6 Bom. 498; *Mahableshwar* v. *Durgabai*, I. L. R. 22 Bom. 199; *Patel Vandravan* v. *Chunilal*, I. L. R. 15 Bom. 565.

(*o*) *Gopal Shridhar* v. *Naro Vinayak*, 7 Bom. H. C. R. App. xxiv., approved in *Rakhmabai's Case*, 5 Bom. H. C. R., at p. 190.

(*p*) See *Ramji* v. *Ghamau*, I. L. R. 6 Bom., at p. 503.

father or of all the male members of the undivided family. Still, however, the right to give or refuse assent cannot be regarded as absolute. "The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption" (*q*). A widow refused permission without reasonable grounds might on Hindu principles properly apply to a Civil Court for a declaration of her right to adopt even against the will of one or more of the sapindas of the husband (*r*.)

B. 3. 35.—ADOPTION BY A WIDOW—WITH CONSENT OF THE CASTE.

A woman may adopt for her deceased husband if she has permission of the caste (*s*) according to some interpretations.

In *Sree Brijbhookunji's Case* (*t*) the Sastris are made to say that a widow not having a written permission from her husband may adopt with the sanction of the caste and the cognizance of the Government. The jnati are more properly the kinsmen, the gentile relatives, and so Colebrooke translates the word (*v*), but the Sastris insist on the approval of the caste unless indeed members of it be not within reach for consultation (*w*). They therefore must have taken "jnati" in the sense of caste fellows.

Many castes at Poona said a widow could adopt with the consent of the caste (*x*). They probably took the ambiguous "jnati" in a sense supporting this rule.

(*q*) *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, 12 M. I. A., at p. 442. This agrees with the Nirnaya Sindhu and the Vyav. Mayukha.

(*r*) See above, sub-sec. B. 3. 26, p. 891, note (*r*).

(*s*) *Narayan* v. *Nana*, 7 Bom. H. C. R. 153 A. C. J.; Vyav. May., Chap. IV., sec. V. 17, 18; Steele, L. C. 48, 188; *Sree Brijbhookunjee Maharaj* v. *Sree Gakoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd ed.); *Thukoo Baee* v. *Ruma Baee*, 2 Borr. 488 (2nd ed.). See above, p. 868.

(*t*) 1 Borr. R., at p. 214.

(*v*) See Mit., Chap. I., sec. XI., para. 9, note.

(*w*) *Brijbhookkunjee's Case*, 1 Borr. 216.

(*x*) Steele, L. C. 187.

B. 3. 36.—Adoption by a Widow—Consent of Persons whose Interests are Affected by the Adoption.

It has been shown above, B. 3. 25, that according to some decisions a vested interest cannot generally be devested by means of an adoption. According to the same decisions, however, the person whose estate is to be devested may assent to the adoption and thus give it validity. This doctrine agrees with that of the Hindu lawyers in so far as it gives weight to an assent which must be disinterested. It is opposed to the Hindu Law if it is applied so as to make the widow's right to adopt absolutely dependent on the assent of one who is interested in refusing it. A separated relative on whom the widow is not spiritually dependent does not acquire a right to control her by taking the estate for which it is her religious duty to provide a better heir. The mother of the deceased is hardly less bound than his widow to secure his eternal peace; she can have no right to deprive him of it merely because she may have succeeded to the estate. The doctrine as thus far developed takes no account of the joint right even in the case of collateral succession according to some jurists (*y*) which the son of the man in whom the estate has vested has forthwith acquired in that estate. The sons' assent to an adoption, if the need for assent rests on proprietary right, ought to be as essential as their father's, but the law has not been pushed to this logical conclusion. Nor has the vested interest as yet been held to involve a right to defeat an express authority to adopt given by the deceased owner to his widow. Such an effect indeed would be entirely opposed to the decisions (*z*). But as the widow's capacity rests on a presumed assent there seems to be no good reason where this principle is admitted for allowing an interested relative merely on the ground of his interest to annul the presumed authority. The necessity for sanction is really a consequence of the widow's dependence (*a*). According to the Bombay Law she cannot adopt to take away an estate from collaterals without their assent except when she herself has a right superior to theirs. In

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(*y*) See above, pp. 655—657.

(*z*) See above, B. 3. 13, B. 3. 23, B. 3. 25; above, p. 895.

(*a*) Above, B. 3. 23; pp. 224 ss., and 898.

It is inconsistent with the consent of relatives, being in them a right of property that, if they refuse it, it may generally be replaced by that of representative members of the caste. Steele, L. C. 394. A question which the caste cannot settle may be referred to the ordinary Courts. *Ibid.* 185, 186.

an undivided family she has to obtain their sanction; in a divided family she herself represents the line, failing other representatives, that would be represented by her adopted son (*b*). When she ends one collateral line she cannot take away the estate from another by adoption (*c*).

It is desirable that the actual decisions should, if possible, be brought into harmony with the principles thus deduced from the Hindu Law itself. These decisions are in themselves somewhat contradictory, and as the Courts in India have built on a few dicta of the Judicial Committee a theory which they seem too narrow to support, a return to the guidance of Indian authority may be the course attended with least disturbance of precedents.

In the Maratha country it was maintained by Sir R. Couch on a very complete review of the authorities that a conscientious adoption by a widow without the consent of kinsmen or co-widow may be legal (*d*). In a later case (*e*), this was qualified by a statement that the consent of a kinsman would be material if an interest in property is vested in him, and he would be devested of it by the adoption (*f*). This prohibitive power was even placed in the hands of a kinsman's widow. Thus a widow of the husband's brother who died in possession (*g*), or a widow of a son who died after his father (*h*), is not, it is said, to be devested by an adoption which would give to the adopted son a place prior to them in the line of inheritance. The deceased husband was the last full owner

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(*b*) *See Lulloobhoy* v. *Cassibai*, L. R. 7 I. A. 212.

(*c*) See above, sub-secs. B. 3. 23, B. 3. 25, B. 3. 34. *Pudma Coomari Debi* v. *Court of Wards*, L. R. 8 I. A. 229; *Thayammal* v. *Venkatrama Aiyan*, L. R. 14 I. A. 67; *Tarachurun Chatterji* v. *Suresh Chunder Mookerji*, L. R. 16 I. A. 166.

(*d*) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. 181 A. C. J.

(*e*) *Rupchand Hindumal* v. *Rakhmabai*, 8 Bom. H. C. R. 114. In this case one of two co-widows it is said must submit to an adoption by another for her husband's beatitude, while to the widow of a united brother such an adoption would work "manifest injustice." But as the adoption could be made to the prejudice of the surviving brother, why not to the prejudice of his widow, who at most continues his existence? The widow of the first deceased similarly continues his existence, and the Hindu Law contemplates an adoption by the widow of each brother so as to reproduce the united family.

(*f*) *Annammali* v. *Mabhu Bali Reddy*, 8 Mad. H. C. R. 108; *Kally Prosono Ghose* v. *Gocool Chunder*, I. L. R. 2 Cal. 295.

(*g*) *Rupchand* v. *Rakhmabai*, 8 Bom. H. C. R. 114 A. C. J.

(*h*) *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharjee*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; Beng. S. D. A. R. 1858, p. 122.

in these cases. Where the deceased was a member of a joint family the widow of a predeceased coparcener may, on the principles above stated, adopt after the death of the last deceased as she could before it, and with a similar effect (*i*). Where he was separated no right can be acquired against his own line by adoption in another. Where on failure of his own line and of united coparceners the estate has passed to a separated branch it cannot be taken away by another by means of a subsequent adoption; but the failure of his own line is not definitive until his widow has died without adopting.

B. 3. 37.—Adoption by a Widow—Consent of Government.

It has been shown (A. 4. 4) that the consent or at least the acquiescence of the Government has sometimes been thought requisite to a valid adoption. The same idea has prevailed still more with respect to adoption by widows. It does not seem to be better founded in the one case than in the other. Some intimation to the Government might be desirable for publicity, and where an estate supporting a public office was to be taken there were obvious reasons why the sovereign should insist on adoptions being made only with his approval, but so far as the Hindu Law is concerned such a sanction was not needed any more for the adoption than for the procreation of a son (*k*). Each is in its place a religious duty, superior to the will of the temporal ruler. Yet according to the Sastri—

"The assent of relatives and of the Government is requisite to the validity of an adoption by a widow" (*l*).

(*i*) A partition and distribution after a coparcener's death seem to prevent a recovery by a son afterwards adopted by his widow. See below, sec. VII.

(*k*) "In contemplation of law such (adopted) child is begotten by the father . . . on behalf of whom he is adopted." *Per* Willes, J., in the *Tagore Case*, L. R. Supp. I. A., at p. 67.

(*l*) MS. 1644. The assent of the Government is not now deemed necessary, *Rangoobai* v. *Bhagirthibai*, I. L. R. 2 Bom. 377; *Narhar Govind Kulkarni* v. *Narayan Vithal*, I. L. R. 1 Bom. 607; 2 Str. H. L. 88.

"The sanction of Government is necessary to an adoption by a widow" (*m*).

Except when her husband is alive a woman may adopt (*n*) with the sanction of the ruling power (*o*).

When the Government has sanctioned and confirmed an adoption, gift, or bequest, the defectiveness thereof need not be inquired into (*p*). Its non-interference entitles the adopted son to succeed to a vatan (*q*).

(*m*) MS. 1644. But as to this see A. 4. 4. In the *Mankars' Case* the following replies were given by the Sastris :

1. "That a woman, whether Brahman or Shoodr, was permitted to adopt a son, without her husband's order, after his death."

2. "That the widow could adopt a son after her husband's death."

3. "A woman is permitted to take a son in adoption according to the Mayookha."

4. "From political motives Bajee Rao declared the adoption of a son by a widow, without the orders of her husband, to be illegal, though he permitted two or three exceptions."

5. "The widow is permitted by the Shastr to adopt any one as her son."

6. "An elderly widow is allowed, of her own accord, to do that which will insure her happiness in the next world, and as adopting a son is one means of attaining it, she may adopt a son."

(*n*) *Narayan* v. *Nana*, 7 Bom. H. C. R. 153 A. C. J.; Steele, L. C. 45, 47, 187.

(*o*) *Sree Brijbhookunjee Maharaj* v. *Gokolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd ed.).

In this case the Sastri said : "A widow, notwithstanding she has no written permission from her husband, may, if she be desirous of adopting a son, do so legally by obtaining the sanction of the gentiles, and informing the ruling authorities."

"A woman . . . in the event of her receiving no order (from her deceased husband) must send for her relations . . . and after acquainting the ruling authorities, may adopt a son according to the ceremonies laid down in the Vedas."

(*p*) *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd ed.); *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R., at p. 187 A. C. J. The importance attached to confirmation by the sovereign where a public trust was concerned may be seen from pp. 206, 209 of the report of Borradaile.

(*q*) *Ramachandra Vasudev* v. *Nanajee Timajee*, 7 Bom. H. C. R. 26 A. C. J., in which references were made to *Bhasker Buchajee* v. *Narro Raghunath*, Select Cases, p. 25; *Virbudru Hurrybudru* v. *Baee Ranee*, Morris, Pt. II., p. 1; *Trimbak Baji Joshi* v. *Narayan Vinayak Joshi*, 3 Morris's S. D. A. R., p. 19; *Vishram Baboorow* v. *Narainrow Kassee*, 4 *ibid.* 26; *Chenbasawa* v. *Pampangowda*, S. A. No. 655 of 1864; *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. A. C. J. 181.

B. 3. 38.—Adoption by a Widow—Omission or Postponement of Adoption.

Though it is a religious duty on the widow's part to give effect to any express direction left by her husband she cannot be constrained to perform it. Without goodwill indeed the reception could hardly be religiously perfect. The cases collected under B. 3. 15 will serve to illustrate this sub-division also along with those which follow.

The right of inheritance is not suspended by pregnancy or until adoption (*r*).

Authority to adopt, upon death of the natural son, does not prevent the widow from succeeding to the son, the authority not being imperative (*s*).

A widow having permission to adopt three sons in succession cannot be compelled to act on that permission before she is allowed to take her contingent estate on the death of the adopted son (*t*). A husband's express authorization, or even direction, to adopt, does not constitute a legal duty on the part of the widow to do so, and for all legal purposes it is absolutely non-existent till it is acted upon (*v*).

B. 3. 39.—Adoption by a Widow—Pretended Adoption.

Some instances of pretended adoption have occurred and have been dealt with by the Courts on the ordinary principle of avoiding fraudulent transactions. As a pretended adoption is not an adoption, the subject does not require detailed treatment.

(*r*) *Dukhina Dossee* v. *Rash Beharee Mojoomdar*, 6 C. W. R. 221.

(*s*) *Dino Moyee Chowdhrain*, v. *A. D. C. Rehling*, 2 C. W. R. 25 Mis. Rulings.

(*t*) *Deeno Moyee Dossee* v. *Doorgapershad Mitter*, 3 C. W. R. 6 Mis. App. See above, pp. 813, 814.

(*v*) *Uma Sunduri Dabee* v. *Sourobinee Dabee*, I. L. R. 7 Cal. 288; *Mutasaddi Lal* v. *Kundun Lal*, L. R. 33 I. A. 55.

B. 4.—Adoption by Females—Anomalous Adoptions.

As a husband and wife must be joint parents of the legitimate begotten son, and ought to join in adopting a boy to replace him, so the widow alone can in strictness be qualified to adopt after her husband's death a son who, becoming his son, becomes hers also. And so long as the widow exists it is quite opposed to principle that she should be supplanted in the performance of this duty by any one else. But in the case of boys dying as infants the right of the mother to adopt has gained recognition by a kind of necessity, and this right has in some instances been allowed an extension even to cases in which the deceased son had left a widow. Where a son has died before his father the sacra have never wholly devolved upon him, and adoption by the father may be conceived as not depriving the daughter-in-law of any distinct spiritual jointure; where she is ousted by her mother-in-law, it must rather be ascribed to confusion of thought or to the predominance allowed in many ways to a mother by caste custom, some instances of which have already been noticed (*w*).

B. 4. 1.—Anomalous Adoptions—Adoption by Mother.

A widow, after succeeding to her natural-born son as his heiress, *may adopt a boy to her own husband* (*x*), or, it is said, to the son himself (*y*), so as to devest her own interest.

"If a daughter-in-law has made an invalid adoption contrary to the wish of the mother-in-law the latter may adopt an eligible

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(*w*) See above, pp. 91, 92, 152, 372.

(*x*) *Bykant Mony Roy* v. *Kristo Soondery Roy*, 7 C. W. R. 392; *Mondakini* v. *Adinath*, I. L. R. 18 Cal. 69.

(*y*) *R. V. Venkata Krishna Rao* v. *Venkata Rama Lakshmi Narsayya*, L. R. 4 I. A. 1; S. C. I. L. R. 1 Mad. 174.

"A widow succeeding as heir to her own son does not lose the right to exercise the power of adoption. By making an adoption she divests her own estate only." The adoption by a mother on account of her deceased son is questionable. It is impossible that the same boy should have been her son and her son's son. Her adoption should be of a son to her husband, in place of the one deceased without son or widow. See B. 3. 13; 2 Str. H. L. 94.

person " (*z*). " If she make an illegal adoption her mother-in-law may make one " (*a*).

A widow having, against the wish of her mother-in-law, who wanted a boy of her own gotra, adopted one of a different gotra, this was pronounced invalid. The mother-in-law adopted a boy of her gotra. The Sastri pronounced this, too, illegal, as the right vested in the daughter-in-law. But of the two the preference was, he said, to be given to the adopted of the mother-in-law as being of the same gotra (*b*).

In a case at 2 Str. H. L. 93 the Sastri said a mother directed to do so by her dying son could adopt for him. Mr. Ellis treated this as a case of delegation, and thought she might act as her son's deputy, as " the Hindu Law and religion allows of vicarious substitution in almost every possible case." The mother could not act as " deputy " for a son deceased, but during his life he might perhaps commission her to act for him, in a simply ceremonial act (*c*), though this is not certain. Colebrooke in the case in question seems to have thought that a mother might complete, on behalf of her son, an adoption begun by the latter but interrupted by his death. Sutherland thought that notwithstanding the son's request the mother could not, after his death, adopt for him (*d*). Adoption by a mother to her own husband after her son's death is, as we have seen, under some circumstances permissible. An adoption by her to her son cannot be regarded as otherwise than grossly anomalous. It is only his wife or his widow who can adopt for a man (*e*) and at the same time for herself, the adoption taking the place of procreation, in which a son and a mother could not possibly join (*f*).

(*z*) MS. 1672. But see 2 Str. H. L. 91 ss.

(*a*) MS. 1632.

(*b*) MS. 1744. See above, p. 92, note (*t*).

(*c*) See *Vijiarangam* v. *Lukshman*, 8 Bom. H. C. R., at p. 256 O. C. J.

(*d*) So *per* Westropp, C. J., in *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R., at p. 265.

(*e*) *Bhagvandas* v. *Rajmal*, 10 Bom. H. C. R. 241.

(*f*) An adoption invalid on account of an intervening holder of an estate is not set up by the death of that person. See *Bykant Moonee Roy* v. *Kisto Soonder Roy*, 7 C. W. R. 392, as compared with the explanation of *Bhoobun Moyee's Case*, in *Pudma Coomari* v. *Court of Wards*, L. R. 8 I. A. 229.

B. 4. 2.—Anomalous Adoptions by Females—By a Daughter-in-Law.

The case discussed above under A. 2. 3 may, from one point of view, be regarded as falling under this section. The validity of such an adoption would hardly now be admitted (*g*).

B. 4. 3.—By a Grandmother.

A grandmother who succeeds to an unmarried grandson cannot adopt (*h*).

C. 1.—*Quasi*-Adoptions—By Males.

"Of the twelve enumerated sons two only—the lawfully begotten and the adopted—are allowed in the Kaliyuga (*i*).

The Kritrima adoption by a male to himself alone or by a husband and wife to both conjointly, is still recognized in Maithila (*k*), but it is of little or no importance for other districts.

The palak putra has no right as such (*l*).

"A foster-son may be heir by custom" (*m*). In such a case the "adoption" must, so far as is known, be made by the foster-father himself.

C. 2.—*Quasi*-Adoptions by Females—Kritrima Adoptions.

"In Maithila the widow is as of right at liberty to adopt without special authority for the purpose (a Kritrima son); the adopted in this case succeeding to her exclusive property only, not to that of her deceased husband to whom he is not considered in any way

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(*g*) In *Dinkar Sitaram* v. *Ganesh Shivram Prabhu*, I. L. R. 6 Bom. 505, the authorization of a father-in-law seems to have been thought of some importance. But no part of the ultimate decision rests on this point. At p. 508, line 5, a seeming error is caused by the omission of the word "of" before "Krishna."

(*h*) *Ramkrishna* v. *Shamrao*, I. L. R. 26 Bom. 526.

(*i*) MS. 1633.

(*k*) See below, sec. VII.

(*l*) Steele, L. C. 184. As to the palak putra, see above, p. 828.

(*m*) MS. 1707. As to the fosterage or *quasi*-adoption prevalent amongst the lower castes, see above, p. 827.

related" (n). He acquires no relationship save to the adopting mother (o).

In Maithila it appears that a wife may adopt to herself independently of her husband by the Kritrima form. The son thus taken succeeds only to her Stridhana (p).

The son thus adopted by a wife or a widow does not lose his place in his own family (q).

The consent of the person adopted is indispensable (r).

C. 2. 1.—*Quasi*-ADOPTIONS BY FEMALES—SUBJECT TO THE ALYA SANTANA LAW.

A female, where the Alya Santana law prevails, cannot adopt if she have male issue living (s).

C. 2. 2.—*Quasi*-ADOPTIONS BY FEMALES—BY KALWANTINS, NAIKINS, &c.

"The Sastras contain no rules applicable to adoption by Kalwantins" (t). A dancing girl can adopt, but only a daughter (v).

The Pandit of the Supreme Court at Calcutta when consulted on an adoption of a daughter by a courtesan answered that there was no such instance of the adoption of a daughter to inherit by the Hindu Law (w).

(n) 2 Str. H. L. 204, quoting Sutherland's Synopsis.

(o) *Boolee Singh* v. *Musst. Busunt Koveree*, 8 C. W. R. 155. With the Kritrima adoption may be compared that allowed in the later ages of the Roman Law. See above, pp. 814, 815.

(p) *Sree Narain Rai* v. *Bhya Jha*, 2 C. S. D. A. R. 23.

(q) *Collector of Tirhoot* v. *Hurroo Persad Mohunt*, 7 C. W. R. 500 C. R.

(r) *Luchman Lal* v. *Mohun Lal*, 16 C. W. R. 179 C. R. See above, pp. 814, 828, 833.

(s) *Cotay Hegady* v. *Manjoo Kumpty et al.*, M. S. D. A. R. 1859, p. 138. The Alya Santana succession is that of a nephew to his maternal uncle. See above, pp. 274, 276, 398.

(t) MS. 1651.

(v) *M. C. Alasani* v. *C. Ratnachellum*, 2 Mad. H. C. R. 56; *Manjamma* v. *Shishgirirao*, I. L. R. 26 Bom. 491. This is not a real adoption. See above, p. 835. The adoption (so called) of a Palak Kanya as a dancing-girl may be annulled at pleasure by the adopter, Steele, L. C. 185.

(w) *Doe dem Hencower Bye* v. *Hanscower Bye*, 2 Mor. Dig. 133.

SECTION IV.—FITNESS FOR ADOPTION.

When a substitutionary son is needed the man seeking him is not at liberty to adopt any child indiscriminately. There are conditions as to sex (*x*), caste, family and personal qualities, which must be satisfied in order to constitute a fit subject for adoption. Some of these afford no more than a ground of preference, but others are indispensable. They go to the root of the capacity to render the desired benefits, or rest on the duties due to the family of birth, which must not be thrown off even in the lower castes. The statement that "an adoption once made cannot be set aside" (*y*) cannot be sustained in the sense that a mere performance of the ceremonies gives validity to an adoption of a disqualified person (*z*), or one given by a person not competent to make the gift. Sir M. Westropp denied that the *factum valet* principle could be applied to such a case (*a*) where a widow without express authority had given an only son in adoption.

1.—Fitness for Adoption as Affected by Caste.

The rule which requires that a boy who is to be adopted shall be of equal class with the adoptive father has already been considered (*b*). It is implied in several of the texts quoted below. The instances of a breach or attempted breach of this rule are, as might be expected, very few. In two cases the following answers were given:

"No adoption is permitted from a different caste" (*c*).

(*x*) The ancient institution of the putrika-putra makes the mention of "sex" not superfluous. See Vyav. May., Chap. IV., sec. V., para. 6.

"The substituting of a daughter for a son is also prohibited, being included amongst those rejected in the Kaliyuga." 2 Str. H. L. 152.

(*y*) *Raje Vyankatrao* v. *Jayavantrao*, 4 Bom. H. C. R., at p. 195.

(*z*) *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at p. 389, and the cases there quoted.

(*a*) *Ibid.*, p. 397. So Colebrooke at 2 Str. H. L. 178.

(*b*) Above, p. 830. See Vyav. May., Chap. IV., sec. V., para. 4.

(*c*) MS. 1637. An adoption is annulled if it be discovered that the boy adopted was of a lower caste than the adoptive father, Steele, L. C. 185. This means that the adoption is declared to have been null from the first. See Datt. Mim. II. 25, 27.

An adoption was pronounced illegal on the grounds that the adopted was of a different caste from the adopting widow, and was an only son (*d*).

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2. 1.—Connexion in Family Generally.

By the birth of a son to one of several brothers, says the Smriti (*e*), all become fathers of male offspring. The probable origin of this notion has already been discussed (*f*). In the more recent developments of the law we have seen that a brother might properly be called in to supply a brother's failure to procure offspring (*g*). In this state of the scripture and of custom it was natural that as adoption gradually supplanted the other methods of recruiting a family the brother's son should seem the fittest for adoption. In his case there was a kind of sonship already, so much so that some writers contended against the necessity of any adoption at all when there was a brother's son (*h*). There could be no question in his case as to an effective change of gotra seeing that no change was needed. He would of necessity sacrifice to the same remote ancestors with the same formulas as would a begotten son of the adoptive father. Besides these considerations the preference of a brother's son found a natural basis in family affection (*i*), and when the brethren were united, as in early times they usually were, the interest of all, and of the children of those who had sons, were better preserved by adopting a son from amongst the necessary participators of the estate than by introducing a stranger who would take a part from all the other members of the family (*k*). Amongst remoter relatives these

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(*d*) MS. 1750. It may seem strange that such a question should have arisen, but the Viramitrodaya, Tr. p. 117, admits a Sudra son by adoption to one of higher caste. See above, p. 830.

(*e*) Manu IX. 182; Mit., Chap. I., sec. XI., para. 36; Vyav. May., Chap. IV., sec. V., para. 19.

(*f*) Above, p. 396.

(*g*) Above, pp. 794, 795.

(*h*) See Datt. Mim., sec. II. 73.

(*i*) The Datt. Mim., sec. II. 29, says a half-brother's son is not to be taken while a whole brother's son is available. There is almost a repulsion between sons of rival wives. But see below, p. 913.

(*k*) The nearness which is generally understood as nearness of family connexion is by some construed as nearness in locality of residence. See

reasons could not operate with the same force. But it was inevitable that next to a brother's son, a cousin, or a cousin's son should be sought as the fittest for adoption, and that the order in point of proximity should become that of practical preference in selection (*l*). A man, Vasishtha says, is to adopt the son of the nearest relative who can and will give one (*m*); but of two persons equally nearly related, either is eligible (*n*). Genealogies carefully preserved indicated at once whence wives might not, and sons, if need were, might be had; the gotra invocations were the same; and the higher deities were worshipped under the same names and conceptions. It is not surprising that the limitation of choice which was thus induced in practice should have come to be regarded by many as necessitated by the law (*o*); but the sources do not afford any authority for such a restriction. What they exact is nearness and likeness, so far as these can be secured, identity of caste, according to the best interpretations, and also, but not indispensably, of family or gotra. Amongst the Sudras the distinctions of gotra in the Brahminical sense cannot exist (*p*). Their *quasi*-gotras mark the more distant family connexions, but there is no objection to a Sudra adopting from a gotra different from his own (*q*).

The question being as to the existence of a legal objection to the adoption of a son from a remote branch the Sastri answered only: " The Sastra is in favour of the adoption of a boy belonging to the near branch " (*r*). Colebrooke says that only a preference is

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Viram. Tr. p. 117. This view seems to be favoured by the Mit., see Chap. I., sec. XI., paras. 13, 14, and notes. The Vyav. Mayukha says the nearest by blood is to be taken, see Chap. IV., sec. V., para. 19, and Datt. Mim. II. 16; V. 36, 38.

(*l*) See above, p. 819, as to the superior claims of the nearer relatives.

(*m*) Vasishtha, Chap. XV. 6.

(*n*) *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd ed.).

The Pandits said, " It is written in the Mayukha that it is necessary that the person to be adopted be of a virtuous disposition, learned, beloved by him who adopts him, and also be the nearest of kin to him, adding verbally, that if there were two persons equally near, Maharanee would be at liberty to adopt either." See Datt. Chand. I. 10; Vyav. May., Chap. IV., sec. IV., para. 19.

(*o*) See Mit., Chap. I., sec. XI., paras. 13, 36, note; Vyav. May., Chap. IV., sec. V., para. 19; Datt. Mim., sec. II., paras. 2, 13.

(*p*) See Datt. Mim. II. 5 ss. 80.

(*q*) *Rangamma* v. *Atchamma*, 4 M. I. A. 1.

(*r*) MS. 1640. See Datt. Mim. II. 18.

to be given to a brother's son, not so exclusive a preference as to shut out the exercise of discretion (*s*). The prohibition against an adoption of an asagotra is of a moral rather than legal character (*t*), and in one case a Sastri expressed the opinion that "if a Brahman cannot find a person fit for adoption in his own gotra he may adopt from another gotra a man of thirty having children" (*v*). In another case amongst Brahmans, a question having been put as to the adoption by a widow of a boy whose upanayana (*w*) had been performed, the answer was merely that if a boy of her own gotra could not be obtained she might take one of another gotra (*x*).

The general rule of propinquity giving a preference for adoption is illustrated by the following cases. A few of them admit the adoption of a younger by an elder brother. Balchandra Sastri gathered a support for this adoption by inference from the elder brother's being "in place of a father" (*y*), but the Smriti had in view merely the nurture and protection of the family by its head. The castes do not seem to have admitted this adoption, and it is opposed to the principle of imitating nature (*z*). It can hardly be regarded, therefore, as allowed by the law.

In *Brijbhukhan's Case* (*a*) the Sastris say that the person to be adopted must be the nearest of kin who can be obtained. But then they add that what has been done conformably to the Vedas cannot be undone, and that a son taken, not from amongst the gentiles, even by a widow, is not a mere dharm-putra but a datta-putra with the full rights of that relation (*b*). It follows that the preference of the nearest is not a matter of legal obligation.

A widow, on the death of her son, adopted a remoter kinsman than one who was available, and on his behalf applied for a certificate of guardianship, which was refused, as the adoption

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(*s*) 2 Str. H. L. 103.

(*t*) *Durma Samoodhany Ummal* v. *Comara Venkatachella Redayar*, M. S. A. R. 1852, p. 111; 1 Str. H. L. 85; 2 *ibid.* 98, 103, 106; *Srimati Uma Deyi* v. *Gokoolanand Das Mahapatra*, L. R. 5 I. A. 40; S. C. I. L. R. 3 Cal. 587.

(*v*) MS. 1639.

(*w*) Thread ceremony.

(*x*) MS. 1617.

(*y*) Steele, L. C. 44.

(*z*) See Datt. Mim., Sec. III. 30.

(*a*) 1 Borr. R., at p. 214.

(*b*) 1 Borr. 218.

was prejudicial to rights of nearer heirs, and their consent was not shown to have been obtained to rebut the presumption of caprice arising from the facts. She was referred to a regular suit to establish a valid adoption, and directed to renew the application for guardianship under Act XX. of 1864 (*c*).

In the following case the Sastri in approving the adoption to a man of his brother by birth put the permission on the ground of a total severance of natural ties by the adoption of the deceased into another family (*d*). "Adoption," he said, "severs the connection with the natural relatives so completely that the adopted son's widow may adopt his younger brother (*e*). But consanguinity, according to the general opinion, is not to be overlooked in adoption any more than in marriage.

Though the adopting brother has been adopted into another family, several decisions have settled that he cannot adopt his natural brother, on the ground that consanguinity does not cease with adoption (*f*). Thus it has been ruled that a brother cannot adopt his brother in Maithila (*g*), or in the Andra country, Madras (*h*).

A Maratha, a widow, having adopted her husband's illegitimate son, his right to inherit was put on his position as a bastard son of a Sudra (*i*).

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2. 2.—Relation Between the Boy to be Adopted and the Adoptive Father through the Natural Father.

This connexion affords, as we have seen, the strongest ground of preference, but it does not, according to the decisions, give to the nearer relatives a legal right to impose a son on a person about to adopt. This would indeed be inconsistent with the affectionate

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(*c*) *Bhagubai* v. *Kalo Venkaji*, Bom. H. C. P. J. 1875, p. 45.

(*d*) Above, p. 834.

(*e*) MS. 1625.

(*f*) *Moottia Mudalli* v. *Uppon Venkatacharry*, M. S. D. A. Dec. 1858, p. 117. See below, sec. VIII.

(*g*) *B. Runjeet Singh* v. *Obhye Narain Singh*, 2 C. S. D. A. R. 245.

(*h*) *Ramanamall* v. *Suban Annavi*, 2 Mad. H. C. R. 399; *Muttusawmy Naidu* v. *Lutchmeedevumma*, M. S. D. A. Dec. 1852, p. 96; *Moottia Mudalli* v. *Uppon Venkatacharry*, M. S. D. A. Dec. 1858, p. 117. Not even his half-brother, see below, sub-sec. 2. 4

(*i*) MS. 1691.

relations which it is an object of the law to foster between those connected by adoption (*k*). The limitation of choice has been thought somewhat stricter in the case of a widow, and there are some obvious reasons why this should be so, but in a united family her necessary dependence secures the desired end, and it cannot be said that apart from this she is confined to the family or gotra of her husband by any strictly legal restraint (*l*).

A near relative of the same gotra, a nephew if possible (*m*), is the first choice. Failing such, a distant gotraja. Failing him, a bhinna gotra-sapinda (*n*). Failing him a non-sapinda of not more than five years, and whose tonsure (chaula, chuda) has not been performed. If such an one cannot be obtained then one of greater age may be taken (*o*). Steele gives the order of choice in adoption according to the customary law of the Dekhan as follows (*p*): Any brother's son should be the first selected for adoption; should there be none, or should the boy's parents, &c., refuse consent, his place is to be supplied by—(2nd), Any boy of the same gotra, and descended from a common ancestor within three generations (sanghit, sagotra, sapinda); (3rd) Any boy connected with the family by the female line of connexions, for whom funeral cakes are offered (usagotra sapinda), such are the mother's brother's son, or the father's sister's son; (4th) Any boy of the same gotra, descended from a common ancestor within seven generations, within which degree marriage is prohibited (wirudh sumbhand)—these relations are called the sagotra dushantil; (5th) Any boy of the same gotra, the genealogy of whose relationship is otherwise unknown (sagotramatra); (6th) A boy of a different gotra, but of the same caste (pargotra)—such are the sister's son and daughter's son, who are adoptible in default of the preceding. A paternal uncle cannot be adopted, being in place of his father. Nor a maternal uncle, for "an elder relation" (without regard to the relative age of the parties) "cannot be adopted."

The castes at Poona answered more simply (*q*):

(*k*) See the texts quoted below.

(*l*) *Srimati Uma Deyi* v. *Gokoolanand Das Mahpatra*, L. R. 5 I. A. 40.

(*m*) Datt. Mim. II. 67, 73.

(*n*) As to these terms, see above, pp. 107, 123.

(*o*) MS. 1672. In Punjab amongst many tribes there is no limit, but the adoption must preferably be from amongst near kinsmen and must be from the gotra or tribe. Punjab Customary Law II. 155.

(*p*) Steele, L. C. 44.

(*q*) Steele, L. C. 182.

The following relations are to be selected in order: 1, brother's son; 2, paternal first cousin; 3, paternal second cousin; 4, one of the same gotra; 5, one of the same caste, P. Should the party first in order be refused by his immediate family, the caste may advise, and if they fail to persuade the party, another boy is, with their concurrence, to be adopted.

From Khandesh a still simpler answer was received (*r*): "The son of the nearest relation is to be adopted; but should his father not consent, a stranger may be adopted with the consent of several respectable persons."

"The son of a half brother may be adopted in preference to the son of a full brother" (*s*).

The existence of a brother's son does not deprive the uncle of power to adopt another boy, the selection being a matter of conscience and not of absolute prescription (*t*).

"A man may adopt the son of a distant, instead of the son of a near, kinsman" (*v*).

"The widow . . . is enjoined to give preference to the nearest relation who is eligible. But the validity of an adoption actually made does not rest on the rigid observance of that rule of selection: the choice of him to be adopted being a matter of discretion" (*w*). The Sastris have expressed the rule more strictly. A husband's brother's son, they said, can be adopted by a widow, even without the injunction of the husband (*x*). When such nephew exists, she cannot adopt another without her husband's injunction (*y*).

(*r*) Steele, L. C. 182.

(*s*) MS. 1627. This is opposed to the Datt. Mim., sec. II. 29.

(*t*) *Gokoolanund Doss* v. *Musst. Wooma Daee*, 15 Beng. L. R. 405; S. C. 23 C. W. R. 340; S. C. in App. to P. C. L. R. 5 I. A. 40; *contra*, *Ooman Dutt* v. *Kunhia Singh*, 3 C. S. D. A. R. 144, on an adoption in the kritrima form. See Suth. Syn. Head II. and the comment by the Judicial Committee, L. R. 5 I. A., at p. 53; 1 Macn. H. L. 68; 1 Str. H. L. 85.

(*v*) MS. 1628.

(*w*) Colebrooke in 2 Str. H. L. 98. See above, p. 800, note (*a*).

(*x*) *Huebatrav Mankar* v. *Govindrav Mankar*, 2 Borr. 75 (83 2nd ed.). See Vyav. May., Chap. IV., sec. V., paras. 17, 18, 19; Datt. Mim., Chap. II., 29, 73; Datt. Chand., Chap. I. 20, 27, 28; Manu XI. 182; Mit., Chap. I., sec. XI., para. 36 ss.

(*y*) . . . "They (the Shastrees) said, a widow can, by her husband's injunction, adopt a son, but not without it, but the prohibition is meant against her taking any other person when the son of her husband's brother exists, whom she may adopt even without such injunction; for from the words (of Manu,

Even amongst the lower castes a Sastri said:

"The deceased husband's brother's son should be adopted by a Sudra widow. Failing him she may take any one of the caste junior to the adopter" (z).

"Though the deceased husband desired that the son of his brother should be adopted, and the brother is willing to give his son—which the Vyavahara Mayukha allows, though sinful (a)—yet the widow is not under such circumstances obliged to take such a son. In taking the son of some other relative, however, she must have the assent of the relatives" (b).

In one case the Sastri said that a widow cannot adopt her deceased husband's first cousin (c). But this was founded on his notion that the adoption of a brother's son was obligatory. In himself a first cousin of the deceased is a proper person to adopt in the absence of a nearer relative, *i.e.* a nephew (d). In Bengal it was said that whatever the preference due to a brother's son it did not prevent a resort elsewhere if that son were refused (e). The same is the law of several Poona castes (f).

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2. 3.—Relation Between the Son to be Adopted and the Adoptive Father through the Son's Natural Mother.

Contrary to the rule by which the connexion with the adoptive through the natural father gives at least a religious claim to preference to the boy thus related, a near connexion through the boy's mother usually makes adoption impossible. The doctrine of the imitation of nature prevents a man's standing in the relation of adoptive father to a son whom he could not have begotten

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Chap. 9th, v. 182, quoted by the Zillah Shastrees) found in the Mitakshara, book second, leaf 55th, page 1st, line 3rd, it appears, that even without the injunction of her husband, a widow may adopt the son, either of her husband's eldest, or youngest, brother." 2 Borr. 99.

(z) MS. 1675.

(a) *I.e.* the only or eldest son. It does not condemn the gift generally. See Vyav. May., Chap. IV., sec. V. 9, 19.

(b) MS. 1644.

(c) MS. 1703.

(d) MS. 1660.

(e) *Gokoolanund Doss* v. *Musst. Wooma Daee*, 15 B. L. R. 405, 416; S. C. 23 C. W. R. 340, 341; S. C. L. R. 5 I. A. 40.

(f) Steele, L. C. 189.

without incest according to the religious law. The prohibited degrees, however, though observed with strictness by the higher castes, have been little regarded by the Sudras. The unions of the latter have not been looked on as having any sacred character, and the means seldom exist amongst them of tracing *quasi*-gotra relationships to any considerable distance. The aboriginal custom of making a sister's son heir (*g*) was thus readily moulded to the needs of a system of adoption, while the daughter's son growing up in the grandfather's house naturally took the place of the appointed daughter's son and became recognized, when some inclusion within the law of adoption was felt necessary, as a fit subject for adoption (*h*).

The opinion of the Sastris in the case of *Haebut Rao Mankar* v. *Govindrao Bulwantrao Mankar* (*i*) declares a son of a daughter, a sister, or a mother ineligible for adoption, except amongst Sudras (*k*). Three at least of the nine Pandits consulted in the case (*l*) pronounce expressly against the adoption of a daughter's or a sister's son. The other six give no opinion on this particular point. A similar opinion to that of the three is expressed by the Sastri, above, p. 410, Q. 6.

The general principle recognized in many decisions of the Courts that adoption is prohibited where the adopter could not marry the mother of the boy proposed for adoption in her maiden state (*m*) is confined to specific instances of a daughter's son, a

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(*g*) See above, pp. 276, 398, and the *Mankars' Case*, 2 Borr., at pp. 95, 96, 106, 107.

(*h*) "Adoption of a sister's son is strictly prohibited unless in the case of Sudras." Ellis, who refers to the Datta Kaustubha,—but this allows such an adoption in case of necessity, see below. He says the Datta Mimamsa of Sri Ram admits this in case of necessity, and that in practice it is not uncommon in all castes. 2 Str. H. L. 100, and Stokes's H. L. B. 553. "Not regarding the putrika-putra as a subsidiary son, his affiliation (it would not be unreasonable to infer) would be valid in the present age." Sutherland, 2 Str. H. L. 201. See also Sutherland's Syn., note I.

(*i*) 2 Borr. 106.

(*k*) Macn. Cons. H. L. 149, 154; 1 Str. H. L. 71; 2 *ibid.* 77. See above, pp. 800, 801. *Bhagwan Singh* v. *Bhagwan Singh*, L. R. 26 I. A. 153; *Ramchandra* v. *Gopal*, I. L. R. 32 Bom. 623; *Walbai* v. *Heerbai*, I. L. R. 34 Bom. 491; *Yamnava* v. *Lakshman Bhumoo*, I. L. R. 36 Bom. 533.

(*l*) 2 Borr. R., at p. 106.

(*m*) *Shrinivas Timaji* v. *Shintaman Shivaji*, S. A. 587 of 1866; *Jivanee Bhayee* v. *Jivu Bhayee*, 2 M. H. C. R. 462; *Sriramulu* v. *Ramayya*, I. L. R. 3 Mad. 15.

sister's son, and the mother's sister's son (*n*); and thus a widow has been held competent to adopt her brother's son in Bombay (*o*), Madras (*p*), and Allahabad (*q*). In *Puttu Lal* v. *Parbati Kunwar* (*r*) their Lordships of the Judicial Committee have held to the same effect, laying down that the gloss by Nanda Pandit or Dattaka Mimamsa must be accepted with caution. It has been recognized that the rule is not binding on Sudras. Thus it has been held that a Lingayat (as being a Sudra), or a Kayastha (*s*), may adopt a sister's or a daughter's son, but a member of a higher caste may not, in the absence of a special custom. The doctrine of *factum valet* does not validate such an adoption (*t*).

The adoption of a brother was disallowed in Madras (*v*).

The adoption of a sister's son is invalid, according to the decisions, as it imports incest not only among Brahmins (*w*), but generally in the three regenerate classes, except perhaps the Vaisyas (*x*); in the Dravida country (*y*); in the Andra country (*z*); in the North-West Provinces (*a*).

(*n*) *Ram Chandra* v. *Gopal*, I. L. R. 32 Bom. 623; *Walbai* v. *Heerbai*, I. L. R. 34 Bom. 491; *Yamnava* v. *Lakshman*, I. L. R. 36 Bom. 533; *Jai Singh Pal Singh* v. *Biji Pal*, I. L. R. 27 All. 417; *Bhagwan Singh* v. *Bhagwan Singh*, L. R. 26 I. A. 153.

(*o*) *Bai Nani* v. *Chuni Lal*, I. L. R. 22 Bom. 973.

(*p*) *Sriramulu* v. *Ramayya*, I. L. R. 3 Mad. 15; *Ragavendra Raw* v. *Jayaram*, I. L. R. 20 Mad. 283.

(*q*) *Jai Singh Pal* v. *Biji Pal*, I. L. R. 27 All. 417.

(*r*) L. R. 42 I. A. 155.

(*s*) *Rajcoomar Lall* v. *Vissessur Dyal*, I. L. R. 10 Cal. 688; Ramalinga *Pillai* v. *Sadasiva Pillai*, 9 M. I. A. 506.

(*t*) *Gopal N. Safray* v. *H. G. Safray*, I. L. R. 3 Bom. 273, 298.

(*v*) *Muthuswamy Naidu* v. *Latchmeedavamma*, M. S. D. A. R. for 1852, p. 96. See above, p. 865.

(*w*) Datt. Mim. II. 91-93; Datt. Chand. I. 17; 2 Str. H. L. 100; *Doe dem Kora Shunko Takoor* v. *Bebee Munnee*, East's Notes, Case 20; 2 Mor. Dig., p. 32; *Nursing Narain* v. *Bhutton Loll*, Sp. No. C. W. R. 194. This case pronounces against the legality of the putrika-putra in the present day.

(*x*) *Ramalinga Pillay* v. *Sadasiva Pillay*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C. The Vaisyas are only partially recognized. See Steele, L. C. 90.

(*y*) *Gopalayyan* v. *Raghupatiayyan*, 7 M. H. C. R. 250.

(*z*) *Narasammal* v. *Balaramacharloo*, 1 M. H. C. R. 420.

(*a*) *Luchmeenath Rav* v. *Musst. Bhima Baee*, 7 N. W. P. R. 441, 443. In the Punjab the objection to sisters' or daughters' sons arises from their taking the property into another got. The consent of the male relatives, therefore, is required. Punjab Customary Law, II. 156.

" If a Prabhu cannot obtain a son of his own gotra he may take from another, except the son of a sister or daughter " (*b*).

The husband's brother's grandson (grand-nephew) may be adopted, as the adoptive father could have married the nephew's wife in her maiden state (*c*).

The adoption of a first cousin's daughter's son having been recognized for a long time, was upheld (*d*).

An adoption by a Brahman of his daughter's son was pronounced invalid, though it was strongly asserted in the particular case to be in accordance with the custom which prevailed among the caste. A few instances to the contrary, adduced to prove a special custom holding such adoptions valid, were set aside as insufficient by the Bombay High Court (*e*). A special custom, favouring adoption of a sister's son in the Dravida country by Brahmans, was similarly refused recognition by the Court (*f*). The subordination of particular usages to the general customary law is discussed in the *Naikins' Case* (*g*).

" A (Sudra) widow may adopt her husband's sister's son " (*h*), as the husband himself could have done.

A sister's son is incompetent to question an invalid or illegal adoption on the part of his maternal uncle in Benares (*i*) and in Maithila (*k*).

(*b*) MS. 1613. As to the Parbhus, see Steele, L. C. 89, 94.

(*c*) *Morun Moyee Debia* v. *Bejoykisto Gossamee*, Cal. F. B. R. 121.

(*d*) *Lakshmapya* v. *Ramapa*, Bom. H. C. P. J. F. for 1873, p. 59. This case, from the Southern Maratha Country, was disposed of conformably to the laxness of the law there as to prohibited degrees already noticed.

The legality of marriage between an uncle and niece was denied in *Ramanagavda* v. *Shivaji*, Bom. H. C. P. J. 1876, p. 73 (the parties being apparently Lingayats of the Southern Maratha country), but an application for review (*ibid.* p. 154) was dismissed on the ground that the suit was barred by limitation.

(*e*) *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*, I. L. R. 6 Bom. 109. This case illustrates the difficulty of establishing a particular custom of a caste or sect diverging from the general law. It will be seen below that there is considerable authority for the practice.

(*f*) *Gopalayyan* v. *Raghupatiyyan*, 7 M. H. C. R. 250.

In the Panjab, it may be noticed, adoption may be made of a relative through a female. See Tupper, Panj. Customary Law, vol. II., p. 111.

(*g*) I. L. R. 4 Bom., at p. 557 ss.

(*h*) MSS. 1622, 1706. The parties, though the caste is not explicitly stated, must have been Sudras.

(*i*) *Thakoorain Saluba* v. *Mohun Lall*, 11 M. I. A. 386.

(*k*) *Musst. Mooneea* v. *Dhurma*, 11 M. I. A. 393.

As to the daughter's son the Sastris have said: "A Brahman cannot adopt his daughter's son" (*l*); and "The adoption of a daughter's son is invalid. Though Pandits differ, the texts do not differ" (*m*). Again, to a question whether a daughter's only son could be adopted by her father in pursuance of an agreement with her husband at the time of marriage, the Sastri says only "the adoption of a daughter's son is forbidden" (*n*).

On the other hand the Pandits of the Poona College on the authority of the Samskara Kaustubha and the Nirnaya Sindhu admitted the adoption of a daughter's or a sister's son in default of boys available within the adoptive father's own gotra (*o*).

In the South Maratha country the customary law allows the adoption of a daughter's son with the consent of the kindred of the adopter (*p*).

It is valid in Saraogi Agarvali caste, which is a sect of the Jains (*q*).

The son of a woman adopted by her paternal uncle was pronounced entitled to the management of business as Muttadar Patel, while the widow of the deceased nephew was pronounced heir to his property (*r*).

In *Somasekhara* v. *Subhadramaji* (*s*) the Court declined to express an opinion on the validity of an adoption of a son whose mother was second cousin of the adoptive father. As a marriage would have been impossible between the real mother and the adoptive father the adoption would be invalid judged by that test.

(*l*) MS. 1638; *Bhagwan Singh* v. *Bhagwan Singh*, L. R. 26 I. A. 153; *Ramchandra* v. *Gopal*, I. L. R. 32 Bom. 623; *Walbai* v. *Heerbai*, I. L. R. 34 Bom. 491; *Yamnava* v. *Lakshman Bhumoo* ,I. L. R. 36 Bom. 533.

(*m*) *Jivanee Bhayee* v. *Jivu Bhayee*, 2 M. H. C. R. 462; *Nursing Narain* v. *Bhutton Lall*, Sp. No. C. W. R. 194.

(*n*) MS. 1633. This question indicates a clinging to the ancient institution of the putrika-putra. See above, pp. 793, 800, 801.

(*o*) Steele, L. C. 44. See above, pp. 800-1; 2 Borr. 95, 96.

(*p*) Steele, L. C. 183.

The fitness of a daughter's son for adoption, where it is recognized by the higher castes, may be traced either to the institution of the appointed daughter (see above, pp. 800, 801) or to the imitation of their low caste neighbours at the prompting of natural affection.

(*q*) *Sheo Singh Rai* v. *Musst. Dakho*, N. W. P. H. C. R. 382; S. C. L. R. 5 I. A. 87; S. C. I. L. R. 1 All. 688.

(*r*) MS. 5. Nothing is said of the caste, or of division or non-division. Division and Sudra caste seem to be assumed. If the widow of the nephew had adopted a contest might have arisen such as is referred to at p. 889, note (*c*).

(*s*) I. L. R. 6 Bom. 524

Where the adoption of a sister's or a daughter's son is allowed the test seems inapplicable. In the South, whence the case came, marriage with a sister's daughter is common even amongst Brahmans, and custom is, to say the least, lax in restricting adoptions. It would seem therefore that the adoption in question was not open to objection on the ground of prior family connexion between the parties.

In one case (*t*) the opinion seemed to be held that a man could adopt his wife's sister's son, but that this had been invalid in the particular case as tending to deprive the heirs of their right of succession (*v*).

There is of course less objection to the adoption of a father's brother's son or a mother's brother's son than to adopting a father's sister's son or a mother's sister's son (*w*).

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2. 4.—Relation Between the Son to be Adopted and the Adoptive Mother.

The principle of an imitation of nature operates, though less conspicuously, in the case of a blood connexion between the proposed adoptive mother and son as between the adoptive father and son.

In the earlier form of the law as the relation of the adopted son to his adoptive mother was merely incidental, the doctrine of a possibility of union between her and the real father seems not to have been developed. It grew up as natural feeling gradually gave to the adoptive mother, as compared with the adoptive father, a more and more important relation to the child whom they brought up as their own. Then as the condition was accepted of a possible union of the real mother with the ideal father to produce the adopted son, a corresponding notion was suggested of a similar necessary relation between the ideal mother and the real father (*x*).

(*t*) *Baee Gunga* v. *Baee Sheoshunkur*, Bom. Sel. R. 73; *Bai Nani* v. *Chuni Lal*, I. L. R. 22 Bom. 973.

(*v*) This case is discussed above, p. 841.

(*w*) *Shrinivas Timaji* v. *Chintaman Shivaji*, S. A. 587 of 1866. See Datt. Mim. II. 107, 108.

(*x*) See above, p. 796. In a footnote at 1 M. H. C. R. 427 to *Narsarammal* v. *Balarama Charlu*, *ibid.* 420, several cases are quoted to show that there must have been a possibility of legal union between the adoptive father and the real mother. One is cited from Macn. Cons. H. L. 170, to show the need of a similar relation between the adoptive mother and the real father.

Thus it came to be admitted, though not at all universally, that where the real father and the adoptive mother could not, without incest, have joined in procreating the boy, he is not a fit subject for adoption (*y*). Such at least is the rule followed by most of the authorities. Others are more indulgent. A deceased wife's connexion with the family whence the boy is to be taken is not recognized as an obstacle to his adoption. This may be taken as a sign of the imitative character of the doctrine. The relation of a deceased adoptive father to the real mother is an obstacle in the same cases as if he were alive, but on the other side the imitation has not proceeded beyond the relation of an adoptive mother still living.

In several instances the fitness for adoption has been pronounced on solely by reference to the connexion between the boy's real mother and his adoptive father, when the only question under the Hindu Law was whether the relation between the real father and the adoptive mother prevented a valid adoption. The Dharmadvaitta Nirnaya allows the adoption of the wife's blood relatives, but this is opposed to the general sense of the authorities (*z*) as regards the higher castes. The two following cases will serve for further illustrations.

In the first it was ruled that the adoption of a wife's brother is valid (*a*), as the adopter could have legally married adoptee's mother in her maiden state (*b*).

In the second it was laid down that—

1. The son of a wife's brother may be adopted.

2. The rule of Hindu Law that a legal marriage must have been possible between the adopter and mother of the adoptee refers to relationship prior to marriage.

3. This rule has nothing to do with the case of a stepmother in her virgin state, accordingly a half-brother cannot be adopted (*c*).

When the connexion between the propositus and the intended adoptive mother arises through the boy's mother, such a relation

(*y*) Datt. Mim. sec. II. 32, 33. The living wife must (religiously) join in an adoption. As a widow she adopts to her husband, but he surviving does not adopt to her.

(*z*) See Datt. Mim., sec. II. 33, 34.

(*a*) *Runganaigum* v. *Namasevoya Pillai*, M. S. D. A. Dec. 1857, p. 94.

(*b*) *Kristniengar* v. *Venamamalai Jyengar*, M. S. D. A. Dec. 1856, p. 213.

(*c*) *Sriramulu* v. *Ramaya*, I. L. R. 3 Mad. 15. The sense of this is that though the particular restriction would not operate, another one does, which prevents an allowance of adoption which would otherwise follow

creates no obstacle to adoption. Two sisters or two female cousins could not possibly be parents of the same boy, so that the ceremonial relation does not in this case imitate anything legally impossible.

Thus a man may adopt his wife's sister's son (*d*).

"A widow may adopt her sister's son if this be consistent with the custom of the caste" (*e*).

A widow may adopt her brother's son (*f*).

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2. 5.—Family Connexion with the Adoptive Parents Amongst Sudras.

It has been pointed out (*g*) that the practice of adoption amongst the lower castes is probably a mere graft of Brahmanical usage upon a primitive stem of a very different kind. The result shows signs of this composite origin. The aboriginal tribes had a family system of their own, which in some form they must retain. The marriage of first cousins, marriage of an uncle and niece, heirship of a sister's son, reception of a daughter's husband as *quasi*-son when there was no real son in the way; for all these and other customs room had to be found in the Brahmanical system before the uncivilized converts could be subdued to it (*h*). Similarly in the case of adoption the practice of succession of a sister's and of a daughter's son had to be admitted; it was brought within the general system by widening the gateway of adoption in the case of Sudras, who in their turn were so far influenced by the ideas of their more intellectual neighbours, that in most cases they gradually accepted adoption as necessary to fully constitute the heritable right (*i*). Concurrently with these changes vicarious sacrifices were allowed (*k*) for those who, under the antique scheme of religion, were wholly excluded from spiritual benefits (*l*). Adoption became ceremonial, yet not so essentially ceremonial but

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(*d*) 2 Str. H. L. 106.
(*e*) MS. 1708.
(*f*) *Bai Nani* v. *Chunilal*, I. L. R. 22 Bom. 973.
(*g*) Above, p. 825 ss.
(*h*) See above, pp. 800, 801.
(*i*) Comp. p. 823.
(*k*) Comp. Manu X. 126, 127.
(*l*) Above, pp. 811, 823, 831; 2 Str. H. L. 263.

that a giving and taking might be effectual without symbolical acts, or sacrifices, or recitation of sacred formulas (*m*). The customs springing from natural loathing of incestuous unions were referred to the principle of the family and gotra as conceived by the twice-born; and even spiritual benefits, it became dimly recognized, might be secured through the proper ministers by the low-caste son for his low-caste father. Still the marriage and the adoption of a Sudra could never be regarded by the depositaries of the sacred traditions but with a kind of contempt. It was of little consequence in their eyes whether purity from physical or spiritual contamination was preserved amongst people who had no devolution of sacra as contemplated in the Veda (*n*), and with whom there was no association on the part of the higher classes that would not honour them. Thus the disdain inspired by caste feeling joined with the desire of gain and of importance to make the Brahmans admit Sudra adoption with the peculiarities that it still presents. Whether in those cases in which the Brahmans themselves follow usages generally peculiar to the lower castes this is to be ascribed to a special development of their own original system or to the mere influence of a majority rising gradually in the social scale (*o*) is a question which cannot at present be answered very decisively. It seems likely that in some cases at least there has been a mixture of classes and of customs which descendants aiming at a higher rank have set themselves to forget as completely as possible (*p*).

Some instances have already been given of the relaxation of the ordinary rules of adoption in favour of Sudras as contrasted with the higher castes. Several other points are brought out by the opinions and the decisions, the chief of which are the following:

(*m*) See above, p. 824 ss.

(*n*) Datt. Mim. II. 80.

(*o*) See above, p. 825.

(*p*) See above, p. 807. It is not a very unusual thing for a man of dubious caste position, who has got up in the world, to assume the sacred thread which he never wore before. A story is got up of his connexion with a regenerate caste much as a pedigree is made to order in Europe, and Brahmans are not wanting to perform the rites of investiture. It has sometimes even been a matter of discussion in a caste whether though hitherto uninvested they might not assume the thread and claim rank at least as Vaisyas. The expense of the ceremonies stands in the way. See further below, sec. VI. D. 1. 2.

Consanguinity does not invalidate an adoption where the parties involved do not belong to any of the three regenerate castes (*q*).

" A Sudra may adopt a sister's son " (*r*).

" A Sudra only may adopt a sister's or daughter's son " (*s*).

" A brother's or sister's son may be adopted by a sister or brother amongst Sudras only " (*t*).

" A Lingayat may adopt his daughter's son " (*v*).

In the Bombay presidency it might seem from the case quoted below that the adoption of a sister's son by a Vaisya was allowed (*w*), and the language of the judgment is so general as to extend to all classes, but the parties were in fact Lingayats, and Lingayats are Sudras (*x*), amongst whom no doubt the sister's or the daughter's son is the most proper for adoption (*y*). The Sudra is bound to adopt a daughter's or a sister's son according to the Mayukha if one is available (*z*). This obligation, however, cannot probably be ranked higher than the ordinary one to adopt the son of a near sapinda which has been pronounced to be merely religious or discretional (*a*).

In a Madras case it was said in argument before the Judicial Committee that the parties were Vaisyas (*b*). If they were the decision is an authority for the legality of a Vaisya's adopting a sister's son in that province, but it would be desirable to have had the caste more satisfactorily established.

It is allowed amongst Jains as a law of the caste (*c*).

The adoption of a sister's son allowed in Bengal in a case noted below (*d*) was afterwards pronounced invalid there (*e*) though allowed in Maithila (*f*).

(*q*) *Nunkoo Singh* v. *Purm Dhun Singh*, 12 C. W. R. 356.

(*r*) MS. 1749. (*s*) MS. 1636. (*t*) MS. 1672.

(*v*) MS. 1641. The Sastri quotes Vyav. May., Chap. IV., sec. V. 9, which relates to Sudras.

(*w*) See *Gunpatrao* v. *Vithoba*, 4 Bom. H. C. R. 130 A. C. J.

(*x*) See below, and I. L. R. 3 Bom. 273.

(*y*) Above, p. 824.

(*z*) Above, pp. 823, 824; Datt. Mim. II. 74 ss.

(*a*) Above, p. 800, note (*a*); Datt. Mim., sec. II.

(*b*) *Ramalinga* v. *Sadasiva Pillai*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C.

(*c*) *Hasan Ali* v. *Naga Mal*, I. L. R. 1 All. 288.

(*d*) Macn. Consid. H. L., p. 167.

(*e*) *Doe dem Kora Shunker* v. *Bebee Munnee*, East's Notes, Case XX.; 2 Mor. Dig., p. 32.

(*f*) *Chowdree Purmessur* v. *Hunooman Dutt*, 6 C. S. D. A. R. 192.

A Sudra's widow having adopted her daughter's illegitimate son, the latter was pronounced heir both as grandson and as adopted son (*g*).

" A Wani, being a Sudra, may adopt his sister's son " (*h*).

" Adoption of a first cousin is forbidden among Sudras " (there having been apparently a sister's or a daughter's son available) (*i*).

The adoption of a mother's sister's son is valid among Sudras (*k*).

Apart from the indulgence conceded as to the adoption of sons of female blood relatives, the rules of adoption amongst the Sudras as to the choice of a boy do not differ essentially from those of the other castes. The necessity, whether legal or religious, of taking the nearest relative in preference to the more remote, or to a stranger, is hardly dwelt on by the Sastris, and is treated in practice merely as a counsel of perfection, which may be followed or disregarded. Many castes, which are really sub-divisions of the Sudra class, decline to recognize this, and affect in some particulars the customs of the twice-born, as in the case of the closer relations which prevent adoption. The remoter relations are hardly recognized, but adoptions seem to be generally forbidden (*l*) which would involve a kind of absurdity, as *ex. gr.* the adoption of an uncle or one older than the adopter (*m*).

" A Mhar may adopt a cousin's son in preference to a brother's son " (*n*).

A Hindu may adopt an asagotra among the Sudras (*o*).

" A Sudra may adopt from an illegitimate branch of his family, though there be eligibles of a legitimate branch " (*p*).

(*g*) MS. 236.
(*h*) MS. 1624.
(*i*) MS. 1618.
(*k*) *Chinna Nagayya* v. *Pedda Nagayya*, I. L. R. 1 Mad. 62.
(*l*) Steele, L. C. 184.
(*m*) *Op. cit.* 388.
(*n*) MS. 1630.
(*o*) *Rungamah* v. *Atchummah et al.*, 4 M. I. A. 1; S. C. 7 C. W. R. 57, P. C.; *Lakshmappa* v. *Ramava*, Bom. H. C. P. J. 1875, p. 394; S. C.; 12 Bom. H. C. R. 364. See above, p. 824, and 2 Str. H. L. 89.
(*p*) MS. 1646.

3.—Relation of the Son to be Adopted to his Family of Birth.

The cases of an only son (*q*), and of the eldest son (*r*) have already been dwelt on. The relation next to these in practical importance is that of the orphan (*s*). The svayamdatta or son self-given is, as we have seen (*t*), not recognized in the present age, and the Sastris have disallowed the adoption of a man otherwise eligible, because his parents having died there was no one who could give him in adoption (*v*). The giving by an eldest brother as head of the family, though there is some authority for it (*w*) amongst the castes, is not contemplated by the sacred formulas, and has been condemned by high authorities (*x*).

The ceremonies of adoption are equally unadapted to the gift of an adopted son, and such a gift is not contemplated by the Hindu Law. The adopted son must generally be an only son, but even when a son has been born there is no formula adapted to the purpose of transferring the adopted son (*y*) to another family. There is none even for restoring him to his family of birth (*z*).

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3. 1.—Relation of Son to be Adopted to his Family of Birth—An Only Son.

In *Radha Mohun* v. *Hardai Bibi* (*a*) the Judicial Committee have laid down that an only son may be given and taken in adoption according to the Hindu Law.

An only son may be given as a dvyamushyayana (*b*).

In Madras such an adoption has been held valid (*c*), and also

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(*q*) Above, p. 818.
(*r*) Above, p. 820.
(*s*) Above, p. 806.
(*t*) Above, p. 807.
(*v*) P. 832; *Balvantrao* v. *Bayabai*, 6 Bom. H. C. R. 83 O. C. J.; *Bashetiappa* v. *Shivalingappa*, 10 Bom. H. C. R. 268.
(*w*) *Veerapermal* v. *Narain Pillai*, 1 Str. R. 91.
(*x*) See p. 832. Macn. Cons. H. L. 207, 228; 1 Mor. Dig., p. 19.
(*y*) See above, p. 808.
(*z*) See above, p. 832, note (*z*), and below, sec. VII.
(*a*) L. R. 26 I. A. 113.
(*b*) *Raja Shumshere Mul* v. *Ranee Dilraj Koer*, 2 C. S. D. A. R. 169.
(*c*) *Chinna Gaundan* v. *Kumara Gaundan*, 1 Mad. H. C. R. 54.

in the North-West Provinces (*d*). The principle was applied in these cases of *factum valet* (*e*).

Among Sudras of the Lingayat caste, an only son can be given in adoption (*f*).

There have been a few cases in which the adoption of an only son has been recognized even in Bombay (*g*).

The doctrine of *factum valet* has been supposed to give efficacy even in Bengal (*h*) to the kind of adoption in question. The adoption of an only son, though criminal, cannot perhaps be set aside (*i*), it was said.

In Madras it was at one time held that it was not lawful for a brother to adopt the only son of a brother in preference to his uncle's son; but in the sense that such an adoption involves both the giver and the receiver in sin, not that it is legally invalid (*k*). In other cases it has been said that—

The adoption of an eldest or only son is sustainable if made by a paternal uncle (*l*). He would generally be taken as a dvyamushyayana.

A dvyamushyayana is not recognized in the present age (*m*), according to the late Sadr Court of Madras. The legality of the dvyamushyayana, however, has been recognized by the Judicial Committee (*n*), and, as the cases show, this form of adoption 's not at all uncommon in some districts of the Bombay Presidency. The following are two instances—

(*d*) See above, p. 817.

(*e*) *Hanuman Tiwari* v. *Chirai et al.*, I. L. R. 2 All. 164.

(*f*) *Basava* v. *Lingangavda*, I. L. R. 19 Bom. 428.

(*g*) *Abaji Dinkar* v. *Gungadhur Wasoodev*, 3 Morris S. D. A. R. 420, 423; *R. Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. R. 191 A. C. J.

(*h*) Col. Dig., Book V., T. 273 Com. *sub. init.*

(*i*) *Nundram et al.* v. *Kashee Pande et al.*, 3 C. S. D. A. R. 232; S. C. 4 C. S. D. A. R. 70; 1 Str. H. L. 87. The effect of the case is given as stated in *Chinna* v. *Kumara Gaundan*, 1 M. H. C. R., at p. 57, but the point was not really decided so as to support the decision in Fulton's Reports, I. 75.

(*k*) *Arnachellum Pillay* v. *Jyasami Pillay*, 1 M. S. D. A. R. 154.

(*l*) *Perumal Nayker* v. *Potteeammal*, M. S. D. A. Dec. 1851, p. 234; *Gocoolanund Doss* v. *Musst. Wooma Daee*, 15 Beng. L. R. 405; S. C. 23 C. W. R. 340; Chinna Gaundan v. Kumara Gaundan, 1 Mad. H. C. R. 54 (reviewing *Perumal Nayker* v. *Potteeammal*).

(*m*) *Annamala Auchy* v. *Mungalum*, M. S. D. A. R. 1859, p. 81.

(*n*) See above, pp. 808, 819.

"An agreement may be made at the time of adoption that the son shall represent both fathers, but without this he cannot succeed to his natural father's property" (*o*).

"If a Brahman adopts a boy of a different gotra the presumption is that he has taken him as a dvyamushyayana" (*p*).

The decisions seem to show that this kind of adoption is generally legal (*q*). Thus:

The only son of a brother may be adopted in Maithila (*r*).

The only son of a person may be adopted by another, on condition that he becomes a son of both of them (*s*). It is presumed from such an adoption (*t*) that the son became a dvyamushyayana.

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3. 2.—Relation of Son to be Adopted to his Family of Birth—Eldest Son.

The grounds of distinction between the cases of the eldest son and the only son have been discussed in a preceding section (*v*). The Mitakshara is distinctly opposed to the gift of an eldest equally as to that of an only son (*w*), but the Dattaka Mimamsa (*x*) and Dattaka Chandrika (*y*), though they prohibit the gift of an only

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(*o*) MS. 1692.

(*p*) MS. 1675. A similar presumption arises where an only son or eldest son has been given to his uncle. *Nilmadhab Dass* v. *Biswambhar Dass*, 13 M. I. A. 85, 101. See Datt. Mim., sec. IV. 32. In *Chinna Gaundan's Case*, 1 M. H. C. R., at p. 55, Scotland, C. J., refers to *Sy. Joymony Dossee's Case*, Fult. 75, as establishing that a condition of double sonship will be presumed after adoption in every case, but that could not be so where a dvyamushyayana is not admitted, see above, p. 809.

(*q*) See p. 927, note (*k*).

(*r*) 2 Macn. H. L. 197. The adoption was in the Kritrima form. As to which see below, and 7 C. W. R. 700.

(*s*) *R. Shumshere Mull* v. *Ry. Dilraj Konwar*, 2 C. S. D. A. R. 169.

(*t*) *Sy. Joymony Dossee* v. *Sy. Sibosoondry Dossee*, 1 Fult. 75; *Nilmadhab Dass* v. *Biswambhar Dass*, 12 C. W. R. P. C. 29; 3 Beng. L. R. P. C. 27; S. C. 13 M. I. A. 85. The presumption extended to cases other than those of adoption of a brother's son tends to nullify the general rule, but an only son can properly be given only to his uncle as a dvyamushyayana. See above, p. 808 ss.

(*v*) Above, pp. 819, 820.

(*w*) Mit., Chap. I., sec. XI., paras. 11, 12.

(*x*) Sec. IV.

(*y*) Sec. I.

son, are silent as to the eldest son. This may be taken as a tacit allowance of the adoption of such a son on the principle frequently repeated that "when there is no prohibition there is assent" (*z*).

The Vyavahara Mayukha (*a*) assumes that the Mitakshara allows the legality while it asserts the sinfulness of the gift of an only or an eldest son. It then goes on to refute the supposed permission and maintain that neither an only son nor an eldest son can be given (*b*). Now it is true no doubt that Vijnanesvara in his disquisition on the nature of property (*c*) dwells on its secular character and the possibility of acquiring it without reference to the ceremonial rules provided for spiritual purposes (*d*). But he does not admit that acquisition without regard to the means produces property (*e*). He regards what is unfit to be given as incapable of being taken by gift (*f*) and could not apparently (*g*), any more than Nilkantha himself, hold the adoption of an eldest son valid (*h*). The legal possibility of this adoption must rest on the absence of any distinct condemnation of it in the older sources of the law, and on the allowance, though a grudging allowance, of it by custom (*i*), and at least by implication in some writers of high authority. For the Bombay Presidency the matter may perhaps be considered closed by the case of *Kashibai* v. *Tatia* (*k*), which gave effect to the adoption of an eldest son.

(*z*) Datt. Chand., sec. I., para. 32; Vyav. May., Chap. IV., sec. V., para. 18.

(*a*) Chap. IV., sec. V., paras. 4, 5.

(*b*) Chap. IV., *loc. cit.*, and para. 36.

(*c*) Mit., Chap. I., sec. I., para. 8 ss.

(*d*) Comp. the Sarasvati Vilasa, sec. 472. And for the special character of religious gifts, Mit., Chap. I., sec. VIII., para. 8.

(*e*) *Loc cit.*, para. 11.

(*f*) 2 Str. H. L. 433; Colebrooke, *loc. cit.*, shows that the Smriti Chandrika and the Madhaviya agree with the Mitakshara in regarding a forbidden gift as invalid. Compare the passage quoted Vyav. May., Chap. IX., para. 3.

(*g*) The sin, he says, is the parents' who give without necessity; an only son or an eldest son is not to be given at all. See Mit., Chap. I., sec. XI., paras. 11, 12.

(*h*) The Viramitrodaya (Transl., pp. 115, 117) is opposed to the gift of an only and of an eldest son, but says nothing of the allowance of either by Vijnanesvara.

(*i*) See Steele, L. C. 183, where the gift of the eldest is disapproved, while the gift of the only son is forbidden.

(*k*) I. L. R. 7 Bom. 225. It was ruled that the adoption of an eldest son was permissible though not approved, the authorities against such an adoption

In *Bomlingappa's Case* it was held that the adoption of an eldest son was invalid in the southern Maratha country (*l*). The Subordinate Judge, after consulting the Sastri, had found this adoption good, as being that of a nephew, and this seems to have been approved by the Sadr Court in a later case (*m*).

In Bengal an adoption of the eldest of several sons is allowable (*n*).

The adoption of an only son being allowed (*o*) it follows *à fortiori* that an eldest son may be adopted (*p*). In Bombay the opinions of the Sastris have not been uniform. Thus it was said "an adoptive son should not be the only or the eldest son of his father" (*q*). "The eldest surviving son must not be given in adoption" (*r*). And again, "the giving of an eldest son is a sin: some hold that an only son can neither be given nor taken" (*s*). But on the other hand—"Though a man's eldest son be dead, the next may be given in adoption" (*t*). And "the eldest of several sons may be given in adoption" (*v*). In another case the Sastri said "the eldest son may be given in adoption to a widow" (*w*).

The case of *Mhalsabai* v. *Vithoba* (*x*), upholding the gift by a widow of her eldest son, was dissented from by Sir M. Westropp, C.J., in *Lakshmappa* v. *Ramava* (*y*). The adoption of an eldest son is undoubtedly disapproved by Hindu Law (*z*), but all that it

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being much less numerous and emphatic than those condemning the adoption of an only son. This was followed in *Jamunabai* v. *Raychand*, *ibid.* 229; see 2 Str. H. L. 105.

(*l*) See 12 Bom. H. C. R., at p. 383.

(*m*) *Ibid.*, pp. 387, 388.

(*n*) *Janokee Debea* v. *Gopaul Acharjea et al.*, I. L. R. 2 Cal. 365.

(*o*) *Radha Mohun* v. *Hardai Bibi*, L. R. 26 I. A. 113.

(*p*) See above, p. 927.

(*q*) MS. 1672.

(*r*) MS. 1647.

(*s*) MS. 1682.

(*t*) MS. 1685.

(*v*) MS. 1621.

(*w*) MS. 1612.

(*x*) 7 Bom. H. C. R. xxvi. App.

(*y*) 12 Bom. H. C. R., at p. 394.

(*z*) *Nilmadhab Dass* v. *Biswambhar Dass*, 12 C. W. R. P. C. 29; S. C. 3 Beng. L. R. P. C. 25; S. C. 13 M. I. A. 85; *Jugbundoo Run Sing* v. *Radasham Narendro*, C. S. D. A. R. for 1859, p. 1556. An eldest son cannot be given in adoption according to Mit., Chap. I., sec. XI., p. 21; Colebrooke, 2 Str. H. L. 105. So Ellis, *ibid.*, who says some authorities make exceptions. The eldest son of a brother, however, may be adopted (1 Str. H. L. 85) as an adult.

seems safe to say on the authorities is that the adoption of an eldest son is improper, not that it is invalid (*a*), as is the adoption of an only son (*b*).

Even by those who object to the gift of an eldest son it is admitted that if a person has by his first wife a son, and by his second wife several sons, the eldest of the latter may be given or received in adoption (*c*). It is also recognized that the subsequent death of the elder son does not render invalid an adoption of a second son in the lifetime of the elder son (*d*).

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3. 3.—Relation of Son to be Adopted to his Family of Birth—Youngest Son.

The Dakhan castes disapproved the gift of the youngest son out of three or more (*e*), and a doubt seems sometimes to have been felt as to the lawfulness of such a gift. It is not, however, condemned by any recognized authority. A Sastri's response on a case submitted to him was "The youngest son may properly be given in adoption to a man of a different gotra. The Sastras forbid giving an eldest but not a youngest son" (*f*).

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3. 4.—Relation of the Son to be Adopted to his Family of Birth—Amongst Sudras.

Although the gotra relation in its stricter sense does not subsist amongst Sudras, yet propinquity is recognized as giving rise to

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(*a*) *Debee Dial et al.*, v. *Hurhor Singh*, 4 C. S. D. A. R. 320; *Veerapermal Pillay* v. *Narain Pillay*, 1 Str. R. 91; Col. Dig., Book V., T. 273 Com.; Mit., Chap. I., sec. XI., para. 12; 2 Str. H. L. 81, 105; Vyav. May., Chap. IV., sec. V., para. 4.

(*b*) Datt. Mim., sec. IV. 1 ss.; Datt. Chand. sec. I. 29, sec. III. 17; Steele, L. C. 183; 2 Macn. H. L. 182, 195; Macn. Cons. H. L. 126, 146, 147; 2 Str. H. L. 105.

The references show a general condemnation of the giving of an eldest son, but less decisive and unanimous than in the case of an only son.

(*c*) *Veerapermal Pillay* v. *Narain Pillay*, 1 Str. R. 91.

(*d*) *Musst. Dullabh De* v. *Manee Bibi*, 5 C. S. D. A. R. 50; *Nilmadhab Dass* v. *Biswambhar Dass*, 12 C. W. R. P. C. 29; S. C. 3 Beng. L. R. P. C. 27; S. C. 13 M. I. A. 85.

(*e*) Steele, L. C. 183, 384.

(*f*) MS. 1677. In the *Mankars' Case*, 2 Borr. R., at p. 95, the Sastris say a father is bound to keep his eldest and youngest sons, but for the latter part of the rule no authority is cited.

certain connexions and restrictions which coincide in a measure with those that prevail amongst the higher castes (*g*). Through the gradual attraction and reception of the Sudras within the Brahminical religious system (*h*) the relation of a son to his father has with many come to be regarded as involving a position and duties analogous at least to those of the Brahman (*i*). The father being thus concerned in the rites to be celebrated by his son (*k*) the same rules which guard against the loss of these benefits amongst the other classes ought equally or almost equally to operate amongst Sudras (*l*). This may be thought to have been secured for Bombay by the following decision on the point. "There is not in the books any ground for drawing any distinction between Sudras and other classes on the question of the legality of the adoption of an eldest or only son" (*m*). The Sastris hold the same view.

The adoption by a Sudra of an only son as a karta putra is allowed by the Hindu Law (*n*) in Bengal. A similar view was taken in Bombay by Sir M. Sausse, C.J. (*o*), which has since been followed in *Basava* v. *Lingangauda* (*p*).

4.—FITNESS FOR ADOPTION AS AFFECTED BY PERSONAL QUALITIES—SEX.

There is no instance in Hindu Law of an adoption of a daughter to inherit (*q*).

(*g*) Datt. Mim., sec. II., 80.

(*h*) Above, p. 827.

(*i*) See above, pp. 824, 825.

(*k*) See Steele, L. C. 225. The Jains do not celebrate the kriya ceremonies, and amongst them adoption must be referred to a different basis. See Steele, L. C. 416; above, pp. 825.

(*l*) See Steele, L. C. 413, 414.

(*m*) *Per* Sir M. Westropp, C.J., in *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at p. 390.

(*n*) *Musst. Tikdey* v. *Lalla Hureelal*, Suth. R. for 1864, p. 133. The term karta putra is used as a synonym for kritrima putra.

(*o*) *Mhalsabai* v. *Vithoba*, 7 Bom. H. C. R. xxvi. App.

(*p*) I. L. R. 19 Bom. 428.

(*q*) *Doe dem Hencower Bye et al.* v. *Hanscower Bye et al.*, East's Notes, Case 75. Daughters cannot be adopted, 2 Str. H. L. 217. See above, p. 906, C. 2. 2, as to a *quasi*-adoption by a dancer. *Gangabai* v. *Anant*, I. L. R. 13 Bom. 690.

In the Dattaka Mimamsa a section (VII.) is devoted to the attempt to establish the adoption of daughters as an institution of the Hindu Law. Great learning and ingenuity were expended on this effort, but it has failed to gain acceptance for the proposed doctrine (*r*). The Vyavahara Mayukha (*s*) rejects it, and no Sastri has maintained it except as a possible variance justified by caste custom. As when one said—" An adoption by a woman of a daughter given by her mother may be recognized if conformable to the caste rules " (*t*). The only custom allowing it is that of the dissolute women whose imitations of adoption have already been considered (*v*).

In *Hencower's Case* (*w*) the pandit denied that the adoption of a daughter was consistent with the Hindu Law. Yet in another case the adoption of a niece in order that she might become the mother of a putrika-putra was allowed (*x*). The adoption, it was said, should be prior to marriage. This decision seems never to have been followed, and like Nanda Panditta's doctrine stands outside the living law (*y*). The validity of any such adoption of a daughter must rest on a special custom.

The adoption of a sister, it was ruled, is illegal to the prejudice of legal heirs (*z*).

A sister's daughter, or her son, cannot become a putrika-putra (*a*). The institution is in fact no longer recognized (*b*), though in the case quoted below it was only questioned by the Judicial Committee whether the old rule of Hindu Law still exists, namely, whether a daughter may be specially appointed to raise a son, and the son of such daughter be preferred to more distant male relatives. If so, it was said, inasmuch as the rule breaks in upon general rules of succession whenever an heir claims to

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(*r*) See above, pp. 790, 833.

(*s*) Chap. IV., sec. V., para. 6.

(*t*) MS. 1681.

(*v*) Above, pp. 833, 834. *Manjamma* v. *Sheshgirirao*, I. L. R. 26 Bom. 491.

(*w*) Above, p. 932 (*q*).

(*x*) *Nawab Rai* v. *Buggawuttee Koowur*, 6 C. S. D. A. R. 5.

(*y*) 1 Macn. H. L. 102.

(*z*) *Toolooviya Shetty* v. *Coraga Shellaty*, M. S. D. A. R. 1848, p. 75. The adoption of a sister is wholly illegal; she could not have been begotten by the adoptive father without incest.

(*a*) *Nursing Narain* v. *Bhutton Lall*, Sp. No. C. W. R. 194.

(*b*) See above, pp. 800, 803, 806.

succeed by virtue of that rule, he must bring himself very clearly within it (*c*).

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4. 1.—Fitness for Adoption—Age.

The proper age of the son to be adopted is stated in widely different ways by different castes (*d*). It is generally agreed that the child ought to be young in order that he may become united by affection to his adoptive parents (*e*), but this is rather a maxim of prudence than of law. Some castes fix the limit of age at five years; many at twenty-five; a few at fifty. The last indeed do not recognize a legal limit of mere age, though, with the others, they require that the adopted son should be younger than his adoptive father (*f*).

The proper age for adoption is not uniform even for the same district in every caste. A boy may generally be adopted from the twelfth day after birth to his upanayana, which is eight years for Brahmans, eleven years for Kshatriyas, twelve for Vaisyas. Sudras may be adopted till the sixteenth year (*g*). This is, however, simply the age of majority according to Hindu Law. The statement must be taken as rather of what is recognized as right than of what is obligatory.

The Hindu lawyers have written very elaborately on the subject of the boy's age as connected with his Samskaras. These views are considered below (*h*). In the North-West Provinces it was ruled, conformably to the Dattaka Mimamsa, that adoption in the Dattaka form ought to be within six years of age of the adoptee (*i*). In *Ganga* v. *Lekraj* (*k*) it was held that a boy upon whom the

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(*c*) *Thakoor Jibnath Singh* v. *The Court of Wards*, 23 C. W. R. 409. For the law as now received, see above, pp. 800, 803, 807, 833; 1 Macn. H. L. 102.

(*d*) Steele, L. C. 383. See above, p. 831.

(*e*) See above, p. 833.

(*f*) Steele, L. C. 182.

(*g*) *Ry. Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. S. D. A. R. 101. See 1 Mor. Dig., p. 22, notes 8 and 9. The authorities quoted in 2 Macn. H. L. 175, 178, give five years as the age within which a boy ought to be adopted. See Datt. Mim., sec. IV. 32, 33, 43, and the Datt. Chand., sec. II. 30, which gives eight years of age as the usual limit amongst Brahmans.

(*h*) Sub-sec. 4. 7.

(*i*) *Th. Oomrao Singh* v. *Th. Mahtab Koonwar*, 2 Agra Rep., p. 103.

(*k*) I. L. R. 9 All. 253

ceremony of the investiture with the sacred thread had not actually been performed, and if he be a Sudra, then before his marriage, may be adopted. In Bombay, as among the Jains (*l*), on the other hand, a person of whatever age is eligible for adoption (*m*). Even—

" A man of fifty and having children, may be adopted if he has parents to give him away, but not otherwise " (*n*).

" A fatherless person of thirty years of age," it was said, " may be adopted with the consent of his mother or elder brother " (*o*).

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4. 2.—Juniority of Adopted Son to Adoptive Father.

It has been noticed that the son adopted must be junior to the adoptive father. He need not, however, be junior to his adoptive mother, when she, as a widow, adopts him (*p*).

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4. 3.—Birth During Adoptive Father's Life.

The imitation of nature is not carried so far as to disqualify a boy who, from the time of his birth, could not have been begotten by a deceased adoptive father. When authority to adopt is given to a widow, she may adopt a boy not born at her husband's death (*q*).

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4. 4.—Identity or Difference of Family or Gotra.

This subject has been considered in the preceding Section (*r*). When members of the lower castes are concerned, the term

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(*l*) *Asharfi* v. *Rup*, I. L. R. 30 All. 197.

(*m*) *R. Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. R. 191 A. C. J.; *Mhalsabai* v. *Vithoba Khandappa*, 7 Bom. H. C. R. App. xxvi.

(*n*) MS. 1755. *Dharma* v. *Ramkrishna*, I. L. R. 10 Bom. 80.

(*o*) MS. 1645. The competence of the elder brother to give in adoption is denied. See above, p. 832, and below, sec. V.

(*p*) *Gopal* v. *Vishnu*, I. L. R. 23 Bom. 250; *Ranganaya* v. *Alwar*, I. L. R. 13 Mad. 214.

(*q*) East's Notes, Case 10; 2 Mor. Dig., p. 16.

(*r*) Above, p. 830 ss. and sub-sec. 2. 2. of the present section. In the *Mankars' Case*, 2 Borr., at p. 95, the Sastris say that a brother's or a daughter's son may be adopted without any ceremonies but an oral gift and acceptance.

"gotra" is used in a second intention, but though this part of the subject is rather obscure it would probably be held that the same degree of propinquity which makes mere age a matter of indifference in the higher castes has the same effect amongst Sudras (*s*). Whether the absence of a true gotraship enables a Sudra to adopt indiscriminately any son younger than himself is a point that still awaits determination. The opinions of the Sastris would probably be opposed to such a licence except on the grounds of the Sudras being below the operation of the religious family law, but no obstacle or preference probably would be recognized by the Courts as arising from consanguinity—none, that is, of an obligatory character. In case of difference of gotra the adoptee should be under five years of age; in case of identity the age of the adoptee is not restricted (*ss*).

Difference of gotra makes it important that the Samskaras should not have been performed in the family of birth. Identity of gotra makes this a matter of comparative indifference (*t*). Hence the following opinions:

"The person adopting may select whom he likes, without the

(*s*) See Datt. Mim. II. 5, 80.

(*ss*) Steele, L. C. 43. *Extract from the Dharmasindhu—Who may or may not be adopted* (see 12 Bom. H. C. R. 373):

Amongst Brahmans the son of a uterine brother, because preferable, is to be taken first.

In his absence any Sagotra-Sapinda, or the son of a half-brother.

In the absence of such, an Asagotra-Sapinda, one produced in the family of the maternal uncle or in that of the father's sister, &c.

In the absence of such, an Asapinda of the same gotra.

In the absence of such, even an Asapinda of a different gotra.

Of the Asagotra-Sapindas the sister's son and the daughter's son are prohibited. . . . But by a Sudra even a sister's son and a daughter's son are receivable. . . . The adopter having adopted should perform the ceremonies commencing with the jatakarma or those commencing with the chudakarana for the boy adopted. This is the preferable doctrine; but if a boy for whom they can be so performed is not procurable, then from amongst the Sagotra-sapindas, one whose upanayana ceremony has been performed, or even whose marriage has taken place, may become an adopted son; but in the latter case, only if he has not produced a son. So it seems to me. If adoption is to be (=can be) made from amongst Asapinda-Sagotras only he whose upanayana ceremony has been performed is to be (may be) taken. This appears also. As to a Bhinna-gotra (one of a different gotra), he whose upanayana has not been performed is alone to be received. Some authors, however, say that a Bhinna-gotra whose upanayana has been performed may also be received.

(*t*) Above, p. 830.

assent of his relatives. If of a different gotra the boy should be adopted before tonsure" (*tt*). On the other hand—

"A man of fifty, and having children, may be adopted if of the gotra of the adoptive father. The latter should invite his kinsmen, but their assent is not essential" (*v*).

A married sagotra may be adopted by a widow in the Dekhan (*vv*). A gift made by the widow, prior to the adoption, may be set aside by the adopted son, in this as in other cases (*w*).

Some decisions recognize that limitation of age becomes material if the adoptee is taken from a line of strangers (*ww*), agreeing with the Sastri, who says—

"The adoption of a boy of eight years old, belonging to another gotra, and whose chaul and munj have been performed, is invalid" (*x*), but this rigour cannot probably be maintained in the present day (*y*).

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4. 5.—Bodily Qualities.

The same qualities are required in an adopted son as in a son who is to inherit. Thus leprosy of a virulent form (*z*) or congenital blindness would disqualify, as making it impossible that the sufferer should discharge the ceremonial obligations of a son to his ancestors (*a*).

(*tt*) MS. 1683. Before upanayana, 2 Str. H. L. 104.

Colebrooke says : "See Mitaksh. on Inh., Chap. I., sec. XI. 13 : A difference of opinion prevails in regard to adoption of adults, or persons for whom certain ceremonies termed Samskara (marriage of Sudras, and tonsure of the higher tribes) have been performed, the prevalent doctrine, in most parts of India, being adverse to it. The objections are less forcible in the instance of a relation of the male side than in the case of a stranger." 2 Str. H. L. 109.

(*v*) MS. 1634. See sub-sec. 4. 9.

(*vv*) *Dharma Dagu* v. *Ramkrishna*, I. L. R. 10 Bom. 80.

(*w*) *Nathaji* v. *Hari*, 8 Bom. H. C. R. 67 A. C. J., quoting—(1) *Raja Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav bin Malharrav Ranadive*, 4 Bom. H. C. R. A. C. J. 191; (2) *Rakhmabai* v. *Radhabai*, 5 Bom. H. C. R. A. C. J. 181; (3) Steele, pp. 44, 182; (4) *Ranee Kishen* v. *Raj Oodwunt Singh et al.*, 3 C. S. D. A. R. 228; (5) *Bamundoss Mookerjea et al.* v. *Musst. Tarinee*, 7 M. I. A. 169.

(*ww*) *Verapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91.

(*x*) MS. 1629.

(*y*) See below, sub-sec. 4. 7.

(*z*) A cripple. Steele, L. C. 184. *Mohunt Bhagwan Ramanuj Das* v. *Das*, I. L. R. 22 I. A. 94.

(*a*) See above, p. 539 ss.

4. 6.—Mental Qualities.

Idiocy or insanity disqualifying for inheritance disqualifies for adoption also (*b*), and for the same reason. Cases are wanting, as in practice no one seeks to adopt a boy known to be disqualified. When the boy has reached a stage of intelligence his own assent must be obtained, which at an earlier stage may be replaced by that of his parents (*c*). Sadrisam (*d*), properly understood, includes a kindly feeling between the adoptive father and son, and a disposition to obedience on the part of the latter not amenable to strict legal rules (*e*).

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4. 7.—Religious and Ceremonial Qualities.

Great differences of opinion are found amongst the authorities as to the precise stage of progress in the Samskaras or family sacra at which a boy becomes indissolubly united to his family of birth (*f*). Some maintain that a severance may be made at any stage such as to fit the subject for initiation in another family (*g*). The Dattaka Mimamsa seems to allow adoption after tonsure to six years of age (*h*). The Dattaka Chandrika gives eight years of age as the limit of age of a tonsured boy (*i*). But both seem to allow a dissolution of the filial bond even after initiation by a repetition of the ceremony of initiation (*k*). The Vyavahara Mayukha expressly allows the adoption of a married man (*l*), though marriage is the limit set forth by other authorities as that at which adoption even of a Sudra becomes impossible. It concurs with the Dattaka Chandrika in doubting the genuineness of a passage on which the limitation to five years of age is founded. Sutherland, in his Synopsis, gives it as "the most general and consistent rule that 'any person on whom the adopter may legally

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(*b*) See above, p. 545 ss; Steele, L. C. 184.

(*c*) Above, p. 833; Datt. Mim., sec. IV. 47.

(*d*) Above, p. 830.

(*e*) Steele, L. C. 182.

(*f*) As to these, see the note Col. Dig., Book V., T. 134; Datt. Mim. IV. 23; and Manu II. 27—68.

(*g*) Above, p. 830 ss.

(*h*) Datt. Mim., sec. IV. 48—54.

(*i*) Datt. Chand., sec. II. 30.

(*k*) Datt. Chand., sec. II. 25—28; Datt. Mim., sec. IV. 51, 52.

(*l*) Vyav. May., Chap. IV., sec. V., para. 19.

perform the upanayana rite (*m*) is capable of being affiliated as a dattaka son ' " (*n*). Macnaghten states very decidedly that no adoption is possible after the upanayana has united a boy to his family by a second birth (*o*).

The Nirnaya Sindhu, which is frequently followed by the Sastris, calls that son anitya datta who before adoption has proceeded in the Samskaras even so far as tonsure, but on this point the people have rather taken the Samskarakaustubha for their guide, which allows adoption after initiation (as the Vyavahara Mayukha allows it after marriage (*p*).

The authorities being so obscure and inconsistent, the guidance afforded by custom and by the Sastris becomes of peculiar importance. Here again, however, there are considerable differences, the caste rules being much more indulgent than the learned Brahmans.

In the opinion of the Sastri " the adopted boy should be under five years old, and his chuda (*q*) and other sacraments should be performed assigning him the adoptive father's gotra " (*r*). Some of the Hindu authorities moreover and several decisions allow that the effect of tonsure as barring adoption (*s*) may be undone by an appropriate sacrifice even in the case of an only son. But on the other hand however much the age of adoptee may be above five years, his adoption will be valid if tonsure was not performed in the natural family (*t*).

(*m*) Investiture with the sacred thread.

(*n*) Suth. Synops. Head II. *ad fin.* See Notes XI. and XII. to the same.

(*o*) 1 Macn. H. L. 73.

(*p*) See above, p. 808.

(*q*) Tonsure.

(*r*) MS. 1673. See above, p. 831.

(*s*) *Sy. Joymony Dossee* v. *Sy. Sibosoondry Dossee*, 1 Fult. 75, 28 March, 1837; 1 Macn. H. L. 72 ss.; 1 Col. Dig., Book V., T. 182, 183, 273; Macn. Con. H. L. 141, 146, 192, 205; 1 Str. H. L. 91; 2 Str. H. L. 87, where the Sastri gives the upanayana or marriage as the limit beyond which a transfer to another family becomes impossible. The caste laws do not in Bombay make tonsure a limitation, though they, in some cases, give this effect to investiture and marriage, Steele, L. C. 182. Even as to these the practice is lax. See sub-sec. 4. 9.

(*t*) *Veerapermal Pillay* v. *Narain Pillay*, 1 Str. R. 91; *Musst. Dullabh Dai* v. *Manee Bibi*, 5 C. S. D. A. R. 50; see Datt. Chand., sec. II. 20—33; Datt. Mim., sec. IV. 22—54, and the notes to the preceding case. At 2 Str. H. L. 123 Ellis says that a boy adopted after tonsure becomes an anitya datta, whose son belongs to the original family of his father. Colebrooke says the son belongs to the family of his father's munj (investiture).

Connexion in gotra makes a new initiation unimportant, and thus the adoption of (1) a sagotra, (2) or of one descended directly from a common male ancestor, (3) or of a near relative of adopter on the paternal side is good, though he is above five years in age and tonsure has been performed in his natural family (*v*).

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4. 8.—Investiture with the Sacred Thread.

A boy ought to be adopted before the performance of his munj (*w*), or investiture with the sacred thread (*x*), according to the law of some few castes. The others do not appear to make a point of this. In many of course there is no upanayana ceremony; the fullest initiation of which a youth is capable is obtained by marriage, which in such castes takes the place to some extent of the investiture (*y*). The restriction, however, must in either case be understood as subsisting only as between strangers by family and gotra. Amongst persons nearly connected there is no barrier raised to adoption by final dedication to the same family or gentile divinities (*z*).

(*v*) *Tanjore Raja's Case*, 1 Str. R. 126; *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. R. 91.

(*w*) See above, p. 830 ss.; and 4. 8.

(*x*) Steele, L. C. 182, 383. For the proper ages of investiture see Datt. Chand., sec. II. 31, note.

(*y*) Datt. Chand., sec. II. 29, 32; Col. Dig., Book V., T. 121 Comm.

(*z*) *Extract from the Samskarakaustubha* (see 12 Bom. H. C. R. 374): "One may be adopted as a son whether the Samskaras commencing with tonsure have taken place or not, and whether he has passed his fifth year or not. As to the doctrine 'one whose Samskaras have not taken place is alone to be adopted,' and 'who has not completed his fifth year is alone to be adopted,' founded upon the Kalika Purana, that is wrong; because some say the passages are not genuine, as they are not to be found in many copies of the Kalika Purana; and others say that, even if they be genuine, the first three shlokas have reference to Asagotra adoption; that, therefore, the last shloka also must be taken to have reference to the same subject; and that hence the rule does not apply to a Sagotra adoption; and they lay down that even a married (man) may be adopted. But the truth is, that even in the case of Asagotras a general prohibition (or non-recognition) of adoption after the Samskaras ending with the upanayana have been performed is not possible upon the strength of the Purana passages, because the authority of the Vedas to overrule contrary passages from the Smritis (and Puranas) is well established by the rule of commentators to determine the relative authority of texts, and the above passages of the Purana are in opposition to the Bahvricha Brahmana. Thus it is indisputable that

It has indeed been said that there is not in strictness any authority for the adoption of a boy whose munj or upanayana has been performed (*a*). And also that—

"A boy (Brahman) cannot be adopted after his munj. The form of adoption gone through confers no right of heirship on him" (*b*).

In other cases the Sastris answered—

"A boy of a different gotra should not be married or have been invested with the thread" (*c*).

"A boy adopted from another gotra should be taken before his thread investiture and marriage. In the same gotra this is not essential. In the former case the adopted acquires no rights of inheritance" (*d*). A boy whose upanayana had been performed would in Madras become but temporarily attached to the adoptive family (*e*). In Bombay on the other hand the adoption by a Brahman of a boy of a different gotra, whose munj had been performed, was pronounced quite legal and effectual (*f*), and a similar answer was grounded on an instance of such an adoption said to be given in the Veda (*g*).

In *Lakshmappa* v. *Ramava* (*h*) it is laid down by Nanabhai Haridas, J., consistently with the replies just quoted, that the performance of the chudakarana (*i*) and the upanayana (*k*) in

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the expression 'the son given and the rest' includes 'the son made and the rest.' Hence it follows that one on whom the Samskaras have been performed in his natural family cannot become a self-given son either. But in the Brahmana it is plainly stated that Shunashepa himself became the son of Vishvamitra, and it is not to be supposed his upanayana had not been performed in his natural family."

(*a*) *P. Venkatesaiya* v. *M. Venkata Charlu et al.*, 3 Mad. H. C. R. 28.

(*b*) MS. 1751. See above, pp. 809, 810.

(*c*) MS. 1616. The question was as to son of father's brother's daughter's son, who would be unfit for adoption on account of his mother's consanguinity with the adoptive father according to the stricter rules as to the prohibited degrees. See above, p. 837.

(*d*) MS. 1615.

(*e*) *P. Venkatesaiya* v. *M. Venkata Charlu*, 3 Mad. H. C. R. 28; 1 Str. H. L. 88, 89, 90. The anitya datta, whose son returns to the family of the father's original gotra, is nowhere recognized by the Bombay Sastris, see above, p. 810.

(*f*) MS. 1719.

(*g*) MS. 1717. The reference is to the story of Sanahsepa (above, p. 808) on which the Samskarakaustubha founds the doctrine here followed by the Sastri.

(*h*) 12 Bom. H. C. R., at p. 370.

(*i*) Tonsure.

(*k*) Investiture.

the family of his birth does not disqualify even a Brahman for adoption, as the effect of these ceremonies may be annulled.

In Bengal the adoption of a boy, eight years old, was held to prevail over a daughter's claim to inheritance, the boy not having been initiated in the natural father's family (*l*). But a contrary rule would prevail where even the chuda had been performed.

The father of a boy after agreeing to give him in adoption performed his tonsure under his own family name. Afterwards the adoption was carried out and the *homam* performed. The Pandit pronounced such an adoption invalid (*m*).

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4. 9.—Fitness for Adoption—As Affected by Marriage.

Strange (*n*) gives marriage in the fourth class as a ceremony after which adoption becomes impossible. This is confirmed by a Madras Sastri (*o*), and the same appears to have been the opinion of Jagannatha (*p*).

"The Poona Sastris do not, however, recognize the necessity that adoption should precede munj and marriage. The passage so interpreting the law is said by the author of the Mayukha to be an interpolation" (*q*). It is only the question of marriage that could be raised in the majority of cases, as for Sudras there is no other (initiatory) ceremony but marriage (*r*). Thus it was answered:

"The son of a sister-in-law may be adopted by a Brahman. But a married man of the same gotra only can be adopted" (*s*).

(*l*) *Keerut Nuraen* v. *Musst. Bhobinsree*, 1 C. S. D. A. R. 161; *Sreenevassien* v. *Sashyummal*, M. S. D. A. Dec. 1859, p. 118; see 1 Str. H. L. 89, 90.

(*m*) 2 Macn. H. L. 181.

(*n*) 1 Str. H. L. 91.

(*o*) 2 Str. H. L. 87.

(*p*) Col. Dig., Book V., T. 183, 273 Comm. "The investiture and other ceremonies . . . concern men of the twice-born classes: marriage is the only sacrament for a man of the servile class." Col. Dig., Book V., T. 121 Comm. "A man of the servile class universally obtains marriage as his only sacrament (Samskara)" *Ibid.*, T. 122.

(*q*) Steele, L. C. 44. See above, p. 834.

(*r*) *Sy. Joymony Dossee* v. *Sy. Sibosoondry Dossee*, 1 Fult. 75; *Ganga* v. *Lekhraj*, I. L. R. 9 All. 253.

(*s*) MSS. 1642, 1643.

This condition being satisfied the adoption of a married man is admissible, though of the mature age of forty-five years, and though he has a family, and his natural father prohibited adoption (*t*).

The more recent decisions also say that the adoption of a married boy is admissible, if he is a sagotra, though he has children, amongst Sudras (*v*). And generally it may be said that by the law of Bombay the adoption of a married Sudra is not invalid (*w*), as in *Lakshmappa* v. *Ramava* (*x*) it is ruled that a married sagotra may be adopted, sagotra meaning one in a relation of natural propinquity.

Whether upanayana and marriage in the natural family are a bar to adoption in another family among Brahmans, was a question raised in the case referred to below (*y*). The Court refused to consider it, holding the defendant bound by estoppel from disputing the adoption as he had taken part in the ceremony. Elsewhere than in the Bombay Presidency a married man does not seem to be eligible for adoption, even amongst the lower castes. Thus in

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(*t*) *Sree Brijbhookunjee Maharaj* v. *Sree Gokolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd ed.); *Lakshmappa* v. *Ramava et al.*, 12 Bom. H. C. R. 364; Vyav. May., Chap. IV., sec. V. 19. The Sastris, in reply to a question put to them, said: In the commencement of the Shastr it is written, A woman who has lost her husband must obtain the sanction of her father previous to adopting a son, and if she have no father then that of the caste. Again it is written, that a woman who has reached years of discretion may of herself perform religious duties. So she may adopt a son without permission, if none of the caste are at the time to be found. It is also stated that a boy under five years of age should be adopted in order that he may be brought up in the religious tenets of his adoptive father. This relates to cases where no relationship subsists, but when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possess common ability, and is beloved by the person who adopts him. However, if the father of the person to be adopted be seriously averse to it, declaring that his son shall not be given in adoption, the ceremony cannot be performed, since the Shastr ordains that the free consent of the father is necessary to the adoption of his son by another person. *Dharma Dagu* v. *Ramkrishna*, I. L. R. 10 Bom. 80.

(*v*) *Nathaji* v. *Hari*, 8 Bom. H. C. R. 67 A. C. J.; *Lakshmappa* v. *Ramava*, Bom. H. C. J. F. for 1875, p. 394; Vyav. May., Chap. IV., sec. V. 19.

(*w*) *Lakshmappa* v. *Ramava*, Bom. H. C. J. F. for 1875, p. 394; *Mhalsabai* v. *Vithoba Khandappa*, 7 Bom. H. C. R. App. xxvi.

(*x*) 12 Bom. H. C. R., at pp. 372, 373; *Dharma Dagu* v. *Ramkrishna*, I. L. R. 10 Bom. 80.

(*y*) *Sadashiv Moreshwar* v. *Hari Moreshwar*, 11 Bom. H. C. R. 190.

Bengal the adoption of a Sudra, if otherwise eligible, is permissible at any age prior to marriage (*z*), not after it.

In Madras too the adoption of a married boy is illegal (*a*). It is illegal though the adopted is a Sudra (twenty-eight years old) (*b*).

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4. 10.—Fitness for Adoption—Place in Caste of the Adopted Son.

According to the customary law of the Dekhan exclusion from caste annuls an adoption (*c*). It must *à fortiori* prevent it, as no benefit, or at least not the benefit chiefly regarded, can be had from an outcaste son.

5.—Fitness for Adoption—In Case of Anomalous Adoptions.

In the case of an adoption anomalous, as made by a mother instead of a widow, if such an adoption can be allowed, no variance, so far as is known, arises in the choice of the boy to be adopted. The dvyamushyayana has been considered under the head of an "Only son" and of "Relation through the natural father" (*d*). As the connexion of a dvyamushyayana with his own family is not severed there is no fullness of the filial relation between him and his *quasi*-adoptive father; consequently the restrictions arising from ideal physical relations between the adoptive parents and the real ones do not apply to this case. In practice, however, the adoption of a sister's or a daughter's son as a dvyamushyayana is not known to occur. Where the adoption is allowed at all it is allowed in the fullest sense (*e*).

We have above seen one instance (*f*) in which a reminiscence of the ancient institution of the putrika putra seems to have been

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(*z*) *Ry. Nitradaye* v. *Bholanath Doss*, Beng. S. D. A. R. 1853, p. 553; *Ganga* v. *Lekhraj*, I. L. R. 9 All. 253.

(*a*) *Ry. Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 M. S. D. A. R. 101.

(*b*) *Virakumara Servai* v. *Gopalu Servai*, M. S. D. A. R. 1861, p. 147.

(*c*) Steele, L. C. 185; comp. above, pp. 843, 845.

(*d*) See pp. 808 ss., 913, 926.

(*e*) Above, p. 801.

(*f*) P. 919.

preserved in practice though opposed to the law of to-day (*g*). In such a case should the practice be authorized by caste custom, there can be no room for choice of the son (*h*).

According to usage in Malabar, adoption is necessary among the Chetty caste, to constitute the sons of daughters lawful heirs on failure of sons (*i*).

6.—Fitness for Adoption—In Case of *Quasi*-Adoptions.

As to the kritrima form of adoption (*k*). No restriction seems to be placed on the choice of the son (*l*) adopted by a man or a woman. He must expressly consent to the adoption, and he contracts no family relation with the cognates of the adoptive father or mother (*m*). This is adoption with all the original significance taken out of it, as in the last stages of the Roman Law, or rather perhaps an inartistic inclusion within the law of adoption of an aboriginal local custom which could not be moulded exactly to the Brahminical scheme (*n*).

In the natural adoptions in use amongst the tribes in Gujarath (*o*) which from the orthodox Hindu standpoint must be regarded as mere *quasi*-adoptions, no restriction is known to exist on the choice of the boy. Nor is it known that a girl is recognized as a fit subject for adoption (*p*). The son of a near relative, male or female, is

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(*g*) Above, pp. 793, 800.

(*h*) The putrika putra who in some lists (Yajnavalkya, Devala) stands second, has no place in Manu's list. This some explain by saying that he stands on exactly the same footing as an aurasa. By a laxity of expression the daughter herself might be called putrika putra, and being appointed by her father might perform his obsequies. Suth in 2 Str. H. L. 199. See above, pp. 793, 800, 801, 806.

(*i*) 1 Mad. S. D. A. R. 157.

(*k*) See above, p. 806.

(*l*) *Ooman Dutt* v. *Kunhia Singh*, 3 C. S. D. A. R. 144, is discredited by the observations in *Srimati Uma Deyi's Case*, L. R. 5 I. A., at pp. 51, 52.

(*m*) 1 Macn. H. L. 75, 76. Hence the adoption of an only son generally disallowed is lawful where the kritima adoption is recognized. *Musst. Tikdey* v. *Lalla Hurylal*, C. W. R. Sp. No., p. 133.

(*n*) See above, pp. 150, 787, 795, note (*d*), and 801.

(*o*) Above, p. 828.

(*p*) A foster-daughter is mentioned above, p. 427 Q. 1; but she is not recognized as a subject of any right of inheritance. The Gujarath castes who admit a foster-son do not allow him to be replaced by a daughter. *Gangabai* v. *Anant*, I. L. R. 13 Bom. 690.

taken as the foster son (palak putra) with such doubtful rights as have already been described.

The adoption of her own brother's daughter by a widow, governed by the Mitakshara, can be regarded only as an adoption in the popular not in the legal sense (*q*).

A man cannot be adopted into a family governed by Alya Santana law (*r*).

"Adoption amongst Kalavantins is to be governed entirely by the custom of the class. The Sastra gives no rules" (*s*). So far as an adoption can be recognized at all it seems to be a matter of the freest choice, as in the following case:—

A dancing woman brought up a son of her servant as her own. On her death his daughter was put into her place to draw the temple allowance. The Sastri declared the foster son heir by caste custom, not his daughter (*t*).

SECTION V.—THE CAPACITY TO GIVE IN ADOPTION AND THE CIRCUMSTANCES UNDER WHICH IT MAY BE EXERCISED.

THE CAPACITY LIMITED TO THE PARENTS.

It is plain that from the religious point of view the gift of a son in adoption ought not to be made without the concurrence of both his natural parents (*v*). Besides his first duty to his father, the son owes ceremonial services to his mother and her father (*w*). Even a step-mother shares the benefit of his sacrifices. In the sphere of positive law the natural connexion between the mother and her son has not been able to contend against the authority of the husband and father. The sources of the Hindu Law give, in some places, a rather uncertain sound, but the general result is

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(*q*) *Musst. Thakoor Dayhee* v. *Rai Balack Ram.* 10 C. W. R. 3 P. C. See above, p. 834.

(*r*) *Munda Chetty* v. *Timmaju Hensu*, 1 Mad. H. C. R. 381 note.

(*s*) The case was one of a sister's son's son adopted by a Kalavantin. MS. 1651. As to the palak kanya of a dancer, see above, pp. 828, 906.

(*t*) MS. 1707.

(*v*) Above, p. 817. Datt. Mim., sec. IV. 14, 15.

(*w*) The subordinate character of the Sraddhas celebrated for a mother and her ancestors may be seen from the discussion. Datt. Chand. I. 24. See also Datt. Mim. II. 72, note.

that the mother has no real control over a proposed gift by her husband, and can herself act alone in giving away a son during her husband's life only on a real or assumed permission from him. This will be evident from the following examination of the authorities.

It will be seen, too, that the capacity of the widow to give in adoption without an authority from her husband is more generally recognized than her capacity to take in adoption, though even in giving she has not an unlimited right. The principal text is in Vasishtha, but with slight variances it is found in other Smritis.

"The father and mother may give, sell, or abandon their son. But an only son is not to be given or received, as he must continue the line of his ancestors. And a woman shall neither give nor receive a son except with her husband's permission."—Vasishtha XV. 2—5 (*x*).

The Dattaka Mimamsa says: "The capacity to give consists in having a plurality of sons, and the assent of the wife" and so forth (*y*). But the most perfect gift, from the religious point of view, must here have been intended, not one legally sufficient. At another place in the same work (*z*) it is laid down that "the husband singly even, and independent of his wife, is competent to give a son, for in the two passages cited (*a*) the father is mentioned singly and unassociated with the mother." The reason rests in part on a grammatical subtlety which it is hard to appreciate, both father and mother being mentioned apparently without any intention to assign a superiority to either (*b*); but reliance is placed also on the greater part of a father in his son (*c*), and on the generally subordinate place of the wife. Whatever may be thought of the reasoning the conclusion is perfectly clear. The Dattaka Mimamsa, however, allows the gift as it allows the

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(*x*) Amongst the Saxons the right of a father to sell his children was recognized, and it continued for some time after they had embraced Christianity. —Kemble's Saxons in England, vol. I., p. 199.

The passages in the Smritis coupling gift with sale and limiting both to a time of distress point back to a stage at which the doctrine of adoption had not been developed to anything like the extent which now makes it so important. See above, p. 792; Col. Dig., Book II., Chap. IV., T. 7.

(*y*) Sec. V. 14.

(*z*) Sec. IV. 13.

(*a*) *I.e.*, Manu IX. 168; Yajnavalkya II. 130.

(*b*) Vasishtha *does* subordinate the mother as shown above.

(*c*) Above, p. 800.

acceptance of a son by a wife under a delegation from her husband still living (*d*). When he is dead his authority or assent can no longer be had, and an adoption is impossible, but the widow may give away her son under the authority of the Smriti, which says: "The father or the mother (both) may give" (*e*). While the husband is alive she must not give without his assent; when he is dead she may use her discretion in the exigencies which would warrant a gift by the father.

The Dattaka Chandrika, after quoting Manu and Atri to the effect that a man destitute of male offspring may adopt a son (*f*), cites the familiar text of Vasishtha, "Let not a woman either give or receive a son in adoption unless with the assent of her husband" (*g*). Hence he gathers that with this assent a woman may adopt. The case of adoption by a widow is not specifically dealt with, but a woman may give in adoption "with her husband's sanction if he be alive, or even without it if he be dead, or have emigrated or entered a religious order" (*h*). The author construes the passage of Yajnavalkya in its natural sense as giving authority to father and mother alike (*i*), a construction which obviously involves the competence of a widow to adopt also without special authority for the purpose from her deceased husband.

The Mitakshara limits the mother's authority to give thus (*k*): "He who is given by his mother with her husband's consent, while her husband is absent or after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (dattaka). So Manu declares." Balambhat's commentary adds "incapable" to "absent," and "without his assent" to "decease," conformably to a general tendency to favour females found in this author. If the mother is present her assent is deemed as necessary it would seem as the father's (*l*). Caste custom, however, though it recognizes the mother's assent as desirable, does not regard it as indispensable (*m*).

(*d*) Datt. Mim., sec. I. 16, 17, 18.
(*e*) Datt. Mim., sec. IV. 10, 11, 12.
(*f*) Sec. I. 3.
(*g*) Sec. I. 7.
(*h*) Sec. I. 31.
(*i*) Sec. I. 32.
(*k*) Mit., Chap. I., sec. XI., para. 9.
(*l*) See Colebrooke's Note, *ad loc.*
(*m*) Steele, L. C. 183.

The Vyavahara Mayukha (*n*), referring to Manu, says that where both parents are alive the gift ought to be made by both, if the father be dead by the mother, if the mother be even absent by the father. The ceremonial prescribed in the same work (*o*) presupposes that the giver and receiver are both males. Vasishtha, however, is quoted as authorizing a woman's gift or acceptance of a son with the assent of her husband (*p*), and the necessity of assent being limited by inference to the woman under coverture, it is said that the widow's authority is unrestricted (*q*). The author had the taking of a boy in adoption more immediately in view (*r*), but his argument applies with at least equal force to giving.

The Viramitrodaya (*s*) says the mother may give with her husband's assent, the father on his own authority. It relies, like the other treatises, on Vasishtha, and maintains, contrary to the Dattaka Mimamsa and other works, not only that the assent of a living husband is unnecessary, but that no assent at all is necessary for a widow adopting. As to the giving of a son the Viramitrodaya is not explicit, and the reason given for allowing an adoption without the husband's assent, that otherwise his spiritual interest may suffer, does not apply to the gift of a son. When, however, there is no danger to these the widow's authority to give seems to be placed on the same level as her power to take: it is subject only in case of her dependence to the approval of the near relatives.

Questions relating to the capacity to give in adoption have naturally been far less frequent than those relating to the power to adopt. By a gift in adoption no one in the family of the child given loses anything, while the introduction of a child often takes away a succession or an estate from him who holds or expects it. The following responses show that a gift by the parents is essential to adoption but without drawing any distinction amongst the several cases of gift by the husband, the wife, and the widow.

"A boy cannot be given in adoption by any one except his parents," and this power cannot be relegated to another person (*t*).

"The father or mother should give a boy in adoption" (*v*).

(*n*) Chap. IV., sec. V., para. 1.
(*o*) Para. 8, 37 ss.
(*p*) Para. 16.
(*q*) Para. 18.
(*r*) See para. 36.
(*s*) Transl., p. 115.
(*t*) MS. 1643. *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590.
(*v*) MS. 1675.

The decisions of the Courts are to the same effect. No one but the natural father or mother can give in adoption (*w*). The grandfather, for instance (*x*), or the brother, has not the requisite authority (*y*).

An orphan cannot be adopted because there are no parents to make the requisite ceremonial gift (*z*). This principle excludes the svyamdatta or self-given (*a*).

Capacity to Give in Adoption.

A.—Gift by the Father.

A. 1.—Father's Personal Competence.

A leper, according to a Bengal case, can give his son in adoption (*b*) unless perhaps he has the disease in a severe and disabling form. Leprosy, as it disqualifies for the performance of religious acts (*c*), might, on that account, be held amongst the higher castes to prevent the gift by a father afflicted with it. The son in fact takes the place of a father thus disqualified in a Hindu family. In Bombay the gift, if made at all, would probably be made by the wife with the assent of relations (*d*).

A. 2.—Circumstances in which the Gift may be Made.

The Dattaka Mimamsa quotes Manu and Katyayana to prove that a gift of a son may be made only in a season of distress (*e*).

(*w*) *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at p. 376, and cases there quoted.

(*x*) *The Collector of Surat* v. *Dhirsingji Vaghbaji*, 10 Bom. H. C. R. 235.

(*y*) *Bashettiappa* v. *Shivalingappa*, 10 Bom. H. C. R., at pp. 271, 272.

(*z*) *Balvantrao* v. *Bayabai*, 6 Bom. H. C. R. 83 O. C. J.; *Bashettiappa* v. *Shivalingappa*, 10 Bom. H. C. R. 268.

(*a*) So *Veerapermal* v. *Narain Pillay*, 2 Mad. H. C. R. 129; and *Muttusawmy Naidu* v. *Lutchmeedevumma*, M. S. D. A. R. Dec. 1852, p. 96.

(*b*) *Anund Mohun* v. *Gobind Chunder*, W. R. 1864, p. 173.

(*c*) See above, pp. 541, 544, 549; Viram. Transl. 256; Vyav. May., Chap. IV., sec. XI., para. 10; Daya Bhaga, Chap. IV., paras. 4, 18; Mit., Chap. II., sec. X., para. 10.

(*d*) See Steele, L. C. 182; Mit., Chap. I., sec. XI., para. 9, note.

(*e*) Sec. I. 7. The original passage of Manu (IX. 168) is quoted. I. L. R. 2 Bom., at p. 380; Katyayana at Col. Dig., Book II., Chap. IV., TT. 6, 7.

In famine a son may be given or even sold, and the stress of necessity justifies a widow in thus parting with her son (*f*). The author gives a strained interpretation to the passage by making it refer to the distress of him who has no son (*g*), but he cannot but accept the natural sense (*h*). The Mitakshara says the condition relates to the giver not to the taker (*i*). The Vyavahara Mayukha (*k*) finds fault with this doctrine of Vijnanesvara and contends that where the gift has not been justified by need, the desired religious state has not been induced by the form of adoption. This seems a rather cavilling objection; it is, at any rate, not one of any practical importance in the law. A gift made by a competent parent is universally admitted to be effectual, whether made under the pressure of want or not. Very few adoptions are made from pauper families, and the gifts or sales made during famine are not usually attended with any ceremonies of adoption.

A Sastri says—"Parents in indigent circumstances may give a son in adoption" (*l*), but no instance occurs of a gift pronounced invalid through want of a poverty qualification.

A. 3.—Qualifications of the Power.

The free consent of the mother is said to be necessary if she is living with her husband (*m*), but "desirable" would be the proper word (*n*) save in a quite exceptional instance. The restrictions arising from the condition of the boy as an only son or an eldest son have been discussed in the previous section. The only substantial qualification of the parents' power arises in the case of a boy sufficiently old to have intelligence and a will of his own. The assent of such a boy (or man) is necessary (*o*). Without

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(*f*) Sec. IV. 12.

(*g*) Datt. Mim., sec. IV. 21.

(*h*) Datt. Mim., sec. I. 8; sec. IV. 18, 19.

(*i*) Chap. I., sec. XI., para. 10.

(*k*) Chap. IV., sec. V., para. 2. See above, p. 928.

(*l*) MS. 1683, but the condition is a purely moral one, and one that is very lightly regarded.

(*m*) Steele, L. C. 45.

(*n*) Steele, L. C. 183, 385.

(*o*) Steele, L. C. 385.

it the desired adaptation of character (*p*) is not in such a case to be hoped for, and the son is not a mere chattel (*q*). His assent may be safely inferred from his going through the ceremonies.

Relatives should be informed of an intended gift in adoption, but their consent and the consent of the caste are desirable rather than necessary. It is most nearly essential, where, owing to the refusal of near relatives to give a son, it becomes necessary to have recourse to distant connexions or to strangers (*r*).

The Poona castes seem to have thought, when questioned by Mr. Steele, that the consent of the Government was necessary in the case of Sarinjamdars and the like, not only to an adoption, but to the particular choice made in each instance (*s*).

B.—Gift by the Mother.

B. 1.—As a Wife—By Express Permission of the Husband.

The Dattaka Kaustubha prohibits the giving equally with the receiving of a son in adoption by a wife without her husband's permission (*t*).

The express permission of her husband is necessary to validate a gift in adoption by a wife of their son, though the Smriti Chandrika is not to be construed as placing adoption and giving in adoption by a wife on the same level (*v*).

B. 1. 2.—With Implied Assent of the Husband.

An express permission does not seem absolutely necessary. The law was stated thus. A wife is not competent to give her son in

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(*p*) Above, p. 830.

(*q*) See above, pp. 832—833; Vayv. May., Chap. IV., sec. I., para. 11; Chap. IX., para. 2. The limitation of the right of disposal over children to the parents originated no doubt in religious feeling, but it has probably been maintained in a measure at least by a sense of its being a necessary safeguard for the children. Their interests were least likely to be sacrificed by their parents. The removal of the child from the class of mere chattels is important with respect to the illegality of giving in adoption subject to terms injurious to the child as a son in the family of adoption. Such terms the Sastris have in some instances pronounced void, as will be seen in the next section.

(*r*) Steele, L. C. 183.

(*s*) Steele, L. C. 182.

(*t*) Leaf 44, p. 1, l. 6 (Bom. Shaké 1783).

(*v*) *Narayen* v. *Nana*, 7 Bom. H. C. R. 153, 162, 167, 172; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at pp. 386, 397.

adoption against the will of her husband, expressed or implied, or gathered from the circumstances of the case (*w*).

It was held also that where the natural father permitted the adoption of his boy under certain conditions, one of which was imposed in consequence of a mistake as to the necessity of an assent of Government to an adoption, non-fulfilment of the condition rendered the adoption invalid (*x*).

When the father is insane and unable to give his consent, the mother alone can give her son in adoption (*y*).

B. 2.—Gift by the Mother—As a Widow.

Jagannatha says, a gift by the mother alone is void; by the father alone valid, though religiously defective (*z*). After the death of one of the parents he regards the father's power as complete, but the mother's as dependent on authority given by her husband (*a*), which will also validate a gift by a wife (*b*). He is thus less liberal to the widow than the authorities quoted in the beginning of this section. It would seem that the true view is that of a joint interest in the son with a discretional power of acting in the widow after her husband's death, except in cases plainly injurious to his spiritual welfare or opposed to his known wishes.

The Nirnaya Sindhu (*c*), quoting from Vatsa and Vyasa, "The son given by the father or the mother is a given son" (dattrima), maintains that the restrictions on the mother's capacity, either to give or to take, endure only while the father lives. The Smriti is obviously a much more direct authority for freedom in giving than in taking. "The Hindu Law clearly points to the mother as the person who can give in adoption when the natural father is dead" (*d*).

(*w*) *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom. 377; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at p. 397.

(*x*) I. L. R. 2 Bom., at p. 383.

(*y*) *Hurosoondree Dossee* v. *Chundermoney Dossey*, Sev. R. 938. See above, sub-sec. A. 1.

(*z*) Col. Dig., Book V., T. 273, 274 Comm.

(*a*) *Ibid.*, T. 275 Comm.

(*b*) *Ibid.*

(*c*) Bom. Edn. Shaké 1784; Parichheda III. fol. 9, 1, ll. 3, 4.

(*d*) *The Collector of Surat* v. *Dhirsingji Vaghbaji*, 10 Bom. H. C. R., at p. 237.

The narrower view of the widow's capacity is illustrated by the following two cases, both in Bengal, where generally the widow's rights are most restricted.

Though the natural father consented to the adoption of his boy, he not having lived to make the gift, the adoption, it was held, could not be made (*e*). A mother indeed, it was said, cannot give her only son in adoption even as a dvyamushyayana without authority previously obtained from her deceased husband (*f*).

In a later Bengal case, however, it was said that the assent of the father to the gift of a son might be presumed where no dissent had been expressed, on the authority of the Datt. Chandrika (*g*), though this did not extend to the taking of a son in adoption (*h*).

The principle of the widow's dependence has been brought to bear in Madras as a means of controlling her right to give in adoption. It was ruled that in the absence of consent from her deceased husband, but with the consent of his father, brother, &c., a mother may give her younger son in adoption (*i*).

In Bombay on the other hand a Sastri said that "when either of the parents has given a son by pouring water on the hands the gift is complete. The parents need not consult their relatives" (*k*). The gift in the particular case, however, had been made by the father, and the Sastri did not probably contemplate the case of a gift by the mother without the consent of the father. Where a father has indicated that he does not wish his son to be given in adoption, his widow has not authority to make the gift. In any case in which he may probably have desired the retention of the son the gift is invalid if made without an express authority from him. Such authority is specially necessary where the gift will leave the deceased father spiritually destitute (*l*).

Even amongst the Lingayats, though they are Sudras (*m*), permission will not be presumed for a widow to give away an only

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(*e*) *Gourbullab* v. *Jugernatpersaud Mitter*, Macn. Con. H. L. 217.

(*f*) *Debee Dial et al.* v. *Hurhor Singh*, 4 C. S. D. A. R. 320. His being the only son was material.

(*g*) Sec. I., paras. 31, 32.

(*h*) *Tarini Charan* v. *Saroda Sundari Dasi*, 3 B. L. R. 145 A. C. J.; S. C. 11 C. W. R. 468.

(*i*) *Arnachellum Pillay* v. *Jyasamy Pillay*, 1 Mad. S. D. A. R. 154; Col. Dig., Book V., TT. 273—275.

(*k*) MS. 1677.

(*l*) *Somasekhara Raja* v. *Subhadramaji*, I. L. R. 6 Bom. 524.

(*m*) *Gopal* v. *Hanmant*, I. L. R. 3 Bom. 373.

son or an eldest son in adoption (*n*). Where a mother, however, in pursuance of the promise of her deceased husband, allowed her son to be adopted, but did not herself (being ill) attend at the adoption ceremonies to give him in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid (*o*).

In one case at Madras it was held that the consent of a brother, as representing his deceased father, to the adoption of his brother, was sufficient. The mother not attending, her consent was presumed (*p*). But this ruling has not been approved. It is inconsistent with several subsequent cases (*q*), and though not entirely unsupported by Hindu authority (*r*) cannot be considered good law.

The concurrence of an eldest son may properly be required to the gift in adoption of a younger son by the widow (*s*). She is legally and religiously dependent on him as head of the family, and this authority may well be recognized where it can be exercised only in restraint of a parting with a brother (*t*).

C.—Gift by Persons Incompetent.

C. 1.—By Adoptive Parents.

The texts do not warrant a gift by adoptive parents (*v*). The prescribed ceremonies imply a gift by the boy's real father to another taking him as his son (*w*).

(*n*) *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R. 364; *Somasekhara* v. *Subhadramaji*, I. L. R. 6 Bom. 524.

(*o*) *Vijiarangam* v. *Lakshuman*, 8 Bom. H. C. R. O. C. J. 244; see 2 Str. H. L. 94 as to the delegation of ceremonial functions.

(*p*) *Veerapermal Pillay* v. *Narrain Pillay;* 1 Str. R. 91; see Macn. Cons. H. L., p. 220; Steele, L. C. 48, note.

(*q*) See *Bashettiappa's Case*, 10 Bom. H. C. R., at p. 272. Below, sub-sec. C. 3.

(*r*) See above, p. 817.

(*s*) Steele, L. C. 48.

(*t*) "A gift made by a dependent person without the consent of the principal owner (*i.e.* the 'head' or 'lord') is void." Col. Dig., Book V., T. 273 Comm.

(*v*) Above, p. 808; see 2 Str. H. L. 142. The Roman Law specially guarded against an adoptive father giving away his adopted son without good cause, while it allowed the son injured by adoption to claim emancipation on reaching his majority. Inst. Book I., T. XI. § 3, and Ortolan *ad. loc.*

(*w*) See 2 Str. H. L. 218; Datt. Chand. sec. II. 16; Datt. Mim. V. 13; Vyav. May., Chap. IV., sec. V., para. 8.

C. 2.—Persons Commissioned by the Parents.

The parents cannot delegate to any other person the authority to give in adoption after their decease (*x*), nor can they do so during their lifetime (*y*), excepting religious ceremonies to the Brahmans (*z*).

C. 3.—By Grandfather, Brother, &c.

When the father is dead, and the mother living, the grandfather cannot give away a boy in adoption (*a*).

The adoption of a boy, delivered by his brother, but not by either of the parents, and in which the adoptive mother did not obtain her husband's consent, was not upheld by the Court (*b*).

One brother cannot give another in adoption on account of their equality in position (*c*), more especially when the parents are dead; and even though the father had previously consented to such an adoption (*d*).

C. 4.—Self-Gift.

"The only son of one deceased cannot give himself in adoption" (*e*).

"The svyamdatta, or son self-given, is not to be recognized in the Kali yug" (*f*).

The kritrima or karta putra in the Maithila district is an exception. But this mode of adoption, as already noticed, is not allowed elsewhere.

(*x*) *Bashettiappa* v. *Shivalingappa*, 10 Bom. H. C. R. 268.

(*y*) *Amrito Lal Dutt* v. *Surnomoye Dasi*, L. R. 27 I. A. 128; *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590.

(*z*) *Ibid.*; *Santap* v. *Rangap*, I. L. R. 18 Mad. 397; *Vedavalli* v. *Mangamma*, I. L. R. 27 Mad. 538, 539.

(*a*) *Collector of Surat* v. *Dhirsungji Waghbaji*, 10 Bom. H. C. R. 235.

(*b*) *Musst. Tara Munee Dibea* v. *Deb Narain et al.*, 3 C. S. D. A. R. 387; Col. Dig., Book V., T. 275. Amongst some tribes in the Panjab a man may give his brother in adoption, but not his only son. Amongst some he may not give his eldest son. In some tribes he may give his only son to a brother or near relative. See Tupper, Panj. Cust. Law, vol. II., p. 155.

(*c*) *Muttusawmy Naidu* v. *Lutchmeedevamma*, M. S. D. A. Dec. 1852, p. 96.

(*d*) *Bashettiappa* v. *Shivlingappa*, 10 Bom. H. C. R. 268.

(*e*) MS. 1746. *Bashettiappa* v. *Shivalingappa*, 10 Bom. H. C. R. 268; *Lakshmappa* v. *Ramava*, 12 Bom. H. C. R., at p. 390.

(*f*) MS. 1755. See above, p. 807.

SECTION VI.—A.—THE ACT OF ADOPTION (*g*)—ITS CHARACTER AND ESSENTIALS.

Adoption amongst the Aryan Hindus, as it was amongst the Greeks and Romans, is essentially a religious act (*h*). Its purpose and the ideas connected with it have been discussed in sec. II. It follows almost necessarily from the view of the subject taken by the Brahmans and by those classes who have inherited or adopted Brahminical institutions that the sacrifices and invocations by which a boy is transferred from association with one line of names to another should be deemed indispensable to a true adoption (*i*). And as the rights of property are under the Brahminical system indissolubly connected with spiritual union (*k*) the succession to a member's place in the united family, or to the aggregate of rights and duties centred in him alone as the sole representative of a family, or as the source by separation of a new one (*l*), must needs pass to him who has the sacra. To the begotten son the sacra pass of right and of necessity (*m*); to the adopted son (*n*) they can pass only by means of the sacred rites supposed to be efficacious in bringing him under the same tutelary divinities as his adoptive father, and imparting to him the father's ceremonial virtue. Such ceremonies as the *putreshti*, and especially the *datta-homa*, are not therefore to be looked on as mere excrescences (*o*). In theory at least they are as important as the gift and acceptance, since without them the reception is defective and the spiritual end cannot be attained (*p*). Men of the mixed and lower castes, as they became imbued with the Brahminical doctrines (*q*), conceived that

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(*g*) This section has once or twice been referred to under the title of the "Method of Adoption," but on a review of the materials a more comprehensive title seemed preferable.

(*h*) Above, pp. 845, 846; Smith's Dict. Ant. Tit. Adoptio. Cic. Pro. Domo Sua, Chap. 13.

(*i*) See above, p. 832; Datt. Mim., sec. V. 56; Vyav. May., Chap. IV., sec. V., paras. 8, 37, 38.

(*k*) Manu IX. 126, 141, 142, 169.

(*l*) Above, p. 73.

(*m*) Comp. pp. 63, 790, 880, 889, above; Datt. Mim. IV. 27 ss.

(*n*) *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*, L. R. 10 I. A. 138; *Rungama* v. *Atchama*, 4 M. I. A. 1; *Gopee Lall* v. *Musst. Sree Chundraolee Buhoojee*, L. R. I. A. Supp. 131.

(*o*) Datt. Mim. V. 56.

(*p*) Datt. Mim. IV. 33, 36, 41.

(*q*) Above, pp. 827, 829.

for them too as for the pure twice-born, there might be a future of beatitude secured by religious services performed in this world by sons duly adopted (*r*), but this adoption, according to the same set of ideas, involved a dedication to the manes of the adoptive family, and the acquisition of spiritual fitness for its sacra. Thus amongst most of the classes aspiring to spiritual and social rank the religious ceremonies have grown to be regarded as at least religiously essential (*s*). It is a mark of inferiority and remoteness from Brahminical connexion that they should be superfluous or simply optional in any caste.

But while this continued extension of the Brahminical ceremonies has been favoured by caste ambition other causes have worked in the contrary direction. The excessive multiplication of ceremonies, natural to the sacerdotal class, made it impossible in many cases through poverty and other causes to fulfil them all (*t*), and as some had to be dispensed with, the idea gained ground that perhaps none were absolutely indispensable. The ancient and probably indigenous system of adoption or fosterage (*v*) required no more than a gift, where a capable giver existed, and a taking by the ceremonial parent (*w*). On this the Brahminical ritual was grafted to a varying extent. It could hardly be said with certainty what rites would by caste custom in any particular instance be deemed indispensable and which only desirable. Ignorance, haste, and other causes led to irregularities in adopting which it was highly desirable not to consider fatal to the affiliation. In some castes the spiritual purpose was disregarded, while the influence of example supported imitative ceremonies as a usual practice (*x*). Except amongst the Brahmanas perhaps nothing is precisely fixed and definite beyond a formal giving and receiving, and by a reflex action the religious ceremonies have become less essential even amongst the Brahmanas than in the earlier time when they were a more peculiar people, more markedly distinct from the other castes. The wish for a temporal heir and for an object of parental affection has grown in importance as the keen appreciation of the spiritual

(*r*) See above, p. 825.

(*s*) The state of things in Gujarath, where Brahminical influence of the Maratha and Benares schools is of quite recent introduction, is an exception that tends to prove the rule.

(*t*) Comp. Steele, L. C. 159.

(*v*) Above, pp. 823, 828; Norton, L. C., vol. I., p. 83.

(*w*) As amongst the Talabda Kolis and others, see above, p. 829.

(*x*) See above, p. 825.

need has declined, so that in Madras at least it has become an established doctrine that mere gift and acceptance will constitute adoption even amongst Brahmanas (*y*). In Bombay no Sastri, so far as can be discovered, has ever lent himself to this laxity of practice. The religious ceremonies are rigorously insisted on, at any rate for Brahmanas, though some indulgences in the actual performance of them have been countenanced. The definition of the essential ceremonies, however, is unsettled; the datta-homa is always prescribed in addition to the formal giving and taking, but beyond this it would be hard to say that any rite has been sufficiently pronounced indispensable. Even in the case of Brahmanas the Courts have shown a disposition to exact as little as possible of mere ritual (*z*), and the customary ceremonies enumerated by Steele (*a*) embrace all probably that would in any case be held essential. In some of the cases (*b*) reference is made to a supposed efficacy of the ceremony for civil, though not for religious, purposes (*c*). Even Sir T. Strange seems to have had a similar idea (*d*). It must be pronounced altogether foreign to the Hindu Law (*e*). It is in virtue of his religious capacity that the adopted takes the place of a born son (*f*).

A. 1.—The Act of Adoption—Its Character and Essentials as to the Gift.

A gift (*g*), which is attended with retention of ownership, even in part by the donor or subject to a condition precedent, is not by the Hindu Law regarded as valid (*h*). The considerations which apply to gifts in general are of more than usual force in the case of

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(*y*) See also above, p. 825.

(*z*) See above, pp. 825, 826. *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590.

(*a*) See below, sub-sec. D. 1.

(*b*) See also above, p. 845.

(*c*) See *V. Singamma* v. *Ramanuja Charlu*, 4 M. H. C. R. 165, and the cases there referred to.

(*d*) 1 Str. H. L. 96.

(*e*) See *Rajendro N. Lahoree* v. *Saroda Soonduree Dabee*, 15 C. W. R. 548; L. R. 3 I. A., at p. 193.

(*f*) See above, p. 790.

(*g*) A gift in case of adoption, not a sale. See above, p. 806.

(*h*) See above, pp. 187, 415.

adoption. It is manifest that the intended purpose of adoption cannot be realized if the natural father's rights in the adopted son are retained. If the status of the son is subject to contingencies his position and that of the family he has joined are painfully uncertain (*i*). The solemn ceremonies prescribed for a complete adoption are intended to effect an immediate and complete transfer of the boy from the spiritual sphere of the natural to that of the adoptive family (*k*). As far as this point there is always a *locus pœnitentiæ,* but when once the gift is consummated no revocation is allowed (*l*); the capacity to give, which belonged to the natural parents, is not so acquired by the adoptive parents (*m*) that they can restore the son they have once taken.

It follows that a mere promise or engagement in *fieri* cannot constitute an adoption. There must be a present unqualified gift and acceptance, just as in the case of marriages, otherwise there is no adoption. The Judicial Committee have insisted on the necessity (*n*) of the actual transfer in several instances. Colebrooke had previously said: " A simple agreement to make an adoption, not carried into effect, will certainly not invalidate a subsequent adoption made with the requisite forms " (*o*), and again, " Be the mode of adoption what it might, this seemed indispensable; that, at whatever time it was contended to have taken place, it should be shown by the claimant, that the operative expressions had been used, indicative of the disposition to give, or to become adopted on one side, and to adopt on the other. The Hindu Law has not prescribed any particular expressions on the occasion; nor does it require that adoption should be by writing. But it has provided, that the intent shall be expressed at the time; and, if the transaction be by writing, its whole genius and course teaches us to look for it there " (*p*).

(*i*) See above, pp. 187, 831. Rights inherent in a status governed by the family law could not, under the Roman system, be affected by a contract. See Dig. Lib. II. Tit. XIV. Fr. 34 (Poth. Pand. § 41).

(*k*) See Datt. Mim. V. 34; Vyav. May., Chap. IV., sec. V., paras. 23, 29, 37, 38; and the formula 2 Str. H. L. 218.

(*l*) Steele, L. C. 184.

(*m*) Above, pp. 808, 821, 832. Under the Roman Law the patria potestas of the adoptive father was subject to severe restrictions if he desired to use it by getting rid of the adopted son. See Inst. Lib. I. Tit. XI. § 3.

(*n*) Above, p. 827.

(*o*) Colebrooke in 2 Str. H. L., p. 115.

(*p*) Colebrooke in 2 Str. H. L., pp. 143, 144.

In *The Collector of Surat* v. *Dhirsingji Vaghbaji* (*q*) Sir M. Westropp said: " It is clear Hindu Law that to constitute a valid adoption there must be a gift and acceptance," the gift after the father's death being competent only to the mother. It is only by reason of the gift indeed that the filial relation to the natural father is extinguished, or that the right of the son in the estate of the giver ceases. A mere deed or declaration by the alleged adoptive father that he has taken a boy as a foster son (palak putra) does not produce the effect of adoption (*r*). Hence, when the ceremonies of adoption had been performed, but no actual gift and acceptance of the child had taken place, the Judicial Committee held that the adoption was invalid (*s*).

The Judicial Committee have recognized the nullity as an adoption of a gift and acceptance still in a measure in *fieri*, though the contract was made by a deed registered and expressed in the present tense (*t*). It was not necessary for their Lordships positively to decide whether there could be " an adoption simply by deed," because in the particular case there was an intention to complete the adoption by the ordinary ceremonies, but a strong opinion on the subject is intimated. " They desire, however, to say that they are far from wishing to give any countenance to the notion that there can be such a giving and taking as is necessary to satisfy the law, even in a case of Sudras by mere deed without an actual delivery of the child by the father." The delivery accompanied by the requisite declaration of transfer of right makes a perfect gift forthwith. The adopted son must be given, not sold (*v*), as the Krita adoption is now disallowed. Hence an agreement by which the natural parents stipulated for an annuity to themselves as a consideration for giving their son in adoption was pronounced illegal (*w*). Similarly, it was held in *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar* (*x*) that an adoption otherwise valid was not prejudiced by an agreement

(*q*) 10 Bom. H. C. R. 235, referring to 1 Str. H. L. 95; Manu IX. 168; Mit., Chap. I., sec. XI., para. 1.

(*r*) *Nilmadhab Das* v. *Biswambhar Das*, 12 C. W. R. P. C. 29; S. C. 3 B. L. R. P. C. 27; S. C. 13 M. I. A. 85.

(*s*) *Bireswar Mookerji* v. *Ardha Chunder Roy Chowdhry*, L. R. 19 I. A. 101.

(*t*) *Mahashoya Shosinath Ghose et al.* v. *Srimati Krishna Soondari Dasi*, L. R. 7 I. A. 250.

(*v*) See further below, sub-sec. A. 6.

(*w*) *Eshan Kishor Acharjee* v. *Harischandra Chowdhry*, 13 B. L. R. 42 App.

(*x*) L. R. 16 I. A. 53.

between the adoptive mother and the natural father, that she should retain her husband's estate during her life, and that an agreement of this kind had no effect upon the rights of the son, nor did it render his adoption conditional. Nor will an agreement between two brothers, one of whom had a son, not to adopt "in case of failure of aurasa (self-begotten) male issue, bind the son or prevent that son's adoption from conferring title by inheritance" (*y*).

The gift must be expressly in adoption, as in the case of a wife the gift must be as in marriage. According to the Hindu Law a mere gift in either case without the attendant volition would be the bestowal merely of a slave (*z*). The religious ceremonies are important even where they are not regarded as essential, as in the case of adoption by a widow (*a*) or of a brother's son (*b*) or of a boy of the same gotra as the adoptive father (*c*), if only as marking clearly the specific nature of the gift and acceptance.

The assent of the mother, either natural or adoptive, is not absolutely necessary if her husband assents to the adoption. Without her assent "the mother's claim is not annulled by the donation" (*d*), but this claim is merely a moral one, making it expedient but not necessary to obtain a release from her as from the natural father of the son's filial duty (*e*). For jural purposes a gift by the natural father suffices: and as an adoption is made for the sake of the sonless man his acceptance of a son in adoption suffices without the assent of his wife, as shown in the previous section.

A. 2.—THE ACT OF ADOPTION—CHARACTER AND ESSENTIALS AS TO THE ACCEPTANCE.

"Acceptance in a certain form is the efficient cause of

(*y*) *Sri Raja Rao Venkata Mahapati Surya Rao Bahadur* v. *Sri Raja Gangadhar Rama Rao Bahadur*, L. R. 13 I. A. 97.

(*z*) Col. Dig., Book V., T. 273; above, p. 836.

(*a*) *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590; *Chiman Lal* v. *Ramchandra*, I. L. R. 24 Bom. 473.

(*b*) *Valubai* v. *Govind Kassinath*, I. L. R. 24 Bom. 218. *Govindayyar* v. *Dorasami*, I. L. R. 11 Mad. 5; *Ranganayakamma* v. *Alwar Setti*, I. L. R. 17 Mad. 219; *Atma Ram* v. *Madho Rao*, I. L. R. 6 All. 276.

(*c*) *Balgangadhar Tilak* v. *Tai Maharaj*, L. R. 42 I. A. 135; S. C. I. L. R. 39 Bom. 441 P. C.

(*d*) Col. Dig., Book V., T. 273 Comm.; see 2 Str. H. L. 131.

(*e*) Col. Dig., Book V., T. 275 Comm.

filiation" (*f*). Hence there must be evidence of the taking as well as of the giving (*g*).

The free consent of the giving and receiving parents is indispensable (*h*). It is but rarely that a question on this point can arise when the giver and receiver were adult males, but in the case of women, and in that of minors, taking in adoption, should the practice be recognized (*i*) there is obviously room for abuses which ought to be guarded against. Fraud and cajolery practised on a widow, in inducing her to adopt, will be relieved against (*k*), and a Hindu female, acting unguided by disinterested advisers, ought not to be prejudiced by her acquiescence in an adoption or a will (*l*).

The gift and acceptance cannot be replaced by any other intimation of desire or consent. "Education and nurture do not constitute any relation entitling to inheritance" (*m*).

Although amongst Sudras no religious ceremony is necessary except in case of marriage (*n*), yet an adoption, even amongst Sudras, must be completed by corporeal gift and acceptance (*o*). A Sudra took a boy of four years old, intending to adopt him, and thenceforth supported him, but never actually adopted him, and in course of time had three begotten sons. The Pandit said this gave the boy no right as a son to share the estate, only a right to be settled in marriage (*p*).

(*f*) Col. Dig., Book V., T. 275 Comm. The salutation already noticed, p. 949, or the kissing of the boy's forehead, as it is described in Sutherland's translation of the Datt. Chand., sec. II. 7, is a solemn indication of acceptance. See, too, Vyav. May., Chap. IV., sec. V., para. 8.

(*g*) *Laxman bin Santaji* v. *Malu bin Ganu*, S. A. 550 of 1874.

(*h*) Steele, L. C. 385. *Somasekhara Raja* v. *Subhadramaji*, I. L. R. 6 Bom. 524; *Ranganayakamma* v. *Alwar Setti*, I. L. R. 13 Mad. 214.

(*i*) See above, p. 814, note (*w*).

(*k*) *Bayabai* v. *Bala Venkatesh*, 7 Bom. H. C. R. App. I. See *Somasekhara Raja* v. *Subhadramaji*, I. L. R. 6 Bom. 524; *Ranganayakamma* v. *Alwar Setti*, *supra*.

(*l*) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A 429.

(*m*) Colebrooke in 2 Str. H. L. 111.

(*n*) *Sreemutty Joymoney Dossee* v. *Sreemutty Sibsoondaree Dossee*, Fult. R. 75, 76; 2 Str. H. L. 89.

(*o*) *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi*, L. R. 7 I. A. 250.

(*p*) 2 Macn. H. L. 198; below, sec. VII.

A. 3.—The Act of Adoption—Assent of the Son.

Manu (*q*) prescribes that the son given shall be not only of the same class but "affectionately disposed." This implies an assent by the boy capable of discrimination (*r*) as a token of the requisite disposition. Accordingly Jagannatha prescribes that "no son must be given away against his will" (*s*).

A. 4.—The Act of Adoption—Contract of Adoption.

An agreement to adopt a child is not rendered void by the death of one of the parties, husband and wife, who executed it. If the husband at his death refers to the agreement, the wife is authorized to adopt the child mentioned in the agreement (*t*).

A mere agreement to adopt, however, is not itself an adoption, and will not invalidate a subsequent adoption made with the requisite forms (*v*). Nor probably would such an agreement be specifically enforced any more than a contract of betrothal (*w*).

Challa Papi Reddi v. *Challa Koti Reddi* (*x*) was a case in which a man A, adopted by his father-in-law according to the Illatam custom noticed elsewhere (*y*), associated another son-in-law B, with himself. This was not a case of adoption, but the son of A

(*q*) IX. 168.

(*r*) See Datt. Mim., sec. IV. 47.

(*s*) Col. Dig., Book V., T. 275 Comm. See above, pp. 832, 833. A child under eight years is considered as (dependent as) one unborn. Thence to sixteen he is called a bala or paganda (adolescent); after that he is of full age. Narada, quoted in Viv. Chint., Transl., p. 35. Hence the Sastris rule in favour of the widow's guardianship of a child under eight, at which age it is superseded by that of the paternal relatives. After eight years of age sufficient intelligence for religious acts is usually attributed to children; and the assent of a child so advanced is requisite to his adoption. It ought in strictness to be proved in contentious cases.

(*t*) *Ry. Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. Sel. Dec. 101; see also *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67, quoted below under sub-sec. A. 7.

(*v*) Colebrooke in 2 Str. H. L. 115, 135.

(*w*) See *Umed Kika* v. *Nagindas Narotamdas*, 7 Bom. H. C. R. 122 O. C. J. *In re Gunput Narain Singh*, I. L. R. 1 Cal. 74; Spec. Relief Act I. of 1877, secs. 12, 21, 22.

(*x*) 7 M. H. C. R. 25.

(*y*) Above, p. 398. For a similar institution, see Index "Gharjawahi," or Steele, L. C. 358.

was held bound by the engagement to B that he should share the estate with A.

A. 5.—The Act of Adoption—Proof of the Transaction.

The fact of an adoption having been made or attempted may be involved in varying degrees of doubt. The principles which govern the reception and appreciation of the evidence adduced in contested cases do not differ from those which operate in other departments of the law; but the special nature of the facts involved has given rise to many decisions which bear on the question of the sufficiency of particular acts and statements to constitute adoption. The same cases might properly be placed in section VIII. on the Litigation connected with Adoption; but it may be convenient to consider them here in close connexion with the legal essentials of gift, acceptance, and assent in the act of adoption (*z*).

The Courts have varied considerably in their views of the completeness of the proof of an adoption, which may properly be exacted before it is recognized in a contested case. No precise rules can be gathered from the decisions, except these, that the evidence must point to a real adoption, not to some connexion substituted for it, and that the religious ceremonies, even when not absolutely necessary, are in most castes so usual that the non-performance of them detracts much from the proof of a disputed adoption.

A. 5. 1.—Means of Proof.

In no case, it was laid down, should the rights of wives and daughters be transferred to strangers or remote relations, unless the fact of the adoption be proved by evidence free from suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth (*a*).

The Court may exact but slight evidence of the performance of ceremonies on proof of the husband's permission to a widow to

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(*z*) It will be seen below that the conduct of those interested has, in several instances, virtually been allowed to replace an act of adoption in constituting the legal relation. Occasionally even where an adoption was *primâ facie* impossible. See p. 969 (*c*).

(*a*) *Sootrugun Sutputty* v. *Sabitra Dye*, 2 Knapp, p. 287; S. C. 5 C. W. R. P. C. 109.

adopt. But from the mere observance of ritual forms no inference can be made of the permission (*b*).

For the validity of an adoption it is not sufficient to prove that the adoption was attempted *bonâ fide*, but satisfaction of the requirements of the Hindu Law must be proved (*c*). "Even a brother's son does not become adopted by the mere performance of other sacraments for him without the ceremonies of adoption" (*d*). A person, immediately on the death of his wife from cholera, asked his brother to give him his son in adoption. The brother assented, but urged the necessity of ceremonies, which were reserved for next day. The adopter also died from cholera the same day as the wife, and the ceremonies remained unperformed. The boy went through the funeral ceremonies of the deceased person. These facts were held not to constitute a valid adoption by gift and acceptance (*e*). Performance of funeral rites by an alleged adopted son and acquiescence of the adopter's widow will not sustain the validity of an adoption, unless it clearly appears that the act itself was performed under circumstances rendering adoption legal (*f*).

Long possession under an adoption will avail nothing if the adoption fails (*g*). "A man not regularly adopted, but who has lived as a member of an undivided family for twenty-five years, may be ejected from the joint property by the other members" (*h*). Still less will mere residence and general recognition avail according to some of the cases. Thus it was held that in the absence of any formal adoption a sister's son residing in his uncle's house from childhood, and recognized and treated as his son, does not acquire the legal status of adopted son (*i*). And similarly that in the absence of any agreement mere residence with the family into which his aunt had married gives no right to any one to a share of the family property (*k*).

(*b*) 1 Hay, 311.

(*c*) *Teelok Chundur Raee* v. *Gyan Chundur Raee*, Beng. S. D. A. R. 1847, p. 554.

(*d*) MS. 585.

(*e*) *Kenchava* v. *Ningapa*, S. A. No. 645 of 1866, 10 Bom. H. C. R. 265.

(*f*) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A. 429.

(*g*) *R. Haimun Chull Singh* v. *Koomer Gunsheam Singh*, 2 Knapp. 203; S. C. 5 C. W. R. P. C. 69. See above, p. 829 ss.

(*h*) MS. 123.

(*i*) *Bhagvan Dullabh* v. *Kala Shankar*, I. L. R. 1 Bom. 641.

(*k*) *Y. Venkata Reddi* v. *G. Soobba Reddi*, M. S. D. A. Dec. 1858, p. 204.

A man having bought or otherwise taken a boy and brought him up as a foster-child, bequeathed part of his property to him. The Sastri pronounced him disentitled to any more as against the blood relations in the absence of a formal adoption (*l*).

As to the nature of the evidence required no merely technical rules have been prescribed. Thus an adoption which took place sixty years ago may be proved by oral evidence (*m*). Ocular testimony may indeed be dispensed with. The adoption of a son was held proved on strong circumstantial evidence, in the absence of direct proof of the performance of the necessary ceremonies (*n*).

A. 5. 2.—Presumption in Favour of Adoption.

Though a true adoption is impossible without the essential ceremonies (*o*), the Courts have in many instances given effect to adoptions of which the direct proof was insufficient. In some of the cases the proof entirely failed. The conduct of the members of the adoptive family it was thought had in such cases created an estoppel against their denying the adoption, or else there had been so long an acquiescence in the adoptive status that the son could not, without extreme hardship, be deprived of his sonship (*p*). To make them consistent with the general principle such cases ought to be referred, as generally they may be, consistently with the known facts, to a presumption of adoption arising from the circumstances. The position of an adopted son under such circumstances resembles that of an heir in whose favour, after long possession, every reasonable presumption will be made (*q*).

It depends upon the probabilities of each case under what circumstances an adoption may be recognized in the absence of the

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(*l*) MS. 122. See above, p. 929; and p. 356, Q. 19.

(*m*) *Basappa* v. *Malan Gavda*, S. A. 229 of 1867. It will be seen that no writing is necessary to an adoption, though amongst some classes it is usual. Steele, L. C. 184.

(*n*) *Perkash Chunder Roy* v. *Dhunmonee Dassia*, Beng. S. D. A. R. for 1853, p. 96.

(*o*) *I.e.*, at least the transfer, and in the case of a Brahmana, the homa, according to nearly all opinions

(*p*) See *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*q*) See *Rajendronath Holdar's Case* below, p. 969 (*z*). Where the question is of the due performance of ceremonies, the presumption arises that all was rightly done

original deed (*r*). There need not, however, be a deed: the Sastri says—"If one maintain another for a length of time, professing to have adopted him, and in fact committing all his affairs to his charge, having, upon his beginning to do so, invited and entertained his relations, acquainted the magistrate, and drunk manjanee, he cannot afterwards abandon the young man so adopted in favour of another; nor is the adopted compellable to renounce the connexion so formed. The relation of an adopted needs no writing for its support" (*s*).

A presumption arises that an adoption was duly made from the undisputed performance by the adopted in question of the kriya and paksha ceremonies for the members of the family of adoption (*t*). The decisions agree with this, as in the following instances: in the case of a brother's son recognized for many years and allowed by the family to perform the funeral rites of the deceased a presumption was admitted in favour of the adoption (*v*). So proof of the performance of ceremonies was dispensed with where the adoption was recognized for a series of years and the adoptee had possession of property (*w*), notwithstanding the continued residence of the adoptee with his natural parents (*x*).

A gift by a duly authorized person in adoption is to be presumed from an adoption which has been acquiesced in for thirty-three years (*y*). But a shorter time will suffice. An adopted son, whose adoption by a widow under a power from her husband with publicity and formality, was acted on and recognized for twenty-seven years by the family, died possessed of property. His adoption was held good until it should be rebutted by evidence of the strongest kind, after making due allowance for all imperfections of evidence on the side of the defendant arising from lapse of

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(*r*) *Roopmonjooree* v. *Ramlall Sircar*, 1 C. W R. 145.

(*s*) 2 Str. H. L., p. 113.

(*t*) Steele, L. C. 184. Kriya=performance, obsequies; Paksha=fortnightly, periodical. See Steele, L. C. 27.

(*v*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. 91; *Behari Lal Mullick* v. *Indramani*, 13 B. L. R. F. B. 401; S. C. 21 C. W. R. 285; *Nittyanand Ghose* v. *Kishen Dyal Ghose*, 7 B. L. R. 1; S. C. 15 C. W. R. 300.

(*w*) *Sabo Bewa* v. *Nahagun Maiti*, 2 B. L. R. App. 51; S. C. 11 C. W. R. 380; *Rajendro Nath Holdar* v. *Jogendro Nath*, 14 M. I. A. 67; S. C. 15 C. W. R. 41 P. C.

(*x*) *Venkangavda* v. *Jakangavda*, Bom. H. C. R. P. J. 1875, p. 49.

(*y*) *Anandrav* v. *Ganesh Yeshwantrav*, S. A. 373 of 1863.

time; for otherwise the adoptee would be deprived of his estate in both families, natural and adoptive (*z*).

A plaintiff, suing for a declaration that an adoption is invalid, is even bound, it was said, to prove its invalidity (*a*), where an adoption took place long ago and has been acted on, and the defendants are in possession by virtue of the adoption (*b*).

The presumption has even been carried within the sphere of the law, where this was opposed to the adoption. Thus the adoption of a sister's son was upheld solely upon its having been recognized for a long time, and the impossibility of cancelling it without seriously affecting the rights of the adoptee (*c*).

A man having engaged that his daughter-in-law should adopt a person, and the latter having performed the promisor's funeral rites, the Sastri said that though no regular ceremony of adoption had been celebrated, yet the adoption, if the adopted was a sapinda of the deceased, might be considered valid (*d*). This opinion is not easy to reconcile with others or with the recognized authorities. What the Sastri meant probably was that a formal gift and acceptance might be presumed, and that this in the case of a sapinda would constitute an adoption.

A. 5. 3.—Estoppel.

The doctrine of presumption in favour of adoption (*e*) has been carried further, or else considerations not strictly applicable perhaps

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(*z*) *Rajendro Nath Holdar* v. *Jogendro Nath*, 14 M. I. A. 67; S. C. 15 C. W. R. 41 P. C.; *Sayamalal Dutt* v. *Saudamini Dasi*, 5 B. L. R. 362; *C. Herasutoollah* v. *Brojo Soondur Roy*, 18 C. W. R. 77.

(*a*) *Brojo Kishoree Dassee* v. *Sreenath Bose*, 9 C. W. R. 463; S. C. 8 C. W. R. 241; *Hur Dyal Nag* v. *Roy Krishto Bhoomick*, 24 C. W. R. 107. See the cases in note (*z*).

(*b*) *Gooroo Prosunno Singh* v. *Nil Madhub Singh*, 21 C. W. R. 84.

(*c*) *Gopalayyan* v. *Raghupatiayyan*, 7 M. H. C. R. 250. The High Court, however, rejected the custom specially found by the District Court, and found "that communion had been created by the course of conduct of the plaintiff and his family." This illustrates note (*c*) to sub-section A. 5. above, p. 1091. The subsequent behaviour of the parties could not make that an adoption which really was not one. See the case cited below A. 5. 4. As far as the plaintiff was concerned the decision might have been placed on estoppel, but the one actually arrived at could be supported only on an absolute presumption against the rule of law as conceived by the Court.

(*d*) MS. 1682.

(*e*) See the cases under A. 5. 4.

to questions of status have been held to prevent the questioning even of an apparently invalid adoption by one who had countenanced it. In the case of an adoptive father, long recognition by one of another as his adopted son was said by the Sastri to make an attempted supersession by another adoption illegal. Colebrooke placed his assent to this on the ground that "the circumstances authorized the presumption" that an adoption had "been actually made" (*f*), but the Sastri considered the father bound as by estoppel.

An admission of the title of an adopted son was held strong evidence to uphold an adoption of a sister's son by a Vaisya (*g*). The admission has been made three times by the undivided brother of the deceased adopter. It was apparently held that the depositions were "decisive of the case" as "an admission of the whole title of the respondent both in fact and in law."

Active participation in the plaintiff's adoption by defendant's brother; acquiescence therein by many subsequent acts on the part of the defendant; letting the adoptive father die in the belief that the adoption was valid; concurrence in the performance of the funeral ceremonies by the plaintiff, were held to estop the defendant from disputing an adoption (*h*). Nor need the case be quite so strong. Though mere presence without raising an objection or protest at the ceremony is not consent (*i*), still presence at and acquiescence in an adoption and association with the adopted son as such in legal proceedings estop a person, it was held, from disputing the adoption (*k*). The Sadar Court of Madras went even so far as to say that the legality of an adoption cannot be challenged by one who has consented to it (*l*).

Where with full knowledge of the invalidity of the plaintiff's father's adoption, as declared by the Court, the defendants had admitted plaintiff to a share in the family estate and executed a

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(*f*) 2 Str. H. L. 113.

(*g*) *Ramalinga Pillai* v. *Sadasiva Pillai*, 9 M. I. A. 506, 515; S. C. 1 C. W. R. 25 P. C. The effect of this must not be carried too far. It is limited by *Gopee Lall's Case*, below.

(*h*) *Sadashiv Moreshwar* v. *Hari Moreshwar*, 11 Bom. H. C. R. 190.

(*i*) *Vasdeo* v. *Ramchandra*, I. L. R. 22 Bom. 551, F. B.

(*k*) *Chintu* v. *Dhondu*, 11 Bom. H. C. R. 192A.

(*l*) *Pillari Setti Samudrala Nayudu* v. *Rama Lakshmana*, M. S. D. A. R. 1860, p. 91.

document to that effect, this was held binding on the defendants (*m*).

Admissions, however, or acquiescence caused by mistake will not create an estoppel, as when the Judicial Committee say: "It has been argued on the part of the appellant that the defendant in this case is estopped from setting up the true facts of the case, or even asserting the law in her favour, inasmuch as she has represented in former suits and in various ways, by letters and by her actions, that Luchmunjee was the adopted son of Damoodurjee, adopted by Damoodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee, or the defendant, on any matter of fact. She is alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that she has arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties" (*n*).

Thus too as to an alleged adoption by a dying man, it was said that acquiescence in the adoption by a widow who afterwards contested it, would not give it validity unless validity arose from the act itself and the circumstances under which it was performed (*o*).

In another case, however, of less authority, widows who after their husband's death had completed the ceremony of adopting a brother begun by him, were not allowed afterwards to question the validity of the adoption (*p*).

A. 5. 4.—Ratification.

A similar principle to that set forth in sub-section 5. 3, must, it seems, be applied to the case of a ratification of adoption by

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(*m*) *Govind Balkrishna* v. *Mahadev Anant*, Bom. H. C. P. J. 1872, No. 31; P. J. 1873, No. 66.

(*n*) *Gopee Lall* v. *Musst. Sree Chundraolee Buhooeej*, 11 B. L. R. P. C. 391, 395; S. C. 19 C. W. R. 12 C. R.

(*o*) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A. 429.

(*p*) Above, pp. 865, 917. The adoption must have been palpably void, unless warranted by a particular custom.

widows or male sapindas (*q*). The adoption must originally have been either valid or invalid, and in the latter case it could not really be ratified as being essentially null (*r*). The assent of the sapindas, when it is necessary at all, is necessary as a condition precedent to the efficacy of the widow's act. If the new status is not acquired the old one continues, with respect not only to the non-assenting sapinda but with respect to others (*s*). In such a case the doctrine of ratification is not properly applicable (*t*).

A. 5. 5.—LIMITATION.

The Limitation Act IX. of 1908, Sch. A, art. 118, prescribes six years after an adoption becomes known to a plaintiff, who may be a female (*v*) as the nearest reversioner (*w*), as the time within which he must sue for a declaration that it was invalid or never took place (*x*). The mere omission, however, by a particular person to sue cannot have the effect of validating a void adoption. The particular suit by the individual is barred, but otherwise the law, it is apprehended, operates as before (*y*.) Similar considerations apply to art. 119, which prescribes for a suit for a declaration of the validity of an adoption "six years from the time when the rights of the adopted son as such are interfered with." The status is not lost by forbearing to sue in a single instance.

(*q*) See *The Collector of Madura* v. *Ramalinga* (*Ramnad Case*), 2 M. H. C. R., at p. 233.

(*r*) Comp. *Rangamma* v. *Atchamma*, 4 M. I. A., at p. 103. *Vasdeo* v. *Ramchandra*, I. L. R. 22 Bom. 551, F. B.

(*s*) *Bawani Sankara Pandit* v. *Ambabay Ammal*, 1 Mad. H. C. R. 363.

(*t*) See *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom. 377; *Bateman* v. *Davis*, 3 Madd. 98; 2 W. & T. L. C. 806 (3rd ed.); *Wiles* v. *Gresham*, 2 Drewry 258; S. C. 23 L. J. Ch. 667; Com. Dig. Confirmation (D 1); Shep. Touchst. 117, 311, 313, 314; *Armory* v. *Delamirie*, notes 1 Sm. L. C. 306 (5th ed.). "Ratification" is not a strictly correct term in relation to an act not done on behalf of those whose concurrent assent is needed to give validity to an act by another on her own behalf. Nor can ratification really change a state of facts, or touch the rights of third parties. See Maynz, Dr., Rom. Lib. I. § 34, 85.

(*v*) *Jumoona Dassya Chowdhrani* v. *Ramasoonderai Dasoya Chowdrani*, L. R. 3 I. A. 72.

(*w*) *Ramchandra* v. *Rangrav*, I. L. R. 19 Bom. 614; *Rani Anund* v. *Court of Wards*, L. R. 8 I. A. 22.

(*x*) *Mohesh Narain Moonshi* v. *Taruck Nath Moitra*, L. R. 20 I. A. 30.

(*y*) See below, sec. VIII.

A. 6.—Terms Annexed to Adoption.

It seems for the reasons already set forth that an adoption subject to a condition, whether precedent or a condition subsequent of defeasance, is impossible (*z*): a contract cannot be made that the validity of an adoption, any more than of a marriage, shall be contingent on a certain volition or event. Nor can it be postponed in operation; its effect is immediate or not at all (*a*). These rules spring from the nature of the institution (*b*), which equally prevents other terms being appended, such as liberty to give back the boy adopted or to adopt other sons which would involve the parties most concerned in perilous uncertainties (*c*). The disposal of the adoptive father's estate should, according to the older Hindu Law, be governed by rules as little subject to individual caprice as any within the system, but as separate property and freedom of disposal have grown up, even permitting the adoptive father to

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(*z*) Above, p. 187. See, too, Di. Lib. 50, Tit. 17, Lex. 77.

(*a*) *Ibid.* The formula of gift imports this. *Balgangadhar Tilak* v. *Tai Maharaj*, L. R. 42 I. A. 135; *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*, L. R. 16 I. A. 53.

(*b*) By the Roman Law, until a late period, mancipation was an essential part of adoption, and mancipation was a solemn public act. Like some other important jural acts, it could not be done subject to a condition or to a term postponing its effect to a future day. Such qualifications were abhorrent to the simplicity of primitive ideas, and too great a burden for the memory of the witnesses by whose recollection, in case of future dispute, the transaction would have to be proved. See Goudsm. Pand. p. 155; Maynz, Dr., Rom. III. 86, 87 (3rd ed.); Main, Anc. Law, p. 206 (3rd ed.). As society advanced the magistrate became of more and the witnesses of less importance, but in exercising a kind of voluntary jurisdiction he long preserved the old forms, and he had to guard the interests of the community as these became more clearly conceived. The considerations stated at p. 187 above then rose into manifest importance. Disastrous results must sometimes arise from its being a conditional matter, whether a certain man is, or is not, the husband of a certain woman, or the legal father of a certain other man. So, too, as to the celebration of the sacra by a person of doubtful competence. The family law consists for the most part of defined duties and rights annexed to mutual relations understood as absolute, and fixed once for all by birth, marriage, and other events of an invariable character, whoever may be the subject of them.

Some authentication of adoptions would prevent many lawsuits in India. As to the use of public authentications of transactions under the Roman and the Teutonic systems, see Meyer, Inst. Jud. Tom. I., p. 305 ss. The records of the Courts in England were originally the recollections of official witnesses. See Bigelow, Hist. Proc., pp. 318 ss.

(*c*) Comp. p. 84.

make a disposition by will (*d*), endeavours have been made to retain the spiritual advantages of adoption while avoiding the risks of handing over properties to the adopted sons. An agreement between the adoptive and the natural parent of the adoptee to the effect that the former will remain in possession of the property, or retain a certain portion in a certain eventuality, has been held binding upon the adoptee both by the Bombay (*e*) and Madras High Courts (*f*). The Judicial Committee have, however, held such an agreement to be invalid (*g*), though in an earlier case the question was left undecided (*h*).

By adoption a widow of a Hindu severed from his brethren deprives herself of her interest in the estate (*i*). The adopted son immediately displaces her as heir with a retroactive effect (*k*). In order to prevent this a widow sometimes endeavours to annex terms to the adoption by which she is secured a life interest in the estate and the management of it. Effect has been given to bargains of this kind both in Bombay (*e*) and Madras (*f*); but the Privy Council have held them as invalid (*g*), and they may be regarded probably as opposed to the strict Hindu Law of the Sastras. It has been said that as a father may even sell his son (*l*) much more may he part with him in adoption on such terms as he thinks reasonable. But the sale of a son (*m*) is allowed only as a last resource in a time of distress (*n*). The Krita adoption by purchase is distinctly forbidden (*o*), so that the *à fortiori* argument is met by a prohibition in a nearer case. The adopted son ranks as if born at his adoptive father's death: his mother could not appropriate to herself the estate of her child; nor could she as his guardian legally make a gain for herself at his cost out of a transaction in which she was bound to do the best for her ward.

(*d*) *Raja Venkata Surya Mahipati* v. *Court of Wards*, L. R. 26 I. A. 83.

(*e*) *Raoji Vinayakrav* v. *Laksmibai*, I. L. R. 11 Bom. 381, 398.

(*f*) *Visalakshi* v. *Sivaramisu*, I. L. R. 27 Mad. 577, 585, F. B.

(*g*) *Bhaiya Radibat Singh* v. *Indar Kunwar*, L. R. 16 I. A. 53, 59.

(*h*) *Ramasawmi* v. *Venkataramaiyan*, L. R. 6 I. A. 196.

(*i*) Steele, L. C. 47, 48, 185, 186, 188.

(*k*) 2 Str. H. L. 127; below, sec. VII. *Mondakini* v. *Adinath*, I. L. R. 18 Cal. 69.

(*l*) Col. Dig., Book III., Chap. I., T. 33 Comm.

(*m*) 2 Str. H. L. 224. See above, pp. 806, 808.

(*n*) Yajnavalkya prohibits it wholly. See Col. Dig., Book II., Chap. IV., TT. 7, 16. See below.

(*o*) 2 Str. H. L. 175 (Colebrooke).

The adoption invests the adopted with the estate as a support for the sacra; the widow took it but provisionally in her lower capacity for securing beatitude to her deceased husband (*p*), and this connexion being established by the law of the family is superior to a convention in which the adopted son himself takes no part. Where indeed he is of full age and assents to injurious terms it may be that he is bound to fulfil them, but it is as under a contract which cannot prevent the estate from passing to him the moment he becomes son to the deceased adoptive father. From the Hindu point of view indeed it is questionable whether in consenting to be adopted a man can lawfully accept terms which sever the estate, even temporarily, from the obligatory sacra; but as on acquiring the property he cannot be prohibited from dealing with it, the previous bargaining can hardly in practice be prevented in the case of an adult adopted son (*q*).

Even in the case of adoptions by males terms are sometimes made which alter the rights and obligations properly incident to the position of the adopted son as such. It is not possible perhaps to draw a precise dividing line between the bargains and settlements of this kind allowed and disallowed by the Hindu Law (*r*). The principles already stated apply to them, and all are subject to the control of the Court as representing the Sovereign according to Hindu principles in protecting the weak and helpless (*s*).

In the following case a contract was made which only expressed a right subsisting without it. A watandar's nephew adopted by him agreed to pay his daughter money in lieu of ornaments. On her death a balance remained due. Her daughter was pronounced entitled to claim it as "Saudayak stridhana" of her mother (*t*). The Sastri admits alternatively to the claim arising from family connexion that the son may have passed the agreement in

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(*p*) See above, pp. 87, 789, 881.

(*q*) Such a case as that of *Tara Munee* v. *Deb Narayan Rai*, 3 B. S. D. A. R. 387, could hardly now be upheld. The declaration of the adopted son that in certain events his adoption should be null could not make it null. As to agnatic rights the case is expressly provided against by the Roman Law, Dig. Lib. 2, Tit. 14, Lex. 34.

(*r*) Under the Roman Law the terms had to be examined and approved by a judicial officer of rank. If prejudiced the adopted son could get himself set free. See Inst. Lib. I. Tit. XI. § 3; Di. Lib. I. Tit. VII. ff. 32, 33.

(*s*) Manu VIII. 27; Viv. Chint., Transl., p. 300; Col. Dig., Book V., T. 450 ss.; 2 Str. H. L. 80.

(*t*) MS. 1566.

consideration of the benefit he received by the adoption, but the case is but a weak one. The Sastris seem generally to have thought that limitations annexed to adoption by which the adopted son would be deprived of the usual advantages of his position could not be enforced. The decisions referred to above, p. 187, are on the whole to the same effect. In a case wherein a Lingayat of full age, about to be adopted by a widow, had agreed that she should retain the management of the estate, the Sastri said that nevertheless the adopted son was entitled to the management, as the widow by adopting had necessarily become dependent (*v*) except as to her stridhana and her right to maintenance (*w*). If the dependence of a widow having a son is regarded as a part of the public law (*x*) creating a relation not variable by the will of the individuals immediately concerned (*y*), this answer is correct, and such no doubt was the view of the Sastri. As a part of the family law resting on sacred texts it may well be supported, and the legal relations of the parties in other respects would, for the most part, be defined by the law (*z*), not left to the exercise of free volition.

In another case a similar agreement had been made with the adopting father and mother. On the death of the father the Sastri said the adopted son succeeded to his estate, but that it would be (morally) wrong for him to break his agreement and disobey his mother, unless she was wasting the property through ill-will towards the son (*a*). The Sastri, as in the case noted above, p. 187, must have thought the condition so repugnant to the status taken by adoption, that effect could not be given to it. In the case of a kritrima adoption, however (*b*), the Judicial Committee appear to have thought that such a condition might be annexed to the adoption, and in *Ramasawmi's Case* (*c*) it was held that an agreement by the real father in derogation of the rights as adopted son of his son whom he was giving in adoption " was not void, but was at the least capable of ratification when the son came of age."

(*v*) See Mit., Chap. II., sec. I., p. 25; Manu V. 147, 148.

(*w*) MS. 1743.

(*x*) See Col. Dig., Book IV., Chap I., T. 4, 5; Book II., Chap. IV., T. 55 Comm. *ad fin;* Book III., Chap. I., T. 52 Comm.; 2 Str. H. L. 96.

(*y*) See *In re Kahandas Narandas*, I. L. R. 5 Bom., at p. 164.

(*z*) See above, p. 349, note (*k*).

(*a*) MS. 1728.

(*b*) *Musst. Imrit Koonwar* v. *Roop Narain*, Pr. Co. 15th March, 1879; 6 Cal. R. 76.

(*c*) Above, p. 187.

But what requires ratification admits of repudiation, so that if ratification was necessary (which is not said) the son could not be prejudiced by such a transaction as the one in question. In *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar* (*d*) the Privy Council have laid down that an agreement between the adoptive and natural parent to the effect that the former should retain her husband's estate during her life was of no effect, and that the adoption otherwise valid was not rendered conditional in consequence. The Sastris' opinions therefore appear to have been set aside. Though an adopted son may resign his rights (*e*) it does not seem consistent with the older principles of the Hindu Law, as set forth in the Sastras, that a man, still less that a woman, adopting a son should be at liberty at the same time to disinherit him, and so sever the estate from the obligation to perform the sacra and maintain the helpless members of the family. Nor can the real father properly give his son on such terms. A father has not ownership in his son as in a chattel (*f*). This is obviously important with reference to the possibility of accepting conditions injurious to the son, such as might arise through arrangements of the kind recognized in *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (*g*), *Chitko Raghunath* v. *Janaki* (*h*), *Radhabai* v. *Ganesh Tatya Gholap* (*i*), *Ravji Vinayakrav* v. *Laksmibai* (*k*), and in *Visalakshi* v. *Sivaramien* (*l*), however defensible in particular cases these may be on other grounds. The Bombay High Court has recently laid down that for such an agreement to be binding upon the adopted son, it must be reasonable (*m*) and not confer upon the widow powers to be exercised for the benefit of persons other than herself.

It would seem from the considerations that have been stated that the Sastris' view of this subject can hardly be contested on the ground which they have chosen. But it is certain that it is not allowed to govern the actual practice of the people; amongst

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(*d*) L. R. 16 I. A. 53.

(*e*) See above, pp. 324, 341. *Mahader Ganu* v. *Rayaji Sidu*, I. L. R. 19 Bom. 239.

(*f*) Vyav. May., Chap. IV., sec. I., paras. 11, 12, and sec. IX., para. 2.

(*g*) 6 Bom. H. C. R. 224.

(*h*) 11 Bom. H. C. R. 199.

(*i*) I. L. R. 3 Bom. 7.

(*k*) I. L. R. 11 Bom. 381, 398.

(*l*) I. L. R. 27 Mad. 577, 585, F. B.

(*m*) *Vyasacharya* v. *Venkubai*, I. L. R. 37 Bom. 251.

whom fair arrangements for the protection of the widow's interest, during her life, are commonly made, and are always supported by the authority of the caste (*n*). This is especially the case when the property was newly acquired by the father: it is generally felt as to such property that his wishes expressed or understood ought to prevail, and that his widow has an interest which ought to be protected (*o*). Sometimes the husband settles terms in an adoption made by himself. Sometimes he annexes to his will or to his permission to adopt specific terms as to the enjoyment of his sole or separate property. In some cases he leaves the whole or part of his property to relatives or to a charity, subject perhaps to a life interest of his widow or some other person. In other cases he gives no direction and dies intestate. Somewhat different questions arise under these different circumstances, and different views have been taken by the authorities.

In the case of an alleged adoption by a male of a nephew on condition or with a reserve to the wife of the adopter of a life enjoyment of the immovable property, and after her death of the self-acquired property to the adopter's daughters, the Judicial Committee said only that it would take very strong evidence to prove such an adoption, and held it had not been proved (*p*).

In *Vinayak* v. *Govindrao* (*q*) a direction was given to adopt a nephew by a will which greatly limited the estate to be taken by him as son. This was upheld on the ground that a sufficient provision was made for the adopted son and that he, after his adoption, had assented to the will and taken the benefit which it secured to him.

In a case, however, in which a will was thought effectual by the Pandits, they added: "If the testator had really given his wife verbal instructions to adopt a son in the event of her not bearing male issue, her compliance with those instructions would of course invalidate the will according to the Hindu Law, it being incompetent for the testator, who authorized the adoption of a son, to alienate the whole of his estate (*r*), and thereby injure the means of the maintenance of his would-be-heir" (*s*).

(*n*) The answers to Questions 3, p. 343, and 10, p. 352, above, were no doubt influenced by a sense of this.

(*o*) Comp. above, p. 605, note (*v*).

(*p*) *Imrit Konwar* v. *Roop Narain Singh*, 6 Cal. R. 76, P. C.

(*q*) 6 Bom. H. C. R. 224 A. C. J.

(*r*) See above, pp. 212, 601, 694; Vyav. May., Chap. IX., para. 2.

(*s*) *Nagalutchmee Ummal* v. *Gopoo Nadaraja*, 6 M. I. A. 320. See above, pp. 209, 210, 214, 215.

In the case of an authority to adopt, unaccompanied by limitations of the property, the Judicial Committee said that—"A son adopted under a permission by a widow takes as such by inheritance from his adoptive father, not by devise" (*t*). If he takes without qualification as a son by inheritance it does not seem consistent with that, that he should be subjected to other terms by either adoptive parent than such as could be imposed on a son by birth. This was the view taken by the Sastri in the case referred to at p. 187. He pronounced the adopted son's right unaffected by stipulations imposed on him by the widow in her own interest.

The terms stated in the deed, where there is one, usually embody the notions of the parties as to the legal effect of the adoption (*v*), but this is by no means always the case. In *Chitko* v. *Janaki* (*w*) a widow adopted without, as appears, any direction from her husband. She contracted with the boy's father for his entire exclusion from any proprietary right, and for his heirship to her "subject" to these "conditions" or rather limitations. They could hardly be pronounced reasonable, but on account of the poverty of the boy's family they were upheld by the High Court. If the boy, however, immediately on the change in his status by adoption became heir to his adoptive father taking by inheritance an unqualified estate, the agreement must, it would seem, have been void. The widow's contract with the boy's father to the boy's detriment would no more stand than such bargains of hers with other persons.

When this ruling came under the observation of the Judicial Committee, their Lordships pronounced it a matter not unattended with difficulty (*x*). In the particular case they had at the time to deal with, their Lordships found that the bargain was one that could be and had been ratified by the adoptive son after he became of age.

It was dissented from by the High Court at Madras (*y*). Sir C.

(*t*) *Bhoobun Moyee's Case*, 10 M. I. A., at p. 311.

(*v*) As in the case at Steele, L. C., p. 188.

(*w*) 11 Bom. H. C. R. 199.

(*x*) *Ramasawmi* v. *Venkataramaiyan*, L. R. 6 I. A., at p. 208.

(*y*) In the judgment of the latter a compromise by the widow of claims set up by the members of her husband's family was upheld, though made with a view to adoption, and directly diminishing the estate. It was thought a fair arrangement in itself, and one therefore which was not affected by the subsequent adoption. (See above, p. 349.)

Turner, C.J., there said: "We are of opinion that a child taken in adoption cannot be bound by the assent of his natural father to terms imposed as a condition of the adoption, and that, like other agreements made on behalf of minors for other than necessary purposes, it would lie with the minor, when he came of age, to consent to or repudiate them (z). This we understand to be the effect of the ruling of the Judicial Committee in *Ramasawmi Aiyar* v. *Vencataramaiyan*" (a). In a later decision (b) the Madras High Court followed this view of the law, and laid down that no agreement in respect of curtailing the rights of an adopted son was valid. But in *Visalakshi* v. *Sivaramien* (c) a Full Bench of the same High Court decided that an agreement of this kind was valid provided it was fair and reasonable and "taken as part of the contract for the adoption, was for the minor's benefit, as being a condition on which alone the adoption would be made."

In Special Appeal No. 32 of 1871 (d) of the High Court of Bombay it was thought, however, following *Vinayak* v. *Govindrao* (e), to be at least possible that a widow adopting might reserve to herself a material part of the estate. In *Ravji Vinayakrav* v. *Lakshmibai* (f) the Bombay High Court approved of the view of the law taken in earlier decisions, and held an agreement of this nature to be valid. But in a subsequent decision (g) it qualified its former view of the law by laying down that an agreement to be valid must be reasonable and contain provisions for the benefit of the widow only, and not empower her to benefit others such as her daughter or brother.

The Judicial Committee, however, in *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar* (h) have held that an agreement between the two parents could not affect the rights of the son, which came into existence only after the adoption, nor could a condition attached to the adoption curtail his rights as the condition on grounds of equity would be void and adoption good.

(z) See *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. 169; *Nathajee* v. *Hari*, 8 Bom. H. C. R. 67 A. C. J.

(a) L. R. 6 I. A. 196; *Lakshmana Rau* v. *Lakshmi Ammal*, I. L. R. 4 Mad. 160, 163.

(b) *Jagannada* v. *Papamma*, I. L. R. 16 Mad. 400.

(c) I. L. R. 27 Mad. 577, 585, F. B.

(d) Decided 12th June, 1871.

(e) Above, p. 977, note (f).

(f) I. L. R. 11 Bom. 381, 398.

(g) *Vyasacharya* v. *Venkubai*, I. L. R. 37 Bom. 281.

(h) L. R. 16 I. A. 53.

A distinction may no doubt be taken between the widow adopting on a general authority or without authority, and one adopting under terms defined by the deceased husband. At Calcutta the husband's authority to limit at will the estate to be taken by his widow and by the son she was to adopt has been fully recognized (*i*). A power of adoption having been given by will to a wife, coupled with a direction that the widow should, during her life, retain all testator's property, ancestral as well as self-acquired, it was held that the widow after adopting had a life interest with remainder to the adopted son (*k*).

It does not seem possible to reconcile with this last decision the opinion of the Sastris given in the earlier case (*l*). In Bombay and the other provinces subject to the law of the Mitakshara a father's power of devise as against living sons is strictly limited (*m*), and the Sastris' opinion would substantially express the law. If the son adopted by a widow under a general power given by will takes even in Bengal otherwise than by inheritance, there is a difficulty on the decisions in conceiving how he can take at all. He may not have been born in the life of the testator (*n*), he could certainly not be ascertained at the moment of his death. No gift could be made to such a person nor consequently could a bequest (*o*). If, however, the adopted son takes by inheritance even the father's power of devise to his injury is very restricted. In *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (*p*) the Judicial Committee say: "A man

(*i*) The terms must, it seems, have been accepted by the boy's real father; otherwise a contention would have been raised on the ground of concealment of the limitations by the widow.

(*k*) *Bepin Behari Bundopadhya* v. *Brojo Nath Mookhopadhya*, I. L. R. 8 Cal. 357, following *Musst. Bhagbutti Daee* v. *Chowdhry Bholanath*, I. L. R. 2 I. A. 256. The latter was not a case of adoption but of a settlement by a man on his wife with the concurrence of his Kritrima son to whom was given a remainder on the wife's death.

(*l*) In a case where the widow was given "absolute control" and possession during her life, Sir R. Couch, C.J., refrained from saying whether she took more than a power of management for the proposed son in adoption. *Ramguttee Acharjee* v. *Kristo Soonduree Debia*, 20 C. W. R. 472 C. R.

(*m*) See above, pp. 206, 212, 214.

(*n*) Above, p. 1018.

(*o*) See the *Tagore Case*, L. R. S. I. A. 47, 67, 70; *Ramguttee Acharjee* v. *Kristo Soonduree Debia*, 20 C. W. R. 472 C. R.

(*p*) 12 M. I. A., at p. 38. *Hanmantapa* v. *Jivubai*, I. L. R. 24 Bom. 547; *Lakshman Dada Naik* v. *Ramchandra Dada Naik*, L. R. 7 I. A. 131; S. C. I. L. R. 5 Bom. 48.

(with male descendants) may dispose by will of his separate and self-acquired property . . . *if movable*, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants." The decision in *Rao Balwant Singh* v. *Rani Kishori* (*q*) gives the father of a family governed by the Mitakshara School full power of disposition over his self-acquired immovable property also. It follows therefore that he could devise his self-acquired immovables as well as movables. Adoption of a boy will not restrict his power in this respect, as there is no implied contract between the adoptive and the natural father that in consideration of the gift of his son, the former will not make a will (*r*) which would result in a loss to the adoptee.

The husband who authorizes a widow to adopt has not sons as coparceners to interfere with his disposal of his property, and an adoption by him after such a disposal could not affect it (*s*). But the case just referred to shows that a gift or devise, made after an adoption "could not prevail to any extent against the son" (*t*), so that if the adoption by the widow is absolutely retroactive a will in her favour being overcome by the son's survivorship cannot secure her against the ordinary risks of adoption. A mritya patra in a form not uncommon may be more effectual by giving her an immediate interest in the property subject to the life-use of the donor (*v*).

It is obviously somewhat inconsistent with the theory of a complete continuity of ideal existence between the son adopted by a widow and the predeceased adoptive father that the widow should be able to stipulate for terms other than those of the son's taking the whole estate with all its responsibilities (*w*). This

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(*q*) L. R. 25 I. A. 54.

(*r*) *Raja Venkata Surya Mahipati* v. *Court of Wards*, L. R. 26 I. A. 83.

(*s*) *Rambhat* v. *Lakshman*, I. L. R. 5 Bom. 631, in which all the authorities have been reviewed.

(*t*) Jud. Cit., at p. 637, and cases there referred to.

(*v*) See above, pp. 213, note (*n*), 216. This form of will avoids the distinction drawn by the High Court of Madras between the gift and the will of an unseparated Hindu, unless the gift itself be deemed incomplete until separate possession of the property is given. See Col. Dig., Book II., Chap. IV., T. 56 Comm.; above, pp. 634, 642, 652, note (*w*); *Vitla Butten* v. *Yamenamma*, 8 M. H. C. R. 6.

(*w*) See above, p. 165. It is shown there that a Hindu inheritance is by native lawyers conceived as a *universitas*. The son takes it with all its burdens even though he should resign a part to the adoptive mother.

theory has in many cases been applied so as to annul the intermediate transactions of the widow (*x*), but withal it is not a thorough-going theory as is seen in the case of collateral succession between the decease and the adoption (*y*). The recognition of separate property, however, implies a right to dispose of it by the husband, and wills being allowed, he can give or bequeath to his widow as against an existing son (*z*), much more it may be said as against a son to be adopted (*a*). If dying sonless he makes no will, his widow takes his separate estate by inheritance (*b*), and even with respect to the immovable property, as she cannot be forced to adopt at all, it seems a necessary concession that she should be allowed to impose reasonable terms on an adoption for her own security (*c*). By avoiding any disposition her deceased husband has, under the law of Bombay, made her discretion virtually his own. If he has given particular directions these must probably be regarded as conditions, without compliance with which an adoption cannot be made in so far as they are conditions precedent (*d*), and which otherwise attend the adoption and govern the rights of property arising under it, so far as is consistent with the status induced by the adoption. The terms must, to satisfy in any degree the Hindu Law, be not grossly unfair to an infant adopted, and must be subject to control and revision by the Civil Court.

Though the Hindu Law, in its earlier form, strictly guarding the family estate, imposed rigorous limitations on gifts to females (*e*) it is inconsistent with its later development that they should not be capable of taking as large an estate as a donor is capable of

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(*x*) Above, pp. 93, 349; *Rajkristo Roy* v. *Kishoree Mohun*, 3 C. W. R. 14; MS. 1716; 2 Str. H. L. 127.

(*y*) See, too, above, pp. 87, 89.

(*z*) Above, pp. 204, 205, 214. *Rao Balwant Singh* v. *Rani Kishori*, L. R. 26 I. A. 54.

(*a*) See above, p. 595. *Raja Venkata Surya Mahipati* v. *Court of Wards*, L. R. 26 I. A. 83.

(*b*) Above, pp. 82, 87, 94; Mit., Chap. II., sec. I., p. 39.

(*c*) Analogy would suggest a possible reserve of one-half as on a partition with her son she would take so much. See above, pp. 710, 714; Steele, L. C., 59. The Sastris' view of the proper extent of the mother's right was the same. See pp. 348, 352.

(*d*) Comp. *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom. 377.

(*e*) Above, p. 262.

bestowing (*f*). The Mitakshara's doctrine of the widow's inheritance (*g*) implies that she may take the whole interest of her husband (*h*). The restrictions on her dealing with the immovable property (*i*) show that when they were set forth the law had not yet become fully unfolded. In the present age when individual right has taken a much higher place than formerly, and a man may dispose freely even of self-acquired lands (*k*), it seems to follow that he may bestow them by gift or devise on a wife or widow as well as on any one else. As regards movables no doubt can exist. The cases referred to above, pp. 205, 279, 299, show that an interest much larger than the technical widow's estate (*l*) may be given to a woman (*m*), and it has recently been expressly ruled (*n*) that a man owning separate property may devise it without limitation to his widows. The widows thus dowered might adopt a son, and the question would then arise of whether by doing so they must necessarily defeat their own estate by a retrospective operation of the adoption so as to nullify the will. The husband's gift to them of his separate property could not be defeated by his son, whether born or adopted, unless the son were thus reduced to indigence (*o*), and as in the particular case the wishes of the husband in favour of the widows have been strongly signified, there seems to be no valid reason why they should not be at liberty to make a reasonable reserve for themselves in settling the terms of an adoption. The assumed will of the deceased in favour of adoption may be supposed to have been thus conditioned, and the act of adoption to connect itself by relation with the purpose or permission that gives it effect (*p*).

(*f*) See above, pp. 205, 214, 279.

(*g*) Mit., Chap. II., sec. I., para. 39.

(*h*) Above, pp. 137, 281 ss.

(*i*) Above, p. 285 ss.

(*k*) Above, pp. 706, 739. *Rao Balwant Singh* v. *Rani Kishori*, L. R. 25 I. A. 54.

(*l*) Above, p. 87 ss.

(*m*) See above, p. 710.

(*n*) *Mulchand* v. *Bai Mancha*, Bom. H. C. P. J. 1883, p. 199; S. C. I. L. R. 7 Bom. 491, following *Jeewun Punda* v. *Musst. Sona*, N. W. P. H. C. R. 1869, p. 6. The father could not disinherit his son by will under the Mitakshara law, as in *Prosunno Coomar Ghose* v. *Tarracknath Sirkar*, 10 B. L. R. 267. See above, pp. 204, 205, 214, 347, 551; 2 Str. H. L. 19, 21. *Sri Braja Kishore* v. *Sri Kundana Devi*, L. R. 26 I. A. 66.

(*o*) Above, pp. 205, 212, 706.

(*p*) See Vin. Abrt. Tit. Relation

Where a deed of permission or a will has explicitly set forth the terms on which the deceased wished an adoption to be made, there should, it seems, be still less difficulty in giving effect to such terms wherever they are not wholly unreasonable. In the case of simple inheritance by a widow a transaction by which she defeats the rights of a *quasi*-posthumous son is certainly opposed to jural theory (*q*). Nor could a widow even claim a partition with her son so as to obtain an equal share (*r*). Her power to make stipulations in adopting must apparently be placed on the general subordination of merely pecuniary arrangements to the will of those concerned, on her faculty to adopt or not at pleasure, and on the benefit to be secured both to her husband and to the child of her choice (*s*) by not making the hazards of adoption too great. As it rests thus on considerations outside a strict construction of the law, it is peculiarly a subject for the equitable jurisdiction of the Courts, the exercise of which is most strongly called for where an infant is transferred from his family of birth and deprived of the rights annexed to his position there.

The older authorities, both textbooks and decisions, agree in a great measure with the strictness of the Sastris' view. It is only within a short time that a relaxation is to be noticed conformable to what has long been the usage in Bombay, and now perhaps going beyond it. As usual under such circumstances the decisions have not been quite consistent. In one case no such condition, it was said, as that of an adoption of a boy remaining good so long only as he was obedient to the mother was proved to have been imposed upon an adoptee at adoption, and even if it were, such a condition would be invalid (*t*). In some other cases, however, such a stipulation has been held not invalid, as in the one noted below, notwithstanding the widow's acknowledgment of the adoption and Government's having acted upon it without question (*v*). The Sastri, however, would not allow even the adoptive son by contract to divest himself of his estate. An

(*q*) Unless it can be maintained that in making no disposition the husband has intended her to be unlimited owner even of the immovable property. This is not admitted by the Courts. See the section on Stridhana.

(*r*) See above, pp. 605, 749.

(*s*) An analogy may be found in the marriage settlements arranged for minors by their parents under the English Law.

(*t*) *Ram Surun Doss* v. *Musst. Pran Koer*, N. W. P. R. for 1865, Pt. 1, 293.

(*v*) *Th. Oomrao Singh* v. *Th. Mahtab Koonwar*, 4 N. W. P. R. 103A.

adoptive mother (Koli) made an agreement with her son, whereby he resigned to her the bulk of the family property. This was pronounced by the Sastri illegal, and the adopted son, if capable, still entitled to inherit, subject to the duty of maintaining the mother (*w*).

The early cases are equally restrictive of the widow's right. The adoption, it was ruled, works retrospectively, notwithstanding that the adopting widow had declared in the adoption deed that the estate was to remain with her during her life (*x*). So also an attempt by a widow in adopting to reserve the estate to herself for life by a formal declaration in writing was pronounced of no avail (*y*).

The relative position of the adoptive mother and son are thus defined by Colebrooke: "Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper stridhana, it ceased to be hers at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property coming into the hands of a pregnant widow, by the same means, cannot be used by her as her own after the birth of a son. An adopted child is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow's husband; and the widow could have no other authority but that of mother and guardian" (*z*). Treating the interval before adoption like a time of gestation, the husband's bequests to his widow might take effect according to principles generally recognized. In the case of an intestacy recourse must be had it seems to popular usage, as a ground for an indulgence to the widow which is foreign to the system of the Sastras.

It was conformable to this, that in the case above where a widow had reserved to herself a portion of property at the adoption, it

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(*w*) MS. 15.

(*x*) *Musst. Solukhna* v. *Ramdoolal Pande et al.*, 1 C. S. D. A. R., p. 324. In *Radhabai* v. *Damodar Krishnarao*, Bom. H. C. P. J. for 1878, p. 9, a document of somewhat doubtful import was construed as not intended to deprive an adopted son of his ordinary rights, and thus a discussion of *Chitko* v. *Janaki*, 11 Bom. H. C. R. 199, was avoided.

(*y*) *Musst. Sabitra Daee* v. *Suturjhun Sutputtee*, 2 C. S. D. A. R. 21.

(*z*) 2 Str. H. L., p. 127. *Ramakrishna* v. *Tripurabai*, I. L. R. 33 Bom. 88; *Lakshman* v. *Radhabai*, I. L. R. 11 Bom. 690; *Moro* v. *Balaji*, I. L. R. 19 Bom. 809.

was held she could sue in her own name in respect thereof (*a*). In *Sreeramabai* v. *Kristamma* (*b*) the Madras High Court has, however, held that an adopted son could not challenge alienation by the adoptive mother made prior to the adoption during her lifetime.

A. 7.—Assent as a Valuable Consideration.

However restricted the capacity may be for varying the rights and duties annexed to the status of an adopted son, yet the boy whom it is proposed to give in adoption, and who has reached years of discretion, may exact terms from his family of birth. His assent to be given in adoption was held to be a good consideration for an agreement on the part of his brother, whose interest was necessarily augmented by the transaction, to give him a building site with a supply of water (*c*).

An engagement to adopt and to settle property on the adopted, in consequence of which parents actually give their son to the keeping of the promisor, is a contract that can be specifically enforced. It stands on a footing similar to that of a promise serving as an inducement to marriage, and the representative of the promisor may be compelled to make good the promised settlement. The estate which had passed to the promisor's widow was held bound by the contract to which she gave full effect by transferring the property thirty years after her husband's death (*d*).

Parents are not, however, allowed to annex to the gift of their son conditions in their own favour, exposing him to the risk of the adoption's being declared void (*e*). The Court refused to give effect to such a contract. Nor are the sapindas, whose assent may be needed, at liberty to sell their assent as if it were a right of property. As to such a (supposed) case the Judicial Committee said—"The rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption

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(*a*) *Oomabai* v. *Sakatmal*, S. A. No. 32 of 1871.

(*b*) I. L. R. 26 Mad. 143.

(*c*) S. A. 433 of 1874; *Ramkrishna Moreshwar* v. *Shivram Dinkar*, Bom. H. C. P. J. 1875, p. 169. The elder brother executed a conveyance to the younger.

(*d*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*e*) *E. K. Acharjee Chowdhry* v. *Hurischandra Chowdhry*, 13 B. L. R. 42, App. Reference is made to sec. 23 of the Indian Contract Act (IX. of 1872); S. C. 21 C. W. R. 381, 382; see above, p. 806, note (*r*).

which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption" (*f*).

B.—The Act of Adoption—The Persons whose Participation is Required.

B. 1.—In Regular Adoptions.

The person who must attend at an adoption are—(1) Parents or survivors thereof on either side of the boy, or their representatives (*g*). (2) The boy to be adopted. (3) The officiating priest or priests in the castes in which sacrifices are thought indispensable.

Persons who may be invited to attend at adoption, but whose non-attendance does not affect validity of adoption, are (1) Near kinsmen (*h*). (2) Neighbouring gentry (*i*). (3) Visitors, standers by, who may become witnesses of adoption (*k*).

B. 1. 1.—The Parents Giving.

"The giver and receiver should both be present at the ceremony of adoption. It should take place at the adopter's house or other place free from impurity. The adopter must personally (not by deputy) take the child" (*l*).

(*f*) *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. 397, 443. See above, pp. 881 ss., 897.

(*g*) Sir F. Macn. Cons. H. L., p. 218; 2 Str. H. L., p. 87. Under the Roman Law "Is qui adoptat vindicat apud prætorem filium suum esse," Gaius I. § 134: after an "in jure cessio" by the natural father. The ancient form is given in the Digest (Lib. I. Tit. VII.) the giver saying "Mancipo tibi hunc filium qui meus est," and the receiver "Hunc ego hominem jure quiritium meum esse aio, isque mihi emptus est hoc ære æneaque libra." Poth. Pand. I. § VIII.

As usual in solemn ceremonies the personal presence of the parties was necessary. They had to make the prescribed declaration before a magistrate of high rank, whose authority then attached to the relation contracted in his presence; mere documents were ineffectual. *Ibid.* An irregular adoption could be confirmed after a judicial enquiry and hearing those who opposed it. *Ibid.*, § XV.

(*h*) *Alank Manjari* v. *Fakir Chand*, 5 C. S. D. A. R. 356.

(*i*) *Sootrugun Sutputty* v. *Sabitra Dye;* 2 Knapp, 387; S. C. 5 C. W. R. P. C. 109.

(*k*) *Veerapermal Pillay* v. *Narrain Pillay*, 1 Str. 91.

(*l*) MS. 1675. See above, p. 832.

The presence of the natural or the adoptive mother, it was held, is not necessary if the fathers be present (*m*). In the particular case the parties were Sudras, but the ceremonies imply the presence only of the fathers (when living) as indispensable even amongst the higher castes. In a case where proof of gift was wanting, either by the father or the mother of the boy, it was said that a deed executed only by the adoptive father was insufficient to establish an adoption (*n*).

Similarly in a case before the Judicial Committee it was laid down that the requisite declaration of gift can be made only by the parent (*o*) giving the boy. An instrument signed by the adopter and declaring the boy his representative is ineffectual for this purpose (*p*), and is needless. A Sastri says: " When either of the parents has given a son by pouring water on his hands the gift is complete." (The gift was in the question stated as made by the father) (*q*). " The parents need not consult their relatives " (*r*).

The corporeal gift of the boy to be adopted may be made by deputy as by a wife, or a brother of the real father, or as a deputy of a widow by her uncle when the request and assent have passed between the real and the adoptive parents (*s*).

B. 1. 2.—The Parents Taking.

" It is ordained that the husband and wife, among the Sudras, should be present, and that they should cause a Brahmin to make oblation to fire (*t*).

The wife, as we have seen above, Section III., may act under a delegation from her husband in giving or receiving a son in

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(*m*) *Alvar Ammaul* v. *Ramasawmy Naiken*, 2 M. S. D. A. R. 67.

(*n*) *Lakshman* v. *Malu bin Ganu*, Bom. H. C. P. J. 1875, p. 186. See above, p. 817.

(*o*) See above, p. 808.

(*p*) *Nilmadhab Das* v. *Bishumbhar Das*, 3 B. L. R. 27 P. C.; S. C. 13 M. I. A. 85.

(*q*) MS. 1677.

(*r*) *Ibid.*

(*s*) *Vijiarangam* v. *Lakshuman*, 8 Bom. H. C. R., at pp. 256-7; *Rangubai* v. *Bhagirthibai*, I. L. R. 2 Bom. 377; *Jamnabai* v. *Raychand*, I. L. R. 7 Bom. 229.

(*t*) 2 Str. H. L., p. 130.

adoption. In such a case the husband's presence is of course dispensed with.

(1) Adoption by a wife of a son in her husband's lifetime; (2) carrying on a suit on his behalf and in his name; (3) non-denial of adoption, were held to be strong circumstantial evidence in favour of adoption with the husband's consent and with due ceremonies performed (*v*).

When one of the adoptive parents has died the other may accept in adoption subject to the conditions already considered. When both are dead, as the acceptance by either parent is impossible, the adoption itself becomes impossible also. The exceptions admitted in a few cases have been considered under Sec. III (*w*). The law was thus laid down by the High Court of Bombay: "There must be not only a giving but an acceptance manifested by some overt act to constitute an adoption according to Hindu Law (*x*). Here there is said to have been a giving, but to whom? to two dead persons, the only two who could have adopted a son to the man" (*y*).

B. 1. 3.—Presence of the Child Given.

The indispensable manual delivery and acceptance of the boy adopted (*z*) implies of necessity his presence at the ceremony. This gives him the opportunity, should he object to the transaction, of expressing his dissent (*a*).

B. 1. 4.—Presence of Relatives.

"The adopter's kinsmen ought to be convened, but their assent is not necessary" (*b*).

(*v*) *Tincowrie Chatterjee* v. *Denonath Banerjee*, W. R. 1864, p. 155.

(*w*) Above, p. 904.

(*x*) 1 Str. H. L. 95; Manu IX. 168.

(*y*) *Per* Westropp, C.J., *Bhagvandas Tejmal* v. *Rajmal*, 10 Bom. H. C. R. 265.

(*z*) Steele, L. C. 184.

(*a*) See above, A. 3.

(*b*) MSS. 1634, 1677. If the doctrine of the *Samskarakaustubha*, as to the widow's independence in adopting be taken as law for the Bombay Presidency, the presence of relatives cannot be necessary, as an intimation of a superfluous assent, see above, pp. 783, 795, 814; *Vasishtha*, XV. 6.

B. 2.—In Cases of Anomalous Adoptions.

In the *quasi*-adoptions in vogue amongst some castes of the Bombay Presidency (*c*) no forms appear to be used beyond those intimating assent on both sides, nor is the presence of relatives thought requisite.

In a kritrima adoption the consent of the party adopted is essential to the validity of it (*d*), and should be expressed simultaneously with the acceptance of the adopter.

In Macnaghten, H. L. vol. II., pp. 196 ss, will be found several cases of kritrima adoptions. Nothing seems essential but the assent of the parties and of the boy's parents if they are alive (*e*).

C.—External Conditions to be Satisfied.

C. 1.—As to Publicity.

To render adoption complete, there must be a public act of giving and receiving, accompanied by a performance of some religious ceremony (*f*).

"It is enjoined that notice of an adoption should be given to the relations within the (the circle of the) Sagotr Sapindas and to the Raja, though no provision appears in case of their disapprobation, even in adoptions by widows" (*g*).

This injunction bears less on the choice amongst different boys in the family than on the necessity or at least the desirableness of the countenance of all members of the family to the celebration of a religious ceremony. To show their assent and presence they ought to sign the deed when there is one (*h*).

"Intimation of an intended adoption should be given to a Mamlutdar or other Government officer of the vicinity, but the want of it does not vitiate an adoption otherwise made with due ceremony" (*i*).

(*c*) Above, p. 829.

(*d*) *Lachman Lall* v. *Mohun Lall*, 16 C. W. R. 179.

(*e*) Suth. Syn. notes xv. xvi.

(*f*) *S. Siddesory Dossee* v. *Doorgachurn Sett*, 1 Bourke, pp. 360, 361.

(*g*) Steele, L. C. 45. The object of the intimation to Government where its interests are concerned may be seen from the cases above, pp. 902—3, and the references at p. 838.

(*h*) *Ibid.* 183.

(*i*) MSS. 1677, 1711; *Vasishtha*, XV. 6.

Publicity is not absolutely essential to validity of adoption, yet it is always sought for on such occasions (*k*).

C. 2.—As to Time.

"A fortunate day ought to be selected for an adoption" (*l*).

"The Sankalpa or declaration of desire to adopt must be made by day. The remaining ceremonies may then take place by night. A formal acceptance is indispensable" (*m*).

C. 3.—As to Place.

It is not a ground for setting aside an adoption that it was celebrated not at the usual place of residence of the parties (*n*), though this is the proper course (*o*).

Sacrifice need not take place in the house of the adopter (*p*), but this is usual (*q*).

D. 1.—Ceremonies and Forms—Constitutive.

D. I. 1.—Amongst Brahmans.

(*a*)—*In adopting Strangers; and generally.*
(*b*).—*In adopting Sagotras.*
(*c*).—*In adopting Adults and Boys already tonsured or initiated.*
(*d*).—*In adopting as a Dvyamushyayana.*

D. I. 1 (*a*).—In Adopting Strangers; and Generally.

The ceremonies used in adoption are either regarded as essential to constitute the relation; as sacrificial; as auspicious; as

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(*k*) *R. Vassereddi Ramanandha Baulu* v. *R. V. Jugganadha Baulu*, 1 M. S. D. A. Dec. 1832, p. 520; *Ranee Munmoheenee* v. *Jairnarain Bose*, C. S. D. A. R. 1857, p. 244; *Ranee Kishtomonee Debea* v. *Raja Anundnath Roy*, C. S. D. A. R. 1857, p. 1127.

(*l*) MS. 1677.

(*m*) MS. 1679.

(*n*) *Bhaskar Buchajee* v. *Naroo Ragonath*, Bom. Sel. Rep. 25.

(*o*) Datt. Chand., sec. II. 9.

(*p*) *Th. Oomrao Singh* v. *Th. Mahtab Koonwar*, 4 N. W. P. R., p. 103.

(*q*) Datt. Chand., sec. II. 16; Datt. Mim. V. 15, 21 ss.

authenticative; or as simply indicating joy and generosity. Amongst the Brahmanas, if the Sastris can be taken as faithful expositors of their law, the first two classes blend into one. But the second class is of very variable extent. At pp. 218 ss. of Strange's H. L. vol. II., there is a description of a very elaborate ceremonial, but at p. 87 this is cut down to a few simple particulars, the demand after invitations and notice to the authorities, the gift, the *datta homa*, followed after adoption by the upanayana to be celebrated by the adoptive father (*r*).

Jagannatha (*s*) insists on the datta homa and on the Samskaras (*t*) from tonsure onwards being performed in the adoptive family. The putreshti, he thinks, may be dispensed with, and this is so in Bombay (*v*).

The Vyavahara Mayukha (*w*) prescribes an elaborate ceremonial borrowed from Saunaka, the chief elements of which are those already indicated. That it was not deemed imperative in every particular may be gathered from Steele's Law of Caste, which describes the requisite ceremonies as follows:

"Of the numerous ceremonies enjoined in the Sastras, the following are the most essential:—1. Prutigruhu, the formal giving away of the boy by his parents, and acceptance by the other party, with the form of Julasunkulp, or pouring water on the hands. Presents may or may not be given. 2. Mustukawugrun (*x*), the placing the boy in the adopter's lap, the latter breathing on his head. 3. Hom, fire sacrifice performed by the Poorohit or others. This is said to be unnecessary in adoptions of a brother's or daughter's son, which are performed by Wakyudan, or verbal gift. Soodrus cannot perform any ceremonies requiring muntrus from the Veds (Vedokt-kurum). 4. Deepwarna, the revolution of a lamp, a ceremony at Pooja, or worship of the idol. 5. Brahmun Bhojun, alms of food, &c., to Brahmuns. Such of these ceremonies as require the repetition of muntrus, as the Mustukwugrun, &c., cannot be performed by a female adopter, personally; she must go

(*r*) See above, p. 838.

(*s*) Col. Dig., Book V., T. 275.

(*t*) A list of the Samskaras will be found in Col. Dig., Book V., TT. 133, 134, notes, and in Steele, L. C. 23. As the latter says, they are now much neglected, Steele, L. C. 159.

(*v*) Steele, L. C. 43.

(*w*) Chap. IV., sec. V., para. 8.

(*x*) See above, p. 847. The system of spelling followed by Steele differs from the one now usually followed.

through the essential form of taking the adoptee in her lap, and supply funds for Brahmun agency in other respects. After these ceremonies (Widhan) have been fully performed, an adoption cannot be annulled. Pending their performance, another may be chosen . . . they are not essential where the adoptee is of the same gotr. But in case of discovery that the boy, being of another gotr, was not adopted with those ceremonies, or that he was of another caste, the adoption is null, and the boy is to receive maintenance as a Das or slave " (*y*).

As the Sastris insist frequently on the necessity of the rites prescribed by the Sastra it may be pointed out that these are very simple as compared with the elaborate ritual which has been built up on them in later days. Thus Vasishtha says: " The adopter shall assemble his kinsmen, announce his intention to the ruler, make burnt offerings in the midst of his house, and recite the Vyahritis " (*z*).

As caste or local custom may regulate the forms of marriage (*a*) so it would seem may it regulate the forms of adoption. This being so, the Courts have naturally never insisted on proof of more than the minimum prescribed by the caste law (*b*). What this is has been differently estimated, but that all difficulties are to be got rid of by making mere gift and acceptance sufficient for adoption in all cases is a proposition that cannot be stated with confidence against the numerous opinions of the Sastris of the Bombay Courts (*c*).

Amongst Brahmanas of different gotras there may be a retraction until the datta homa has been celebrated, but not afterwards, and the last rule holds for all cases in which the fire sacrifice takes place (*d*). The homa is thus thought essential to a complete adoption (*e*). The celebration has no constitutive effect at all,

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(*y*) Steele, L. C. 45, 46.

(*z*) Vasishtha XV. 6. The Vyahritis are mystic syllables pronounced in offering the fire oblations. See Bühler *ad loc.* The ritual described by Baudhayana is more elaborate. See Baudh. Parisishta, Pr. VII. Ad. 5; Datt. Mim., sec. V. 42; Datt. Chand., sec. II. 16.

(*a*) *Gatha Ram Mistree* v. *Moohita Kochin et al.*, 14 B. L. R. 298; *Rajkumar Nobodip Chundro Deb Burmun* v. *Rajah Bir Chundra Manikya Bahadoor*, 25 C. W. R. 404, 414. See above, p. 840.

(*b*) See above, pp. 824, 825.

(*c*) See above, pp. 825, 827.

(*d*) Steele, L. C. 184.

(*e*) Above, p. 835.

until, in its essential parts, it is completed, and a person is at liberty to change his mind and put aside a boy before full performance of the ceremony (*f*). This rule is subject to the qualification that in case of adoption of a brother's son (*g*) or of a boy of the same gotra (*h*) the performance of the ceremony of the datta homam is not essential for the validity of the adoption.

Jala Sunkalp, or the pouring of water on the hands, is deemed an essential part of the ceremony of giving a son (*i*).

In all the castes in which the Sastra ceremonies are observed at all the placing of the boy in the lap of the adopting parent is considered indispensable (*k*).

Steele says (*l*): " The Putreshta ceremony and the distinction of nitya and anitya adoptions are not recognized in Poona " (*m*).

The rule formerly announced by the Sadar Court of Bengal was that affiliation, established by sacrifice, is absolutely essential (*n*), and with this the opinions of the Bombay Sastris agree, at least as to the Brahmana caste. The following are instances:

" The only adoption to be recognized in the Kali Yug, is the ' Datt Vidhan,' with assent of parents and due ceremonies " (*o*).

" No adoption is valid unless made with the prescribed ceremonies. Mere declarations by the adoptive father will not constitute an adoption valid. Nor will the performance of funeral ceremonies for the adoptive father by the adopted son " (*p*).

" Sacrifices are to be made according to the Sastras " (*q*). " Adoption is a religious act. It requires a formal declaration of desire to take a son (Sankalp); a formal gift (Dan); and a ceremonious acceptance (pratigraha). There is an abbreviated form called Gampaksha for one *in extremis*. But in no case can the ceremonies be altogether dispensed with, even though the adopted be of the adopter's family. The contrary view of the

(*f*) *Daee* v. *Motee*, 1 Borr. R. 75.
(*g*) *Valubai* v. *Govind Kashinath*, I. L. R. 24 Bom. 218.
(*h*) *Tilak* v. *Tai Maharaj*, I. L. R. 39 Bom. 441, P. C.
(*i*) Steele, L. C. 42.
(*k*) Steele, L. C. 184.
(*l*) Steele, L. C. 48.
(*m*) See below, E. 1.
(*n*) *Alank Manjari* v. *Fakir Chand*, 5 C. S. D. A. R. 356.
(*o*) MS. 1755.
(*p*) MS. 1683.
(*q*) MS. 1675.

Dattaka Darpana is rejected" (r). "A person *in extremis*," another Sastri says, "may shorten the ceremony but cannot omit it (s), though the Dattaka Darpana says he may in adopting a relative" (t).

Steele speaks of adoption as "sometimes made by nuncupative will at the point of death" in the Southern Maratha Country (v). But by this he evidently means merely an adoption *in extremis* with ceremonies abridged to suit the exigency (w).

"No adoption," a Sastri again declares, "is valid without the prescribed ceremonies. The dispensation from ceremonies in the Samskar Ganpatti, supposing the passage genuine, extends only to daughters' and brothers' sons" (x), and another insists that, "Whatever is done contrary to the rules of the Sastras must be considered as null and void" (y). But the objections in the case went to the eligibility of the adopted and the adopting widow's capacity.

The age of the parties has not been thought to make any difference. An adoption of a married man was said to require for its validity the performance of the due ceremonies (z).

A man *in extremis* adopted a son without ceremonies. The adopted performed his funeral ceremonies. The Sastri said, this, according to the Mayukha, constituted the son only a priti-putra, not an heir (a).

(r) MS. 1714.

(s) MS. 1674.

(t) MS. 1675.

(v) Steele, L. C. 185.

(w) The reader will be reminded of the adoption by testament of Octavius by Cæsar, which, however, was, except in form, only the nomination of an heir, and had to be ratified by a vote of the people. This was not really an adoption; it was merely a mode of designating a successor, and preserving one's name which became common. (Maynz, Dr. R. § 328.) In a true adoption under the Hindu Law the adopted, except a dvyamushyayana, takes a new name and a patronymic from his adoptive father (see *Gangava* v. *Rangangavda*, Bom. H. C. P. J. 1881, p. 248), the palak-putra does not, nor does the kritrima son. An adoption by will is not allowed, only a permission to adopt, see above, sub-sec. III. B. 3.

(x) MS. 1686.

(y) MS. 1672.

(z) MS. 1643. This is the strongest mark of abandonment of right, and is properly used in such a solemn transaction as a gift or sale of land. See Mit., Chap. I., sec. I., para. 32; 2 Str. H. L. 426.

(a) MS. 1680. *Sayammaul v. Sashachaka Naiker*, 10 M. I. A. 429.

In the case of a son adopted without any rites by a man since deceased, the Sastri, not allowing that he was already sufficiently adopted, insisted on the elder widow's competence to adopt him as the person indicated by her husband, notwithstanding the opposition of the junior widow (*b*).

The required ceremonies need not be performed by the person adopting. They can be completed after his death so as to constitute a valid adoption (*c*). The Sastri answered that "a ceremony begun by a dying person, who does not live to complete it, may be completed by his widow" (*d*). She may, however, begin *de novo*, if she likes.

Jagannatha discusses at some length (*e*) the question of whether besides a gift the prescribed religious ceremonies and samskaras performed in the adoptive family are essential to adoption. His conclusion is that "should the oblation to fire be partly omitted through inability to complete it, the adoption is sometimes good." As to the samskaras he accepts the passage of the Kalika Purana which Nilkantha questions (*f*), and derives from it the rule that tonsure and the subsequent samskaras are at least requisite to the completion of sonship (*g*). Hence there can be no adoption of a boy whose tonsure has been performed (*h*). As there is no ceremonial tonsure as a samskara in the lower castes (*i*) the obstacle it would create does not exist amongst them (*k*), nor has any rite to be performed in order to complete an adoption beyond a gift and acceptance distinctly for that purpose.

Colebrooke too says—"Adopted sons being duly initiated by the adopter under his own family name become the sons of the adoptive parent. The upanayana (thread ceremony) . . . must be performed in the name of the adopter's gotra" (*l*).

(*b*) MS. 1649.

(*c*) *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 590; *Vedavelli* v. *Mangamma*, I. L. R. 27 Mad. 538, 539.

(*d*) MS. 1661. *Subbarayar* v. *Subbammal*, I. L. R. 21 Mad. 497.

(*e*) Col. Dig., Book V., T. 273 ss.

(*f*) Vyav. May., Chap. IV., sec. V., para. 20.

(*g*) Col. Dig., Book V., T. 183 Comm.

(*h*) Col. Dig., Book V., T. 273 Comm. See 2 Str. H. L. 109.

(*i*) Col. Dig., Book V., T. 134, note. There is in most a tonsure, but without the sacramental significance.

(*k*) Col. Dig., Book V., T. 275 Comm. *sub fin.*

(*l*) Col. in 2 Str. H. L. 111. See above, p. 838.

The performance of the sacred ceremonies is not competent to a woman or a man of low caste, since the utterance of the Vedic formulas is forbidden to them (*m*). The difficulty is removed by a vicarious performance of these rites. "Like the consecration and dismissal of a bull, the adoption of a son may be completed by an oblation to fire performed through the intervention of a Brahmana" (*n*). The Brahmana incurs guilt, but the spiritual purpose is none the less achieved (*o*).

In Madras the mere gift and acceptance as in adoption constitute adoption even amongst Brahmanas (*p*). Proof of the datta homam is not necessary there. The Madras High Court quoted with approval Sir T. Strange's statement:

"There must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary, for as to notice to the Rajah and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession, and even with regard to the sacrifice of fire, important as it may be deemed, in a spiritual point of view, it is so with regard to the Brahmin only; according to a constant distinction in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire, and those who do not keep such fires, *i.e.*, between Brahmins and the other classes, it being by the former only that

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(*m*) Vyav. May., Chap. IV., sec. V., paras. 12—15.

(*n*) Col. Dig., Book V., T. 275 Comm.

(*o*) Vyav. May., Chap. IV., sec. V., para. 14; 2 Str. H. L. 89.

(*p*) *V. Singamma* v. *Ramanuja Charlu*, 4 M. H. C. R. 165. On this doctrine the Judicial Committee has observed : "Then it has been more recently decided in the Madras High Court that even in the case of an adoption by a Brahmini woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the Madras decision is correct, and how far the ceremonies may be omitted in the case of adoption by a Brahmini woman. They may, however, observe that the reasoning of the Madras Court applies even *à fortiori* to Sudras. The other Indian decisions which have been cited, and particularly those of the late Suddur Dewanny Adawlut, clearly show that the present question has long been treated as an open and vexed one by Pandits as well as Judges. It was so treated in a case before their Lordships in 1872, *Sree Narain Mitter* v. *Sreemutty Kishen Soondory Dassee*, L. R. I. A. Supp. 149, but was not then decided, the suit being dismissed upon another ground." *Indromoni Chowdhrain* v. *Behari Lal Mullick*, L. R. 7 I. A. 36. *Subbarayar* v. *Subbammal*, I. L. R. 21 Mad. 497; *Vedavelli* v. *Mangamma*, I. L. R. 27 Mad. 538.

the datta homam with holy texts from the Veda can properly be performed, as was held in the case of the Rajah of Nobkissen by the Supreme Court at Bengal. . . ." (q).

Even in Bombay and amongst the classes who imitate the Brahmanas in their ceremonies proof of the homa has not in all cases been thought essential (r) by the Courts.

In one case it seems to have been held that the religious ceremonies might be dispensed with even in the case of Brahmanas (s), while in *Tilak* v. *Tai Maharaj* it has been held that (t) no datta homam is necessary in case of adoption of a son of the same gotra. So in *Valubai* v. *Govind Kashinath* (v) the adoption of a brother's son without the homam was held valid.

In one instance a Sastri pronounced an adoption without sacrifice valid for a Brahmana. An adoption publicly made by a Brahmana without the homa was, he said, valid on the authority of the Logakshi Bhaskar (w.)

D. 1. 1.—Ceremonies and Forms.

(b). In Adopting Sagotras.

The homa sacrifice or burnt offering deemed religiously indispensable in other cases is by custom pronounced unnecessary in the adoption of a brother's or daughter's son (or a younger brother) (x). In these cases the mere verbal gift and acceptance are said to suffice (y). As a daughter's son can be adopted only by a Sudra, and no Sudra can pronounce a mantra from the Veda (z), the homa must in strictness be dispensed with in his case, though a vicarious offering and recitation by a Brahmana may according to the Vyav. May. Chap. IV. sec. V. para. 13, and

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(q) *V. Singamma et al.* v. *Ramanuja Charlu*, 4 Mad. H. C. R. 167.

(r) *Crastnarao* v. *Raghunath*, Perry, O. C. 150; *Lakshmibai* v. *Ramchandra*, I. L. R. 22 Bom. 890.

(s) *Jagannatha* v. *Radhabai*, S. A. 165 of 1865.

(t) I. L. R. 39 Bom. 441, P. C.

(v) I. L. R. 24 Bom. 218.

(w) MS. 1688. See above, p. 825. The authority is not generally admitted.

(x) Steele, L. C. 46; Comp. Col. Dig., Book V., T. 275 Comm. *Valubai* v. *Govind Kashinath*, I. L. R. 24 Bom. 218.

(y) See above, p. 832.

(z) Datt. Mim., sec. I. 26.

by custom answer the purpose (*a*). In the case of a brother's son there is no need for a discharge from the gotra of birth and an admission to that of adoption, as both are the same, so that the main purpose of the fire sacrifice not existing, the sacrifice itself becomes needless (*b*).

The adoption of a nephew by word of mouth without burnt sacrifice is valid (*c*). The Sastri, however, said in another case: "The prescribed forms cannot be dispensed with even in the case of the adoption of a member of the adopter's family" (*d*). But again, as in the following case, the ceremonies may be excused: "An uncle must perform the ceremony even to adopt his nephew. But if he has accepted a gift of the nephew and performed his munj the boy is thus affiliated without the (regular) ceremonies" (*e*).

In Bengal the adoption of a kinsman may be made by verbal declaration, in presence of witnesses, but without any religious ceremony (*f*).

D. 1. 1.—Ceremonies and Forms—Constitutive.

(*c*). In Adopting after Tonsure.

It has been seen (*g*) that in the case of an adult the gift by his parents is as indispensable as in the case of a child (*h*). The formal acceptance is equally indispensable, though the placing of an adult son in the lap of the acceptor (*i*) may not be regarded as essential. Where burnt offerings are requisite they are not less, but if possible more, necessary in the case of one who, by

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(*a*) Comp. Datt. Mim., sec. I. 27. *Valubai* v. *Govind Kashinath*, *supra*.

(*b*) 2 Str. H. L. 89, 104, 107, 123, 220.

(*c*) *Huebatrao Mankur* v. *Govindrao Mankur*, 2 Borr. 83, 95. Yama says: "It is not expressly required that burnt sacrifice and other ceremonies should be performed on adopting the son of a daughter or of a brother, for it is accomplished in those cases by word of mouth alone." (Wak Danu, a verbal gift.)

(*d*) MS. 1673. The Sastri is supported by this, that the Smritis which contemplate adoption from within the gotra still prescribe the homa sacrifice. See *ex. gr.* Vasishtha XV.

(*e*) MS. 1690.

(*f*) *Kullean Singh* v. *Kripa Singh*, 1 C. S. D. A. R. 9.

(*g*) See p. 832.

(*h*) See pp. 817, 832.

(*i*) Steele, L. C. 184.

the successive samskars has become more firmly knitted to his family of birth and its sacra (*l*). If adoption is at all regarded by a caste as involving a change of religious dedication it is not easy to conceive how it can take place when the samskaras have been completed even in the case of a man of one of the lower castes (*m*); but where the adoption is within the same gotra or *quasi*-gotra, no change of invocation is required, and the formal transfer should suffice.

In the case of untonsured children (*n*) mere irregularities in forms used in adopting are said to be cured by means of the performance of the sacrifices and samskaras by the adoptive father (*p*). The following is an instance:

" When a man has received a son in adoption, whether regularly or not, and has performed sacrifices for him as included in the adoptive father's gotra, he must be recognized as an adopted son. The adoption is not affected by the natural father's subsequently performing the boy's munj " (*q*).

Sacrifice to fire will undo the effects of tonsure in the natural family (*r*).

D. 1. 1.—Ceremonies and Forms—Constitutive.

(*d*). In the Case of a Dvyamushyayana.

The ceremonial in the adoption of a son as a dvyamushyayana does not differ from that of the ordinary adoption except by the variance in the formula of gift. " He shall belong to us both " (*s*).

(*l*) See above, p. 809.

(*m*) *I.e.* not twice-born. See above, p. 825, note (*i*).

(*n*) See Datt. Mim., sec. IV. 33.

(*p*) See Datt. Mim., sec. IV. 69.

(*q*) MS. 1677. See Col. Dig., Book V., T. 183 Comm.; Datt. Mim., sec. IV., 33 ss.

(*r*) *Sy Joymony Dossee* v. *Sy Sybosoondry Dossee*, 1 Fult. 75. See Datt. Mim., sec. IV. 51, 52. The author insists on a restriction to five years of age—not observed in Bombay—in order that the boy's investiture may take place in the adoptive family. The Datt. Chand. extends the age to eight years, sec. II. 23, 27, 30. This authority also insists on investiture not having taken place as a condition of fitness not apparently to be replaced by any ceremonies. In the case of a Sudra marriage there is the same obstacle as investiture in the case of a twice-born. (*Ibid.*, para. 32.)

(*s*) Vyav. May., Chap. IV., sec. V., para. 21.

D. 1.—Ceremonies and Forms—Constitutive.

D. 1. 2.—Amongst the Lower Castes.

The sacrifice of fire is important with regard to Brahmanas only (*t*).

" It is held that, if a lad be adopted into a family, even where it is not the custom to perform homam (sacrifice of adoption), he cannot be turned out of it at will " (*v*).

" It has been held that, in the case of Sudras, no ceremonies, except the giving and taking of the child, are necessary to an adoption." " The giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption " (*w*).

" As the Sastras do not recognize Kshatriyas as existing in the Kali age, those who call themselves so should follow the ceremonies prescribed for Sudras " (*x*).

(*t*) *Nobkissen Raja's Case*, 1 Str. H. L. 96; *Th. Oomrao Singh* v. *Th. Mahtab Koonwar*, 4 N. W. P. R. 103. The needlessness of the datta-homam ceremony amongst Sudras is placed by Ellis on the ground of their having no gotra (in the stricter sense). See above, pp. 831, 836. The transfer from the care of one to another set of tutelary deities being impossible, the rite by which it is consummated is superfluous. See above, pp. 823—829. It is plain that the central idea of adoption according to the Brahmanical conception must be entirely wanting in the case of Sudras. The indigenous natural adoption of the latter has been wrought into a kind of harmony with the former only by the accommodations shown in the preceding pages. Sraddhas are now looked on as appropriate to nearly all castes. See above, p. 825.

(*v*) 2 Str. H. L. 126. The following case rules only that no other ceremonies are necessary in Bengal : " It is admitted that whatever may be the force of the words ' so forth ' in the case of Brahmins, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Sudra is the *datta homam*, or burnt sacrifice, which it is said he, though as incompetent to perform that for himself as he is to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brahmin priest." *Indromoni Chowdhrain* v. *Behari Lall Mullick*, L. R. 7 I. A. 35.

(*w*) *Shoshinath Ghose et al.* v. *Krishna Sunderi Dasi*, I. L. R. 6 Col. P. C. 381.

(*x*) MS. 1675. . . . " The word Dvijate (twice-born) which in former ages included Brahmins, Kshatriyas, and Vaisyas, in the present is generally understood to be confined to Brahmins, these only performing the upanayanum, or ceremony of tying on the sacrificial cord; whence the second birth, with the texts of the Veda." 2 Str. H. L. 149; *ibid.* 263. Pure Kshatriyas and Vaisyas are not now recognized, Steele, L. C. 89, 90. In 2 Str. H. L. 263, Ellis gives an instance of a considerable conversion of Lingayats who thereon assumed the sacred thread as Vaisyas. Such cases are not very uncommon, and they justify the distrust with which the Brahmanas look on pretensions to the twice-born caste rank.

" An oral adoption is effected by the ceremony of giving and accepting " (*y*).

An overt act of adoption is sufficient to prove an adoption, unaccompanied by religious ceremonies. But evidence of the giving and receiving is indispensable, and is easily procured where there has really been an adoption in a family of any local consequence (*z*).

" The Sastras give no rules of adoption applicable to Lingayats. If the caste rules prescribe any particular ceremonies, these should be observed " (*a*).

But even of a Simpi it was said : " No one (not even a brother's grandson) can be adopted without the ceremony of homa or burnt offering " (*b*). The Sastri must, in this case, be considered to have stated the law too stringently.

A dying widow put sugar in the mouth of a child of one of her relatives and called him her son. The Sastri said there was nothing in the Sastras to give validity to this as an adoption (*c*).

" The Sudras cannot recite the Vedic texts, but they can adopt, confining themselves to the ceremonies proper to their caste " (*d*).

In a Sudra adoption the ceremony of " pootreshto jog " is not essential, yet it is conformable to law and religion; and if performed, is the best proof of real intention of adoption (*e*). It has been pronounced essential when the adoption is in the dattaka form (*f*). But it is not necessary in Bombay (*g*).

Among the Sikhs proof of datta homam does not seem to be essential (*h*).

Whether in Bengal religious ceremonies are generally necessary to make valid adoptions among Sudras might seem uncertain (*i*).

(*y*) MS. 1655. (Sudras.)

(*z*) *Premji Dayal* v. *Collector of Surat*, R. A. 54 of 1870; Bom. H. C. P. J. for 1873, No. 12.

(*a*) MS. 1677.

(*b*) MS. 1689. The Simpi ranks as an Atisudra, *i.e.* below the recognized Sudra. See Steele, L. C. 107.

(*c*) MS. 1687.

(*d*) MS. 1675. See above, p. 998 (*o*).

(*e*) *Hurrosoondree Dassee* v. *Chundermohinee Dassee*, Sev. 938.

(*f*) *Luchmun Lall* v. *Mohun Lall*, 16 C. W. R. 179.

(*g*) See above, pp. 1002—3.

(*h*) *Deo dem Kissen Chundershaw* v. *Baidam Bebee*, East's Notes, Case 14.

(*i*) *Sri Narayen Mitter* v. *Sy Krishna Soonduri Dossee*, 11 C. W. R. 196; S. C. 2 B. L. R. 279 A. C. J.; *Nittianand Ghose* v. *Kishen Dyal Ghose*, 7 B. L. R. 1; S. C. 15 C. W. R. 300.

The performance of the datta homam was once held essential there to the adoption even of a Sudra (*k*), but this was afterwards overruled (*l*) by a Full Bench, no further ceremony, it was said, being necessary than gift and acceptance (*m*).

D. 1.—Ceremonies and Forms—Constitutive.

D. 1. 3.—Subsidiary Forms.

Amongst these are the expressions of assent by the relatives and the representative of the Government. Additional prayers and sacrifices fall into the same class. But the chief subsidiary form is that of reducing the declaration of transfer to a formal instrument signed by the parents and attested by the relatives and other principal persons present. Where any particular settlement is made, varying in any way the rights and obligations of the parties within the limits allowed by their law, a written instrument should be deemed indispensable. For the adoption itself no writing is necessary; but in every case it may probably be useful to authenticate the transaction. Macnaghten says:

"There is no law requiring the execution of a written instrument on the occasion of receiving a boy in adoption, though the practice of resorting to writing is prevalent" (*n*). And the Judicial Committee ruled that neither registration of adoption, nor any written evidence, is essential to validity of adoption (*o*):

No stereotyped form of adoption is requisite; absence of registration or of a stamp may raise suspicion but cannot invalidate the deed (*p*). The language of the Privy Council in the case lately quoted is important. "According to the Hindu Law, neither registration of the act of adoption, nor any written evidence of that act, having been completed, is essential to its validity. It is to be lamented, that an irrevocable act, which

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(*k*) *Bhairabnath Sye* v. *Maheschandra Bhaduri*, 4 B. L. R. 162 A. C.; S. C. 13 C. W. R. 169.

(*l*) *Behari Lal Mullick* v. *Indramani Chowdhrain*, 13 B. L. R. 401; S. C. 21 C. W. R. 285.

(*m*) *Nittianand Ghose* v. *Krishna Dyal Ghose*, 7 B. L. R. 1.

(*n*) 2 Macn. H. L. 176.

(*o*) *Sootrugun Sutputty* v. *Sabitra Dye*, 2 Knapp, p. 287; *Pritima Soonduree* v. *Anund Coomar*, 6 C. W. R. 133; 2 Wyman, 135.

(*p*) *Pritima Soonduree* v. *Anund Coomar*, 6 C. W. R. 133.

defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done, be proved by verbal testimony. It would certainly contribute much to the security of property and the happiness of Hindu families, if, in a country where the religious obligation of an oath is unfortunately so little felt, and documents are so readily fabricated, adoptions and all other important acts were required to be perfected in the presence of some magistrate and recorded in some Court."

"But although neither written acknowledgments, nor the performance of any religious ceremonial, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of zemindars or opulent Brahmans, that wherever these have been omitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relations, unless the proof of adoption, by which that transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth" (*q*).

The execution of deeds, without actual gift and acceptance, is not sufficient (*r*) to constitute an adoption. A mere constructive giving and receiving cannot be relied on. A suit to set aside deeds giving and receiving in adoption, where no son was given according to the deeds, is not maintainable (*s*). [For without gift and acceptance there can be no valid adoption, and cancellation does not avail anything.] Where a deed was executed, signifying an intention, if a certain approval was obtained, to take a boy in adoption, and the boy was not given or accepted, the adoption was held incomplete, the deed being provisional and intended to be acted upon during the life of the executing party, who had not capacity to make a testamentary disposition (*t*).

(*q*) Lord Wynford in *Sootrugun Sutputty* v. *Sabitra Dye*, Knapp's P. C. pp. 290, 291.

(*r*) *Siddesory Dossee* v. *Doorga Churn Sett*, 2 I. J. N. S. 22; *Sri Narayan Mitter* v. *Sy Krishna Sundari Dasi*, 11 C. W. R. 196; S. C. 2 B. L. R. 279 A. C. J.

(*s*) *Sri Narayan Mitter* v. *Sy Krishna Sundari Dasi*, 11 C. W. R. 196; S. C. 2 B. L. R. 279 A. C. J.

(*t*) *B. Banee Pershad* v. *M. Syad Abdool Hye*, 25 C. W. R. 192.

An adoption of a daughter's son was held invalid for want of a writing or deed of adoption, and for want of proof that religious ceremonies were performed (*v*). This decision cannot be considered very satisfactory. If the parties were Brahmanas the adoption of a daughter's son was invalid. If they were Sudras religious formalities were unnecessary.

D. 1.—Ceremonies and Forms—Constitutive.

D. 1. 4.—Informalities.

According to the Poona castes—"Any irregularity or defective performance in the adoption of customary rule, . . . is a cause of its annulment" (*w*).

It is not easy to gather from the cases what informalities are to be regarded as vitiating an adoption and what do not affect its validity. The chief authorities tend, it will be seen, to the sufficiency of a gift and acceptance authenticated by *some* religious rites, especially the homa (*x*). The others cannot be regarded as so important that the omission of some of them is a cause even for grave suspicion. Colebrooke says: "An inadvertent omission of an unessential part as sacrifice does not vitiate adoption" (*y*). . . . "The essence of the adoption of a son given . . . is the gift on the one side, and the formal acceptance of the child as a son on the other . . . the rest of the ceremonies prescribed . . . may be completed in pursuance of the adopter's intention, by others for him, if he should die prematurely. The unintentioned omission of some part of them by the adopter would hardly invalidate the adoption; though the wilful omission of the whole by him might have that effect, since the performance of the ceremony of tonsure, and other rites, in the family of the adopter, is indispensable to the completion of the adoption" (*z*).

"However defective the ceremony," Ellis said, "and however small in consequence the spiritual benefit, the act of adoption

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(*v*) *Baee Gunga* v. *Baee Sheokoovur*, Bom. Sel. Rep. 80.

(*w*) Steele, L. C., App., p. 388.

(*x*) See above, p. 836 ss. The Sastris, as we have seen, are more exacting.

(*y*) 2 Str. H. L. 126.

(*z*) Colebrooke in 2 Str. H. L. 155

cannot be set aside on any account whatever; *à fortiori*, not on account of any informality " (*a*). And Colebrooke on the same case, " The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son (Mitakshara on Inheritance, Chap. II., sec. X.), but he cannot forfeit the relation of son " (*b*). " The meaning of that passage is, that a lawful adoption, actually made, is not to be set aside for some informality which may have attended it; not that an unlawful adoption shall be maintained " (*c*).

In one case Sir E. Perry expressed himself thus:

" Wassadeo Wittaji expressed a strong desire in his will that a son should be adopted to him; and as we find it indisputably proved that the widow did in fact solemnly adopt the infant plaintiff in the presence of a great many Brahmins, Purvoes, and relatives; that all the more important ceremonies were observed the Ganputty Puja, or worship of the god Ganput, the Puja Wachan, or reverence to the Ganges, the Hom or sacrifice of fire,—we were inclined to think that even if other observances had been disregarded, still, the essence of the ceremony having been adhered to, the adoption was good for every legal purpose " (*d*).

The non-observance, however, of the ceremonies, other than those held to be indispensable, though it does not render an adoption invalid, yet will afford presumptive evidence against the adoption where the situation in life of parties renders such forms usual (*e*).

In Madras " if the performance of the datta homam be established, the adoption is established; but, if otherwise, the converse does not hold good. Further evidence may be adduced. In no case can the omission of the ceremony affect an adoption in other respects valid. If not performed, when the adoption is from another gotram, it would seem, from analogy, that the son so adopted must be anitya datta " (*f*).

(*a*) Ellis in 2 Str. H. L. 126.

(*b*) Colebrooke in 2 Str. H. L. 126.

(*c*) 2 Str. H. L. 178, 179.

(*d*) *Crastnarao Wassadewji* v. *Raghunath Harichandarji et al.*, Perry's Or. Cases, pp. 150, 151.

(*e*) *Sutrugun Sutputty* v. *Sabitra Dye*, 2 Knapp, 287; 1 C. S. D. A. R. 15.

(*f*) 2 Str. H. L. 220.

D. 2.—Ceremonies and Forms—Collateral.

2. 1.—Inducing Good Fortune.

" Donations are to be given to Brahman mendicants " (*g*).

D. 2. 2.—Indicating Joy and Generosity.

" Some clothes and ornaments are to be presented to the adopted child " (*h*).

D. 2. 3.—Authenticative.

The instruments described above under sub-section D. 1. 3. might properly be placed under this head also. But in some few castes they are thought essential, and in all they serve to make the declaration explicit. A reference here seems enough. The assembly of relations and neighbours is another and the usual means of record of the transaction.

" At an adoption a festival is held, to which are invited relations, friends, and leading men of the caste. Presents are distributed among the head men of the caste, village officers, relations and guests. The fact of distribution of sugar, cocoanut, and pan is evidence of an adoption " (*i*).

E.—Variations—In the Case of *Quasi*-Adoptions.

E. 1.—Disapproved Adoptions.

A distinction was taken by a Pandit in Madras between a permanent (nitya) adoption accomplished by a ceremony including the homam and a temporary (anitya) one, where the homam had been dispensed with. In the latter case it was said the son of the man thus adopted might be initiated in either gotra. Ellis recognizes this (*k*), but the anitya adoption is not allowed in Bombay. The boy is wholly adopted or not at all.

(*g*) MS. 1675.
(*h*) MS. 1675.
(*i*) Steele, L. C., p. 184, " Pan " is the betel-leaf.
(*k*) 2 Str. H. L. 121, 123.

The krita son, it is said, must be received from the hand of the father or of the mother as his agent (*l*). This mode of adoption is no longer allowed (*m*), except in the modified form used by ascetics (*n*), who buy children to maintain a spiritual succession (*o*). A Sastri thought the ordinary forms should be used. " Sudras in adopting (and Gosavis are Sudras) are to omit the recitations from the Vedas " (*p*).

" In the kindred case of the kritrima, or son made, the mode of adoption as practised in those of our provinces in which it prevails is very simple, being completed by the declaration and consent of the parties without any religious ceremonies." The Datt. Mim., however, makes the religious rites indispensable alike to the Dattaka and Kritrima, and hence Colebrooke says they must, when the krita form is allowed, be essential to that also (*q*).

As to Bombay, adoption after payment of a price is not, it is said, recognized there in the Kali yuga (*r*), but one or two of the Gujarath castes adhere to the practice, and " with some castes in Madras the mode of adoption is uniformly by purchase " (*s*). Amongst them it may be allowed on the ground of class usage, which must also govern the ceremonies in any particular instance (*t*). The krita adoption [*i.e.* by purchase] is really obsolete, unless on the ground of local usage (*v*) even in Madras.

VARIATIONS IN THE CASE OF *Quasi*-ADOPTIONS.

E. 2.—CONNEXIONS RESEMBLING ADOPTION.

In the case of a palak putra a mere assent of the parties openly expressed is all that custom requires.

(*l*) Col. Dig., Book V., T. 281 ss.; see 2 Str. H. L. 138, 143.

(*m*) Above, p. 806, note (*r*).

(*n*) 2 Str. H. L. 133.

(*o*) See above, p. 516 ss.

(*p*) MS. 1678. See above, pp. 834, 835.

(*q*) Colebrooke 2 Str. H. L. 155. The consent of the person adopted by the kritrima form is indispensable. See above, p. 907.

(*r*) *Eshan Kishor Acharjee* v. *Harischandra*, 13 B. L. R. App. 42; S. C. 21 C. W. R. 381; see 2 Str. H. L. 156.

(*s*) 2 Str. H. L. 148.

(*t*) Above, p. 2.

(*v*) *Gooroovummal* v. *Mooncasamy*, 1 Str H. L. 102, 103; 1 Str. Notes of Cases, p. 61.

The Roman adoption *per œs et libram* approached most nearly amongst the Hindu forms, probably, to the krita. There was a real or fictitious sale by the paterfamilias of the person adopted.

In one case, noted above (*w*), the Sastri was of opinion that by mere nurture and recognition an Agarvali (*x*) had given to a boy the status of an heir. But this, as shown in the remark, is opposed to the general Hindu Law; it could be sustained only on the ground of caste custom.

Recognition of dancing girls as daughters suffices, it was said, to constitute adoption without any formal act (*y*).

SECTION VII.—CONSEQUENCES OF ADOPTION.

I.—Governed by the Ordinary Law.

I. 1.—Perfect Adoption.

A.—General Consequences.

A. 1.—Change of Status.

"Adoption causes an immediate change of status" (*z*).

"The relationship of the son to his family of birth ceases" (*a*).

"The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it" (*b*). An adopted son ceases to be the son of his natural parents, and becomes the son of the adoptive father to all purposes (*c*).

(*w*) P. 356, Q. 18.

(*x*) See Steele, L. C. 97.

(*y*) *Vencatachellum* v. *Venkalasamy*, M. S. D. A. Dec. 1856, p. 65.

(*z*) MS. 1671. "Adoption alone constitutes affiliation; but the ceremony of tonsure performed by the family, to which he originally belonged, renders it essentially invalid. . . . But this affiliation once effected, is not cancelled by his naming his former family in performing a sacrifice, or in consecrating a pool. Birth caused by male seed and uterine blood is one ground of filiation, the second birth, by investiture and other ceremonies, is equally a ground of filiation, by whomsoever performed. When he who has procreated a son gives him to another, and that child is born again by the rites of initiation, then his relation to the giver ceases, and a relation to the adopter commences: this birth cannot afterwards become null by his erroneously reverting to his original family." (Col. Dig., Book V., T. 183 Comm.)

(*a*) MS. 1760.

(*b*) *Uma Sankar Moitro* v. *Kali Komul Mozumdar et al.*, I. L. R. 6 Cal. 259.

(*c*) *Gopeymohun Thakoor* v. *Sebun Koer et al.*, East's Notes, Case 64; 2 Mor. Dig., p. 105; *Appaniengar* v. *Alemaloo Ammal*, M. S. D. A. R. for 1858, p. 5; *Narasammal* v. *Balaramacharlu*, 1 M. H. C. R., p. 420. The statement must be slightly qualified. See below.

The adopted takes generally the rights and the duties of a begotten son (*d*).

"If it is once conceded that the adoption is valid, all the legal consequences attached to it must follow as a matter of course" (*e*).

It follows that "only one adopted son can subsist at one time" (*f*).

When a Hindu gives his son in adoption, his power, it was said, more resembles that of a proprietor than that of guardian (*g*). This is true in so far as a guardian could not possibly give away his ward. The father has power to annihilate his own paternal rights, and does so by giving in adoption.

The chief purpose, and originally it seems the only purpose, of adoption having been the maintenance of the adoptive father's sacra (*h*), it is said, "A son given is therefore the child, not of his adoptive mother, but of his adoptive father only" (*i*). The interest of the adoptive mother and her ancestors in the adopted son and the religious duties to be performed by him is an idea of later growth and less definitely settled. It may now be accepted, however, that "if a son be adopted by the husband, the wife has a secondary claim to that child, because property is common to

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(*d*) Above, p. 349. "Adoption is as if the adoptive father had begotten the son." *Per* Willes, J., in the *Tagore Case*, I. L. R. I. A. Supp., pp. 47, 67. *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*, L. R. 10 I. A. 138.

(*e*) *Per* D. Mitter, J., in *N. Rajendro N. Lahoree* v. *Saroda Soonduree Dabee*, 15 C. W. R. 548. *Sreenarain Mitter* v. *Sreemutty Kishensoondery Dassee*, 11 Beng. L. R. 171 P. C.; S. C. L. R. I. A. Supp. 149.

(*f*) Steele, L. C., p. 45. *Gopee Lall* v. *Musst. Sree Chundraolee Buhoojee*, L. R. I. A. Supp. 131; *Mohesh Narain* v. *Taruck Nath*, L. R. 20 I. A. 30.

(*g*) *Chitko* v. *Janaki*, 11 Bom. H. C. R. 199. He is bound, however, to guard the interests of his son (see above, sec. VI. A. 6). Under the Roman Law down to a late time a child could be disposed of like goods, and therefore let on hire or pawned. This was forbidden except in cases of extreme necessity, such as justify a sale under the Hindu Law, and at last wholly prohibited by Justinian. See Maynz, Dr., Rom. sec. 410; Vyav. May., Chap. IV., sec. I., paras. 11, 12, sec. IV., para. 41, sec. V., para. 2, Chap. IX., paras. 2, 3, compared with Manu IX. 174, Vasishtha XV. 2; XVII. 31, 32. Apastamba forbids the sale, Pr. II., Pat. 6, Kh. 13, para. 11. So, too, does Yajnavalkya. Katyayana allows it in extreme necessity, Col. Dig., Book II., Chap. IV., TT. 6, 7, 16. Above, p. 806.

(*h*) Above, p. 789 ss.

(*i*) Col. Dig., Book V., T. 273 Comm. See H. H. Wilson, Works, vol. V., p. 57.

the married pair (*k*), and the line of the maternal grandfather is the ancestry of the adopter's father-in-law " (*l*).

I. 1. A. 2.—Change of Sacra.

The change of sacra, that is of connexion with the manes of ancestors, of obligations to them, and of the peculiar family rites and formulas, is the most important element of adoption to the orthodox Hindu. The supreme importance of initiation as completing this connexion is much dwelt on in the Sastras (*m*), and the due celebration of sraddhas occupies the chief place in the religious books (*n*). For their effectual performance the son adopted must be qualified by a complete reception into the family (*o*).

When a son has been adopted, and has gone through the samskaras, it must be inferred that, as in the case of a son by birth, a deliverance from *put* of the ancestors by adoption has by this fulfilment of duty been effected (*p*). In the event therefore of his death, no further adoption is necessary for the fulfilment of religious duty.

(*k*) See above, p. 86; Col. Dig., Book II., Chap. IV., T. 18.

(*l*) Col. Dig., Book V., Chap. IV., T. 275 Comm. The expression is in English very awkward. The son being commanded to honour his maternal grandfather, this is an interpretation of the command for the case of an adopted son. In the event of an adoption during a son's exclusion from caste, followed by the son's re-admission, the position of the adopted son on a reconciliation between the one he has replaced and his father seems not to have been settled. (See above, pp. 814, 815.) The adopted son would probably be reduced to a share of one-fourth.

(*m*) See above, pp. 789, 811 ss.

(*n*) Comp. Vyav. May., Chap. IV., sec. VII., 29 ss.

(*o*) See Vasishtha II. 4, 5; XI. 49; H. H. Wilson, Works, vol. V., p. 45, compared with the statement above, p. 880.

" Sraddha ceremonies are performed on the anniversary of a father's death. The Paksha ceremonies are performed subsequent to the first year after a father's death, at some time during the month Bahadrapad. There are also daily and monthly offerings for the benefit of a father and ancestors deceased." Steele, L. C., p. 26 (note); Col. Dig., Book V., T. 399 (note), enumerates sixteen Sraddhas that must be performed for a Brahmana recently deceased. See Col. Dig., Book V., T. 276 Comm.; above, pp. 418, 421, 795, 808; and Comp. Ortolan, Instituts, Tom. II., §§ 129, 132, on the corresponding institution at Rome.

(*p*) Col. Dig., Book IV., T. 155 Comm.; above, p. 789.

The ceremonial impurity arising from births and deaths in the family of his birth no longer affects the person who has been transferred to another by adoption. He presents no oblations to his natural father and his ancestors, but "distinct oblations" to the adopted father and his ancestors (*q*).

I. 1. A. 3.—Adoption Transfers the Offspring.

"A man having a son is adopted and then dies. His son takes his place as heir in the adoptive family" (*r*).

"This is so though another son is born (to the adopted) after the adoption" (*s*).

"The son born before his father's adoption not only is heir to the adoptive grandfather's estate, but is answerable for a debt of the grandfather admitted by his father" (*t*).

By Act XXI. of 1870, § 6, the word "son" in the Indian Succession Act (X. of 1865) is in many places made to extend to an adopted son, and "grandson" to a grandson by adoption. The following sections of the Succession Act must be so construed, §§ 62, 63, 92, 96, 98, 99, 100, 101, 102, 103, 182.

I. 1. A. 4.—Adoption in the Adoptive Father's Life is Prospective.

The general effect of adoption is as if a son had been born, though the rights thus acquired are subject to total (*v*) or partial defeasance by the birth of a real son. Thus, it has been said, it is competent to an adopted son to claim a partition of ancestral property (*w*) where a begotten son could do so. The adoption is in this sense tantamount to the birth of a son to the adopter (*x*); consequently there cannot be two adopted sons (*y*). But neither

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(*q*) Datt. Chand. IV. 2.

(*r*) MSS. 1730, 1742.

(*s*) MS. 1738.

(*t*) MS. 1737. See above, p. 76.

(*v*) As in the case of a Raj impartible. The right to maintenance must be excepted.

(*w*) MS. 1731.

(*x*) *Heera Singh* v. *Burzar Singh*, 1 Agra H. C. R., p. 256.

(*y*) Steele, L. C., App., p. 393; above, p. 821. *Gopee Lall* v. *Musst. Sree Chundraolee Buhoojee*, L. R. I. A. Supp. 131.

does the adoption any more than the birth of a son affect bygone transactions of the father which were valid when entered into (*z*). An adoption during the pendency of a suit affecting the ancestral property, does not affect a previously completed gift by the adoptive father though accompanied by a trust in his own favour (*a*).

I. 1. A. 5.—Adoption After the Adoptive Father's Death is Retrospective.

"As soon as a son is adopted by a widow he succeeds to her husband's estate. Her independent rights and those of her mother-in-law forthwith cease" (*b*). The widow succeeds to her separated husband, but her estate is subject to immediate defeasance on her adopting a son. Her right is reduced to a legal claim to maintenance.

Adoption works retrospectively and relates back to the death of the husband of the adoptive mother, invalidating a gift or sale, unless it was made for preservation of the estate from foreclosure under a prior conditional sale by the husband (*c*), or other necessary purpose. In the following cases the retroactive effect is expressed most strongly:—

"In *Ranee Kishenmunee* v. *Rajah Oodwunt Singh* (*d*) it was held that according to the Hindu Law, a boy adopted by a widow, with the permission of her late husband, has all the rights of a posthumous son, so that a sale by her, to his prejudice, of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity" (*e*).

(*z*) Even in the case of a partition the right of an after-born son to share in divided property depends on whether he was begotten at the time of the partition (*Yekeyamian* v. *Agniswarian et al.*, 4 Mad. H. C. R. 307, 310.) If begotten before it, he would take a share; if after it, he would share only with his father in the latter's share.

(*a*) *Rambhat* v. *Lakshman Chintaman Mayalay*, I. L. R. 5 Bom., at p. 635.

(*b*) MS. 1716.

(*c*) *Prannath Rai* v. *R. Govind Chandra Rai*, 5 C. S. D. A. R. 37; *Moro* v. *Balaji*, I. L. R. 19 Bom. 809; *Bijoy Gopal* v. *Nilratan*, I. L. R. 30 Cal. 990. "An adopted son is in most respects precisely similar to a posthumous son." Colebrooke in 2 Str. H. L. 127.

(*d*) 3 Beng. S. D. A. R. 228.

(*e*) *Nathaji Krishnaji* v. *Hari Jagoji*, 8 Bom. H. C. R. 73 A. C. J.

" In *Bamundoss Mookerjea* v. *Musst. Tarinee* (*f*) (in which the decision of the Bengal Sadr Divani Adalat was adopted without qualification by the Privy Council) the Judges, referring to that case, said :—' In that case the son, when adopted, became the undoubted heir, and it was of course the correct doctrine that no sale made by a widow, who possesses only a very restricted life-interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity " (*g*).

Yet in the case last quoted it was laid down that an adopted son has an absolute vested interest and a right of action only from date of actual adoption (*h*), and that the power of adoption in a widow does not, *per se*, divest her of her life interest. Her position in the meantime is such as has already been described (*i*), and as she is certainly a manager in possession, and represents the estate, her transactions with respect to it must, for the benefit of the estate itself, be upheld (*k*) where they have not been palpably detrimental or in excess of her limited powers of dealing with immovable property inherited from her husband (*l*).

In the case of a dispute between a widow and her husband's sapindas it was lately said by the High Court of Madras : " . . . Where *bona fide* claims are made which call for adjustment, where the existence of the husband's consent to the adoption is in question, we consider that the powers of the widow and reversioners may not improperly be exercised to effect a settlement of the claims before an adoption is made, and that their exercise is not affected by the circumstance that the dispute as to the direction or consent conveyed to the widow was at the same time set to rest, and that the arrangements affecting the estate were made in contemplation of the adoption. The widow, although she may have received an express direction to adopt, could not have been compelled to act upon it, and she might have persisted in her denial that she had received authority to adopt, had the reversioners declined to allow her to retain possession of the jewels " (*m*).

(*f*) 7 M. I. A. 169. (*g*) *Nathaji* v. *Hari*, *supra*.

(*h*) *Musst. Tarinee* v. *Bamundoss Mookerjea*, 7 C. S. D. A. R. 533.

(*i*) Above, pp. 87, 349.

(*k*) H. H. Wilson contends for the widow's full power of disposal. Works, vol. V., p. 66. Above, p. 291 ss.

(*l*) See above, pp. 349, 350.

(*m*) *Lakshmana Rau* v. *Lakshmi Ammal*, I. L. R. 4 Mad. 160, 165.

The right of inheritance then vests in an adopted son from the time of his adoption only (*n*) in this sense, that until the adoption by a widow, she fully represents the estate, though with limited powers, and may maintain suits concerning it. Such a suit continued in her own name after an adoption was held to have been maintained by the widow as guardian of the adopted son (*o*). For other purposes the adoption reacts as from the moment of the adoptive father's death.

The continuity of existence with the deceased does not affect rights and interests which were not his in his life or which are not a mere development of these (*p*). Thus where a new grant had been made, it was ruled that the absolute ownership of Government in the interval from the death of the Rajah until the act of State by which a transfer of territory was made to his widows and daughters was fatal to the claim of a defendant, in preference to the widow, as lineal heir to the Rajah, by right of adoption, though the adoption was valid (in all other respects) (*q*).

I. 1. A. 6.—Adoption is Irrevocable and Irrenounceable.

Adoption once really made is indefeasible (*r*). Accordingly the Sastris say:—"An adoption made with due ceremonies and followed by the chaul cannot be set aside" (*s*). "It is held that, if a lad be adopted into a family, even where it is not the custom to perform homam (sacrifice of adoption), he cannot be turned out of it at will" (*t*).

(*n*) *Bhubaneswari Debi* v. *Nilkomul Lahiri*, L. R. 12 I. A. 137.

(*o*) *Dhurm Das Pandey* v. *Musst. Shama Soondri Dibiah*, 3 M. I. A. 229; S. C. 6 C. W. R. P. C. 43; 2 Str. H L. 127.

(*p*) See below, sub-sec. B. 2. 6 (*b*).

(*q*) *Jijoyiamba Bayi* v. *Kamakshi Bai*, 3 M. H. C. R. 424.

(*r*) 2 Str. H. L. 142. See above, pp. 347, 838. "An adoption concluded agreeably to the Sastras is not annullable. It is not retractable among Brahmans after the Hom ceremony has been performed, nor among the lower castes." Steele, L. C., p. 184. *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee*, 11 Beng. L. R. 171, P. C.; S. C. L. R. I. A. Supp. 149.

(*s*) MS. 1752. "The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption." Col. Dig., Book V., T. 273 Comm.

"The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son (Mitaksh. on Inheritance, Chap. II., sec. X.), but he cannot forfeit the relation of son." Colebrooke in 2 Str. H. L. 126.

(*t*) 2 Str. H. L. 126.

When a widow sought to violate this rule the Court said—" Nor can we admit that the facts and the validity of the joint adoption (by two widows) being unquestionable, she is singly competent to set aside or annul in any degree an act which must be assumed to have been performed in obedience to the injunctions of her deceased husband " (*v*).

An adopted son cannot renounce his family of adoption and the consequent obligations to which he is subject. He can but resign his rights in that family (*w*). A Sastri declared that " an adoption cannot be annulled except on sufficient grounds (*i.e.* not by mere agreement) " (*x*), and the decisions rule that the status created by adoption cannot be given up by the adopted son (*y*) or dissolved by the parties immediately concerned.

Where a woman sought to disclaim an adoption made by her by a deed purporting to convey her property to her illegitimate son, this was pronounced illegal, though the upanayana of the adopted had been performed (after adoption) in his real father's house. " The adoption," Colebrooke said, " being once completely and validly made it cannot be recalled " (*z*).

In one case of an adoption of doubtful validity it was indeed ruled that—If after becoming of age an adopted son execute an agreement acknowledging the validity of his right to depend on his performance of certain conditions, his infraction of these will nullify his right (*a*). But the soundness of this judgment seems open to doubt (*b*). A man must belong to the one family or the other, it cannot rest on the mere option of another person (*c*).

I. 1. A. 7.—No Return to the Family of Birth.

This follows from the principles already laid down. According to the Sastri, " The son given in adoption cannot be reclaimed " (*d*).

(*v*) *Ry. Roop Koour* v. *Ry. Bishen Koour*, N. W. P. S. D. R. N. S., Pt. II. 1864, p. 655.

(*w*) Above, p. 838. Comp. pp. 324, 722. *Mahader Ganu* v. *Rayaji Sidu*, I. L. R. 19 Bom. 239.

(*x*) MS. 1741. See *Mohapattur* v. *Bonomallee*, Marsh, R. 317.

(*y*) *Ruvee Bhudr* v. *Roopshunkar*, 2 Borr. 713.

(*z*) 8 Str. H. L. 111.

(*a*) *Musst. Tara Munee Dibia* v. *Dev Narayan et al.*, 3 C. S. D. A. R. 387.

(*b*) See *Balkrishna Trimbak Tendulkar* v. *Savitribai*, I. L. R. 3 Bom. 54.

(*c*) See *In re Kahandas Narandas*, I. L. R. 5 Bom., at p. 164. Above, 187, and sec. VI. A. 6 of this Book.

(*d*) MS. 1748.

To a question put to the Sastris by the Court in another case they replied :—

"If any one about to adopt should receive from one not related to himself in the male line that person's son, and should perform his adoption according to the ceremonies of the Veda, and after that cause his regeneration by performance of the choora and oopanayana samskar, &c. (tonsure at three years of age; investiture with the string at five or eight years; and the remaining regenerating ceremonies) in the name of his own gotra, or paternal line, that son so invested with the lineage and estate of the adopter has no right to keep up connexion with the other lineage, that is, he cannot return to his own . . . " (*e*).

In Bengal as in Bombay the adopted son cannot return to his family of birth (*f*).

I. 1. A. 8.—The Connexion by Blood with the Family of Birth is not Extinguished.

Although there is a complete severance in religious and secular interests from the family of birth, the artificial status is not allowed to make marriage possible between an adopted son and his real mother or sister. It is only the religious and ceremonial connexion with the family of birth that is extinguished, and as the Datt. Mim. VI. 10 says, adoption does not remove the bar of consanguinity operating against intermarriage within the prohibited degrees (*g*).

I. 1. A. 9.—Terms and Conditions.

The incongruity of an adoption the operation or abiding validity of which is to be subject to a term or condition has already been noticed (*h*). In a case of this kind the Court said—

(*e*) *Ruvee Bhudr* v. *Roopshunkar*, 2 Borr. 656.

(*f*) *Sreemutty Rajcomaree Dossee* v. *Nobcoomar Mullick*, 2 Sevestre, 641 note.

(*g*) *Moottia Moodelli* v. *Uppon Venkatacharry*, M. S. D. A. R. for 1858, p 117; *Narasammal* v. *Balaramacharloo*, 1 M. H. C. R. 420. See above, p. 912.

(*h*) Above, p. 187, note (*b*). Under the Roman Law there could be no "adoptio ad diem" or "sub conditione," as mancipation by which it was originally effected was a solemn public act not susceptible of qualification. See Maynz, Cours. de Dr., Rom. sec. 412; Goudsm. Pand., p. 155; Maine, Anc. Law, p. 206 (3rd ed.).

"We . . . cannot find that the Hindu Law recognizes a conditional adoption, which appears to leave unsecured, and in jeopardy, the objects contemplated by the adopting, and to involve an element of injustice to the adopted party. . . . Insubordination to the widow of the deceased adopting father being an insufficient [reason] . . . we hold that he could not legally do so (*i*) and that the entry of such condition in the *wajib-ool-urz* (*k*) is worthless and ineffective. Nor do we admit that any value or efficacy would accrue to the entry, or that any validity would be given to the condition, even if the defendant, . . . when still very young, whether he were legally of age or not, authenticated the *wajib-ool-urz*, *pro forma* with the view of curing the ostensible defect of its having been authenticated by his father after his decease. It would be extremely inequitable to hold that he thereby deliberately intended to express his assent to the conditions . . . of which it is quite possible, and not at all unlikely, that he was ignorant. Even if he were aware of it, and ignorantly supposed himself to be bound by it, we are not prepared to admit that he is for that reason bound by it" (*l*).

In discussing under the preceding section (*m*) the legal possibility of making an adoption subject to terms differing from those annexed to it by the law, the effects of agreements and of adoptions thus made have been to some extent considered. It would seem that of the several cases which occur in practice, that of the adoptive father's stipulations for preserving the estate and securing his widow against destitution could not be refused effect by the Courts, so far at any rate as they bear on his separate or sole property. But if a man adopting for himself may do so on terms varying the usual rights of the son, it is but a slight extension of the principle when wills are once admitted to say that he may by a power or will allow his widow to impose such terms. And when a widow takes the whole estate without any will or direction to adopt, but with an assumed licence from her husband, it may be conceived that he, knowing an adoption was probable, but entirely at the option of the widow, has given her a tacit authority

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(*i*) *I.e.* prescribe such a condition.

(*k*) A petition, memorial.

(*l*) *Per Curiam* in *Ram Surun Das* v. *Musst. Pran Kooer*, N. W. P. S. D. R. Pt. I., 1865, p. 293. Comp. the remarks of the Judicial Committee above, sec. VI. A. 6

(*m*) Sec. VI. A. 6.

to make her own terms. This logical development of the principles involved in the allowance of a will seems to be contained in the following two cases.

Where a power of adoption had been given by will to a wife coupled with a direction that the widow should during her life retain the whole of the testator's property, ancestral as well as self-acquired, it was held that the widow, after adopting, had a life interest with remainder to the adopted son (*n*).

In *Ramasami Aiyan* v. *Venkataramaiyan* (*o*) where the natural father of a boy, whom the widow of a deceased Hindu proposed to adopt as a son to her husband, entered into a written agreement with her to the effect that the boy should inherit only a third of the property of his adoptive father, the Privy Council held that the agreement was not void, but was at least capable of ratification when the adopted son became of age. *Chitko* v. *Janaki* (*p*) was referred to doubtingly. The stipulation that the boy adopted as a son should obtain that status without the corresponding rights was one, no doubt, unwarranted by the Hindu Law of the Sastras, and was subject to challenge by the son until he had ratified it on becoming *sui juris*. The Pandits consulted in Bengal on this point had said that an instrument by which a widow adopting a son reserved the property to herself for life was not lawful. The adopted son, they said, in spite of such an instrument, was entitled to the estate (*q*). In a somewhat similar case in Bombay, an adoptive mother (Koli) made an agreement with her son, whereby he resigned to her the bulk of the family property. This was pronounced by the Sastri illegal, and the adopted son, if capable, was, he declared, still entitled to inherit, subject to the duty of maintaining the mother (*r*). But wills also are not allowed by the Sastras, and yet in one form or another they have grown up to meet social needs, even within the sphere of the Hindu Law. So too the customary law has approved reasonable arrangements for

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(*n*) *Bepin Behari Bundopadhya* v. *Brojo Nath Mookhopadhya*, I. L. R. 8 Cal. 357, following *Musst. Bhagbutti Daee* v. *Chowdry Bholanath Thakoor et al.*, L. R. 2 I. A. 256. The latter is not a case of adoption, but of a settlement by a man on his wife with the concurrence of his kritrima son, to whom was given a remainder on the wife's death.

(*o*) I. L. R. 2 Mad. 91.

(*p*) 11 Bom. H. C. R. 199.

(*q*) *Musst. Soolukhna* v. *Ram Doolal Pandeh*, 1 C. S. D. A. R. 324 (1st ed.). Above, p. 178 (*h*).

(*r*) MS. 15.

the adopting mother's security. It seems impossible now to say that this advance will not be maintained (*s*).

Cases such as that of *Ramguttee Acharjee* v. *Kristo Soonduree Debia*, referred to above at p. 981 note (*l*), must raise questions as to whether by the disposition the adopted son takes a vested estate forthwith on his adoption, although his enjoyment or actual possession be deferred, or whether his estate is wholly contingent or future. Such questions will probably be dealt with according to the analogies furnished by the English cases. A gift subject to a condition precedent could hardly be made under the Hindu Law (*t*), though one deferred, or by way of remainder, would not be inconsistent with it, the ascertained interest being created from the first. Such an estate, immediate in interest though deferred in enjoyment, must have been contemplated by the Court in the following remarks:—"Whatever directions an adoptive father may have given in regard to the time when the son was to get into the management and enjoyment of the estate, still he was the son and heir from the time of his adoption, and by his death apparently the mother would succeed him" (*v*). The Judicial Committee have held that a condition attached to the adoption is void, though the adoption is good (*w*). The law in Bombay and Madras, as already noticed, appears to be in favour of the validity of a condition attached to a valid adoption, if it is fair and reasonable and solely for the benefit of the adoptive widow.

(*s*) Any interest that a widow allows an adopted son to take in possession during her own life must so far be a detriment to her own estate, seeing that she is owner of the whole, and cannot, according to the Sastris, be deprived of this which they regard as a jointure by any testamentary disposition made by her husband. In the case of *Musst. Goolab* v. *Musst. Phool* (1 Borr. 173) the Zilla Judge proposed to the Sastris a question—Can a man separated in interest from his brother, and whose wife is alive, bequeath his property to his brother's son? The answer, resting on the Mitakshara, was—"The wife . . . has a right to inherit her husband's estate, and a will made by the husband . . . in favour of his brother's son is not valid" (pp. 175, 176). This was confirmed by the Pandit of the Sadr Court (p. 180). The theory of a power of bequest equal to the power of gift was not accepted by the law officers in these cases, and the widow was regarded as taking by a kind of survivorship, though no doubt with a restricted interest or faculty of disposal.

(*t*) See above, pp. 186 ss.

(*v*) *Per* L. Jackson, J., in *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*, 24 C. W. R. 183.

(*w*) *Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*, L. R. 26 I. A. 53.

I. 1. B.—Specific Effects.

B. 1.—As to the Relations Between the Adopted and his Family of Birth.

B. 1. 1.—Between the Natural Parents and the Son—Immediate Personal Relations.

(a) Parents the Active Subjects.

"When a father has given his son in adoption, his status and rights as father are extinguished" (x). Accordingly it was ruled that the adoptive parents have a right to the guardianship and society of the adopted son superior to that of the natural parents (y). The boy is often left for a longer or shorter time with his family of birth, but "though an infant after adoption be brought up by his natural parents, they must on demand surrender him to the widow who adopted him (z). "The natural father need not incur the expense of getting the boy married; it devolves properly on the adoptive mother. She cannot recover from his father the expenses of his adoption and investiture. She cannot restore the boy, nor can the father reclaim him on the ground of having got him married" (a).

"Tonsure performed in the family of the natural father, after gift, has no vitiating effect" (b).

(b).—Son the Active Subject.

"A boy severed by adoption from his own family and incorporated in the adoptive family is not affected in status by

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(x) MS. 1759. *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee*, 11 Beng. L. R. 171 P. C.

(y) *Lakshmibai* v. *Shridhar Vasudev Takle*, I. L. R. 3 Bom. 1.

(z) In the *Mankars' Case* the Sastris, in the opinion quoted above, p. 901, recognize a widow's direct interest in adoption for securing her own future happiness. See, too, p. 838.

(a) MS. 1754.

(b) *Musst. Doolubh Dai* v. *Manee Beebee*, 5 C. S. D. A. R. 50. "The adoption of a child . . . for whom tonsure and other ceremonies were afterwards performed under the family-name of his natural father, would be nevertheless valid : for the ceremony of tonsure performed under the family name of his natural father is void, because he did not then belong to that family; and because the ceremony is performed by one who had no right to do so, since he truly became son of the adopter, and certainly belonged to his family, not having already initiated under the family-name of his natural father when the adoption took place." Col. Dig., Book V., T. 273 Comm.

performing the funeral ceremonies of his natural father and mother" (*c*).

"An adoptee performs the ceremonies of Kreea and Puksh for his [natural] father and relations, only in case his natural father should die without any other son or near relation, when he would perform them as a Dharmaputra. An adopted performs Sutak (*d*) for his natural family according to their adoptive relationship" (*e*).

"Since it is not a fit practice for a son given to perform the obsequies of his former mother, it is proper to take for adoption a boy whose mother is living, and who is given both by her and by her husband" (*f*).

"In case of being adopted by his father's brother, the adoptee is enjoined to perform the Sraddha both for his natural and adoptive fathers, inheriting the property of the former, however, only in default of heirs in order of succession before brothers' sons" (*g*).

An adopted son is considered in the nature of a purchaser for valuable consideration, which is his loss of inheritance in his natural family (*h*).

I. 1. B. 1. 2.—Relations as to Property.

"An adopted son forfeits all right of inheritance in his natural family" (*i*). "He (the adopted son) cannot, after being adopted, claim the family and estate of his natural father, which follow the funeral oblations; nor is he liable to pay his natural father's debts" (*k*). "He (an adopted son) can only inherit from his

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(*c*) MS. 1673.

(*d*) Sutaka—Impurity; here ceremonies for its removal.

(*e*) Steele, L. C., p. 185

(*f*) Col. Dig., Book V., T. 275 Comm. The conception is that without a positive resignation the mother's claim to the son's religious services may continue.

(*g*) Steele, L. C., p. 47. He ranks as a brother's son. *Krishna* v. *Paramshri*, I. L. R. 25 Bom. 537.

(*h*) *Gopeymohun Deb* v. *Rajah Ray Kissen*, cited in *Doe Dem Hencower Bye* v. *Hanscower Bye*, East's Notes, Case 75; 2 Mor. Dig., p. 133. See above, sec. VI. A. 7.

(*i*) *Appaniengar* v. *Alemalu Ammal*, M. S. D. A. Dec. 1858, p. 5; *Chandra Kunwar* v. *Chaudhri Narpat Singh*, L. R. 34 I. A. 27; S. C. I. L. R. 29 All. 184.

(*k*) Steele, L. C., p. 47; Mit., Chap. I., sec. XI., para. 32; above, p. 347; Col. Dig., Book V., T. 181; Manu IX. 142. The term "funeral oblation"

natural father, in default of other heirs in previous order of succession . . . in virtue of his adoptive, not his original, relationship " (*l*). Even where the sacrificial idea is absent, " a Jain adopted by his uncle ceases to be heir as son to his natural father " (*m*). The Sastri added that " what he had acquired before adoption by using the capital of his natural father belonged to the latter " (*n*). The natural relation was in fact jurally annulled, and his father would no more inherit from him than he from his father (*o*). But in an emergency the Sastri says—" Should the natural parents have no other heir, the son they gave in adoption may perform their Sraddhas and take their property also " (*p*). Among the Gyawals in Gaya adoption does not deprive the adoptee of his rights in the family of his birth (*q*).

The Calcutta and the Madras High Courts have laid down that what had solely and absolutely vested in the adoptee remains unaffected by his adoption (*r*). This point is, however, unsettled, there being a difference of opinion thereon.

After adoption, the person adopted cannot mortgage property belonging to his natural family, nor can his widow do so after his death (*s*).

I. 1. B. 1. 3.—Relations as to Obligations.

The natural father is not responsible for the debt of a son given in adoption (*t*). Nor conversely is the son liable (*v*). Thus the Sastri says:—" A son given in adoption must pay his natural

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intends that which is made for a father. *Pranvullubh* v. *Deocristin*, Bom. Sel. Rep. 4; *Kasheepershad* v. *Bunseedhur*, 4 N. W. P. S. D. 343.

(*l*) Steele, L. C., p. 186.

(*m*) MS. 1757.

(*n*) MS. 1756.

(*o*) Colebrooke in 2 Str. H. L. 129. *Muthayya* v. *Ninakshi*, I. L. R. 25 Mad. 394.

(*p*) MS. 1761.

(*q*) *Luchman Lal* v. *Kanhya Lal*, L. R. 22 I. A. 51; S. C. I. L. R. 22 Cal. 609.

(*r*) *Venkata Narasimha Appa Row* v. *Rangayya Appa Row*, I. L. R. 29 Mad. 437.

(*s*) *Yesubai kom Daji* v. *Joti*, Bom. H. C. P. J. 1875, p. 16.

(*t*) 2 Str. H. L. 125; see *Udaram Sitaram* v. *Ranu*, 11 Bom. H. C. R. 76, 84, 86.

(*v*) *Pranvullubh* v. *Deocristin*, Bom. S. D. A. Sel. Rep. 4.

father's debts only if he has inherited property from the natural father" (*w*), and in the case of a suit it was ruled that an adopted son is not liable for debts of his natural father who died in jail in execution of a decree for debt against him (*x*).

I. 1. B. 1. 4.—Relations Between the Adopted and the Other Members of his Family by Birth—Immediate Personal Relations.

An adopted son is to be considered as one actually begotten by the adoptive father in all respects except an incapacity to contract a marriage in his family of birth (*y*).

"Adoption does not remove the bar of consanguinity operating against intermarriage within the prohibited degrees" (*z*).

"An adopted son is restricted from intermarrying with any girl of either his natural or adoptive families within the prohibited degrees, and his descendants are under a similar restriction with regard to the former family to the third generation, viz., so long as remembrance may continue of the adoption" (*a*). "He cannot intermarry with either his natural or adoptive gotr" (*b*).

A Sastri said in one case, that "adoption severs the connexion with the natural relatives so completely that the adopted son's widow may adopt his younger brother" (*c*). We have seen that there is some authority for this kind of adoption (*d*), but the better opinion appears to be that embodied in the ruling that an adopted son cannot adopt as his son his brother by birth (*e*).

I. 1. B. 1. 5.—Relations as to Property.

"A son (an only son) who, having been given in adoption has passed out of his family of birth, has no longer any claim to the

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(*w*) MS. 1758. See above, p. 347.

(*x*) *Pranvullubh Gokul* v. *Deokristen Tooljaram*, Bom. Sel. Rep., p. 4.

(*y*) *Narasammal* v. *Balaramcharlu*, 1 M. H. C. R. 420. The same case pronounces strongly against the adoption of a sister's son in the Andhra or Telingana country. *Kali Komul Mozoomdar* v. *Uma Shunker*, L. R. 10 I. A. 138.

(*z*) *Moottia Moodelli* v. *Uppon Vencatacharry*, M. S. D. A. Dec. 1858, p. 117.

(*a*) Steele, L. C., p. 47. Above, pp. 837, 838.

(*b*) Steele, L. C., p. 186.

(*c*) MS. 1625.

(*d*) Above, p. 911.

(*e*) *Moottia Moodelli* v. *Uppon Vencatacharry*, M. S. D. A. R. 1858, p. 117.

property of that family" (*f*), and reciprocally, a member of a Hindu family cannot as such inherit the property of one taken out of that family by adoption. His severance is so complete that no mutual rights as to succession to property can arise between him and his relations of the natural family (*g*). Hence it was said, that on an adopted son dying without issue, his property reverts to his adoptive family, his introduction into the new family causing his severance from his natural kindred, and they forfeiting all claims to succeed to his estate (*h*).

I. 1. B. 2.—Consequences as Creating Relations in the Family of Adoption.

B. 2. 1.—Between the Parents and Ascendants, and the Son and Descendants—Immediate Personal Relations.

(*a*) Parents the Active Subjects.

"An adoptive father is entitled to the custody of the person of the adopted son" (*i*). It follows that the proper residence of an adopted son is with his adoptive parents (*k*). The only exception is in case of cruelty or incapacity. Thus it was ruled that the adoptive parents, if willing, have a better right to act as guardians of their adopted sons than the natural parents, in the absence of proof of ill-treatment towards the boy or incompetency on their part to take care of him; the boy's residence with the adoptive family being part of the consideration for adoption (*l*).

An adopted son can claim maintenance from his father until put into possession of his share of the ancestral estate (*m*).

(*f*) MS. 1756.

(*g*) *Narasammal* v. *Balaramacharlu*, 1 M. H. C. R., p. 420; *Rayan Krishnamachariyar* v. *Kuppannayyangar*, 1 M. H. C. R., p. 180; *Srinivasa Ayyangar* v. *Kuppan Ayyangar*, 1 M. H. C. R., p. 180.

(*h*) *T. M. M. Narraina Numboodripad* v. *P. M. Trivicrama Numboodripad*, M. S. D. A. R. for 1855, p. 125.

(*i*) MS. 1677.

(*k*) *Lakshmibai* v. *Shridhar Vasudev Takle*, I. L. R. 3 Bom. 1.

(*l*) *Lakshmibai* v. *Shridhar Vassudev*, Bom. H. C. P. J. for 1878, p. 7; S. C. I. L. R. 3 Bom. 1; *Sheo Singh Rai* v. *Musst. Dakho et al.*, 6 N. W. P. R. 382.

(*m*) *Ayyavu Muppanar* v. *Niladatchi Ammal*, 1 M. H. C. R., p. 45.

" An adopted son's widow must be supported by her mother-in-law, who has got possession of the deceased's vatan " (*n*).

The chaul and munj of the adoptive son should be performed by the adopting widow (though but ten years old) (*o*).

The adoptive parents' authority, as we have seen (*p*), does not extend to giving away their son in adoption.

I. 1. B. 2. 1.—Immediate Personal Relations.

(*b*) Son the Active Subject.

" Adoption is . . . (1) to secure his (the adoptive father's) happiness in the future state by the adopted son's or his descendants' performance of funeral rites (kreea), mourning (sootak), and annual oblations of rice (sraddh sapindadan); and (2) to preserve the adopting parents' good name in the present world by the practice of alms-giving, feeding Brahmans, pilgrimages and other Hindu virtues " (*q*).

" The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons) " (*r*).

(*n*) MS. 1928. The widow of a predeceased adopted son has of course the same right to maintenance as if he had been a son by birth. (Above, p. 239 ss.; *Dilraj Koonwar* v. *Sooltan Koonwar*, N. W. P. S. D. A. R. for 1862, p. 240.)

(*o*) MS. 1648. See Steele, L. C. 187. Above, p. 891. The ceremonies ought to be completed on the widow's attaining maturity.

(*p*) Above, p. 926.

(*q*) Steele, L. C., p. 42. In *Ram Soonder Singh* v. *Surbanee Dasi*, 22 C. W. R. 121, Mitter, J., says the prescribed repetition of the Sraddhas implies a power of repeated adoption by the widow though a son should have attained maturity and passed through all the Samskaras. There does not seem to be any authority for this, but at any rate the duty would be that of the widow of the son should there be one. (See above, p. 87, and sub-sec. I. 1. A. 2 of the present section, p. 1012.)

(*r*) *Uma Sankar Moitro* v. *Kali Komul Mozumdar et al.*, I. L. R. 6 Cal. 261. According to Datt. Mim., VI., para. 50, the manes of the adoptive mother's ancestors benefit by the Sraddhas celebrated by the adopted son. " In the double set of oblations, it is indispensably necessary that the son should perform the Sraddha for the paternal line, not for the line of his maternal grandfather: but it is simply reprehensible in one who performs the Sraddha for the paternal ancestors, not to perform it also for the maternal grandfather and his progenitors. Consequently, since the Sraddha may be performed without

"Though the adoption be not annulled, yet should the adoptee not perform his filial duties, he separates from his adoptive father, receiving some share of the property" (*s*).

An adopted son succeeds to the adoptive father's property, subject to the right of maintaining the widow (*t*).

"There being a born son and an adopted son, they are jointly and severally responsible, according to their means, for the support of their parents" (*v*).

"A daughter-in-law adopts a son, and as his guardian manages the estate. The mother-in-law can claim maintenance from her" (*w*).

A widow of an adoptive father being refused maintenance by the adopted son sold part of the estate in her possession. The Sastri said the adopted son could recover it only on payment of the purchase money and interest (*x*).

I. 1. B. 2. 2.—Relations between the Parents and the Son with respect to Property.

(*a*) Between the Adoptive Father and Son.

An adopted son has all the rights of a son born (*y*).

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noticing the maternal grandfather's line in a subordinate double set of oblations, and the like, the Sraddha for the maternal ancestors is not requisite to the completion of the obsequies performed in the dark fortnight of Aswina." Col. Dig., Book V., T. 273 Comm.

(*s*) Steele, L. C., p. 185; above, p. 839. As to a second adoption on the refusal or incapacity of the first adopted to fulfil his duties, see above, pp. 549, 551, 838, 845.

(*t*) *Rungama* v. *Atchama*, 4 M. I. A., p. 1; S. C. 7 C. W. R. 57 P. C. See above, p. 241. "The adoptee is bound to provide the widow in necessaries." Steele, L. C., p. 188.

(*v*) MS. 1842.

(*w*) MS. 1831.

(*x*) MS. 16. See above, pp. 245, 605, 698; below, sub-sec. B. 2. 2 (*b*). Provision may be made for a widow's maintenance before rejecting her. (See above, p. 605.)

(*y*) Steele, L. C. 47; *Maharajah Juggurnath Sahaie* v. *Musst. Mukhun Kunwur*, 3 C. W. R. C. R. 24; *Teencowree Chatterjee* v. *Dinonath Banerjee*, 3 C. W. R. C. R. 49; *Ry. Kishenmunee* v. *Raj Oodwunt Singh*, 3 C. S. D. A. R. 228; *Srinivasa Ayyangar* v. *Kuppan Ayyangar*, 1 M. H. C. R. 180; *N. Chandvasekharudu* v. *N. Bramhanna*, 4 M. H. C. R. 270; *R. Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. R. A. C. J. 191; *Trimbuk Bajee* v. *Narain Venaik*, 3 Morris 19; *Rayan Krishnamachariyar* v. *Kuppannayyangar*, 1 M. H. C. R., p. 180; *Sree Narain Rai* v. *Bhya Jha*, 2 C. S. D. A. S. 27.

An interest vests in the adopted immediately on his adoption (*z*), though he be a minor, and he is entitled to the profits after his adoption (*a*), as also to immovable property purchased with money derived from ancestral estate, which property continued to exist at his adoption (*b*).

" A man who has adopted cannot alienate immovable property without good reason. With reason he may, especially what he has himself acquired " (*c*). The older cases agree with this opinion, as when the Judicial Committee ruled that by adoption a person divests himself of his right to dispose of immovable property without the consent of the son adopted (*d*). Adoption, however, it has been ruled, is not a valuable consideration proceeding from the boy adopted in such a sense as to bind the adoptive father against an alienation of his self-acquired property (*e*). The adopted stands in this respect on precisely the same footing as a son by birth (*f*). The case might have been dealt with on the ground that

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(*z*) *Sudanund Mohapattur* v. *Sorjo Monee Debee*, 8 C. W. R. 455; S. C. 11 C. W. R. 436; reversed, 20 C. W. R. 377, by the Judicial Committee on the ground that the validity of the will questioned by the adopted son had been adjudged in a previous suit by him.

(*a*) *Sreemutty Deeno Moyee Dossee* v. *Doorga Pershad Mitter*, 3 C. W. R. Misc. 6.

(*b*) *Sudanand* v. *Bonomalee*, 6 C. W. R. 256.

(*c*) MS. 1725.

(*d*) *Rungama* v. *Atchama*, 4 M. I. A. 1; S. C. 7 C. W. R. P. C. 57. See above, pp. 572, 205 ss.

(*e*) *Purshotam Shenvi* v. *Vasudev Shenvi*, 8 Bom. H. C. R. 196 O. C. J.

(*f*) The case of *Mohapattur* v. *Bonomallee* (see above, p. 666) was relied on, because as in it the first adopted son suing as heir did not dispute the father's disposal of his self-acquired property, it was thought apparently that it could not be disputed. But that was a Bengal case, and in Bengal the relations of father and son as to property are different from what they are in Bombay (see Dayabhaga, Chap. II., 8, 17, 18, 28—30; 2 Str. H. L., 437, 444; Mit., Chap. I., sec. I., para. 27; above, p. 618; 12 M. I. A., at p. 38, there referred to; 2 Str. H. L. 449). Under the Mitakshara the son has a joint interest in the immovable property acquired by the father. He must submit to his father's dealings with such property on account of his subordination and the father's freedom from control (self-government) as manager (see above, pp. 207, 601), but this subjection cannot last beyond the father's life. The father's right is one of joint ownership plus *svatantrata*, unshared control (see 2 Str. H. L. 443). On his death the son's right by survivorship makes him complete owner, and the father's will cannot operate against him, although it would be effectual against others, not co-owners, only successors. (See above, p. 551.) The right to sell is not identical with the right to give, nor is the right to give identical with the right to devise (see above, p. 214). This is manifest from what the

where no more was engaged for, the adoption gave to the adopted only the ordinary advantages of a son. Had a contract been made or property settled on the son, there seems to be no doubt that on the principle of the cases referred to in sec. VI. A. 6 and 7, his becoming an adopted son would be a consideration (*g*) such as would make the transaction binding.

The right of interdiction has been recognized by the Sastris as acquired by adoption as in the following instance—" An adopted son can claim from his father property that the father is making away with in order to deprive the son of it (*h*), as an alienation made in order to deprive a son or brother may be rescinded by the State."

A Joshi having an adopted son, 15½ years old, executed a deed of gift of part of his vatan to his daughter's children. This was endorsed with an assent by the natural father of the adopted son. Such signature was pronounced useless. But the adopted son was pronounced answerable to make good a gift of part only of the vatan (*i*).

" A gift of a house made by a Brahman to his mistress does not enable her to dispose of it to the detriment of his subsequently adopted son, though she may retain it for life if she behaves becomingly to her master " (*i.e.* apparently the son) (*k*).

" An adopted son may claim a division of ancestral property from his father, but not of his father's own acquisitions " (*l*).

Judicial Committee say in *Lakshman Dada Naik's Case* (I. L. R. 5 Bom., at pp. 61, 62); and though the law of wills follows the analogy of the law of gifts it need not go so far. It is plain that it does not; and the power of a father to devise his acquired lands away from his son cannot apparently be rested on the recognized authorities (see Vyav. May., Chap. IV., sec. I., paras. 4, 5; Colebrooke in 2 Str. H. L. 435, 436). In the cost of *Musst. Goolab and Phool* (above, sub-sec. A. 9), the Sastris and the Courts refused effect to a will which went to deprive widows of their right of inheritance, though undoubtedly the wives could not have interfered with their husband's dealings during his life. Ellis at 2 Str. H. L. 428 expresses a similar opinion. Colebrooke differed only because he thought the power followed from wills ranking as gifts. The right of a son is as co-owner, that of the wife altogether dependent (see *Narbadabai* v. *Mahadev Narayan*, I. L. R. 5 Bom. 99).

(*g*) *See Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*h*) MS. 1735.

(*i*) MS. 711. See above, p. 193.

(*k*) MS. 712. See above, pp. 697, 698. The donor could by an explicit grant give her a larger interest. See above, pp. 205, 279, and sec. VI. A. 6 of this book.

(*l*) MS. 1731. In answer to Q. 1704, it is said, he cannot claim a partition (nature of property not specified).

"An assignment of a village for maintenance to an adopted son cannot be revoked" (*m*).

An adopted son can sell his right, title, and interest in his share of undivided family property (*n*).

"An adopted son's son can claim a share of the grandfather's (former) property though his father be alive, unless the property having been mortgaged or alienated the father has recovered it" (*o*).

An adopted son becomes heir to the whole of the adoptive father's property, and is excluded from inheritance in his own family (*p*).

A son, adopted by a widow under her husband's authority, supersedes all other heirs (*q*).

A son, adopted by a widow of a predeceased son, succeeds to his grandfather's estate as well as to that of his own adoptive father, whether the adoption took place in the grandfather's lifetime or not (*r*). If the adoption was made with the consent of the grandfather, his subsequent disposition or the birth of a son to his daughter in wedlock will not invalidate the adoption (*s*).

(*m*) MS. 790. This was probably understood as a case of partition. See above, pp. 648, 839.

(*n*) *Rutoo bin Bapooji* v. *Pandoorangacharya*, Bom. H. C. P. J. 1873, p. 176. The son was tenant of the whole property, and his interest was sold in execution. The purchaser was pronounced liable to the adoptive father for a moiety of the rent, he having been put into possession of the whole. See above, p. 615.

(*o*) MS. 1736. See above, p. 665.

(*p*) *Bhasker Buchajee* v. *Narro Ragoonath*, Bom. Sel. Rep., p. 25; *Duttnaraen Singh* v. *Ajeet Singh et al.*, 1 C. S. D. A. R., p. 20; *Gopeymohun Deb* v. *Raja Ray Kissen*, see East's Notes, Case 75; *Ranee Bhuwanee Dibeh* v. *Ranee Sooruj Munee*, 1 C. S. D. A. R., p. 135; *Srinath Serma* v. *Radhakaunt*, 1 C. S. D. A. R., p. 15; *Appaniengar* v. *Alemaloo Ammal*, M. S. D. A. R. for 1858, p. 5; *Raje Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. R. A. C. J., p. 191.

(*q*) *Veerapermal Pillay* v. *Narain Pillay*, 1 Str. 91; *Nundkomar Rai* v. *Rajindernaraen*, 1 C. S. D. A. R., p. 261. "Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator as if he had existed at the time of the testator's death, having been actually begotten by him." Willes, J., in the *Tagore Case*, L. R. Supp. I. A., at p. 67. See above, p. 879.

(*r*) *Gourbullab* v. *Juggernotpersaud Mitter*, Macn. Con. H. L. 217.

(*s*) *Ramkishen Surkheyl* v. *Musst. Sri Mutee Dibea et al.*, 3 C. S. D. A. R. 367. The assent of the grandfather was necessary on the principles stated in sec. III. B. 3. 33.

An adopted son takes by inheritance and not by devise (*t*) in the case of his adoption by a widow under an instrument providing for the boy only as an adopted son and successor.

An adopted son, though separated from his adoptive father, succeeds to the residue of the latter's estate, undisposed of by him by gift or will, in preference to the widow, in case he dies leaving no unseparated son surviving him (*v*).

On an adopted son's dying without issue his adoptive father's property goes, it was said, to his natural heirs (*w*). This would depend on whether the son died before or after the father.

In a suit by an adopted son to set aside a will, the will was held of no effect as a valid devise of property. At the father's death the right of survivorship was in conflict with the right by devise. Then the former, being the prior title, took precedence (*x*).

As an adopted son has no more rights than a natural son would have, so the adopter is at liberty to dispose by will of immovable property acquired by him, to any one he pleases (*y*).

If an elder adopted son takes the whole of the ancestral property, which the father could not dispose of without his consent, he must give up for the benefit of the second adopted son the whole property included in the devise, to the disposition of which his consent was not necessary (*z*).

A Hindu cannot disinherit a duly adopted son, even for bad character, nor can he adopt another (*a*). It is only in an extreme

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(*t*) *Musst. Bhoobum Moyee Debia* v. *Ram Kishore Acharj Chowdhry et al.*, 10 M. I. A., p. 279, 309; S. C. 3 C. W. R. P. C. 15; Beng. S. D. A. R. for 1856, p. 122. See above, sec. VI. A. 6.

(*v*) *Balkrishna Trimback* v. *Savitribai*, I. L. R. 3 Bom. 54. See above, p. 342.

(*w*) *Sabrahmaniya Mudali* v. *Parvati Ammal*, M. S. D. A. R. for 1859, p. 265.

(*x*) *Vitla Butten* v. *Yamenamma*, 8 M. H. C. R. 6.

(*y*) *Purushotam* v. *Vasudev*, 8 Bom. H. C. R. 196 O. C. J. See above, pp. 205 ss., 595, 706. *Rao Balwunt Singh* v. *Rani Kishori*, L. R. 25 I. A. 54; *Raja Venkata Surya Mahipati* v. *Court of Wards*, L. R. 26 I. A. 83.

(*z*) *Rungama* v. *Atchama*, 4 M. I. A. 1; S. C. 7 C. W. R. P. C. 57. The right of the second adopted son rested wholly on the devise, his adoption being invalid.

(*a*) *Daee* v. *Motee*, 1 Borr. 84. "It is declared that, if culpable, even a son of the body does not take the heritage, hence vicious sons, whether begotten in lawful wedlock or the like, or adopted as sons given and the rest, are excluded from participation; sons so adopted, being void of good qualities, shall have a maintenance: but such sons, being virtuous, shall take the inheritance of a father, or of his kinsman," Col. Dig., Book V., T. 278 Comm. See above,

case of violation of duty that a son's rights are lost, or that a father can disinherit an adopted son. Both stand on the same footing (*b*).

Renunciation by an adopted son of his right in his adoptive father's property, though permissible, does not free him from adoption. If he resigns the right, the adoptive mother succeeds to the separate property of her husband (*c*).

An adopted son may for money relinquish his share in the adoptive father's family. This puts him into the position of a separated son. It does not disinherit him. If he be disinherited for adequate cause his son takes his place as heir (*d*).

On the death of an adopted son before that of the father his joint proprietary right, like that of the son by birth, is of course absorbed in that of the father (*e*), and his widow, should he leave one, is entitled to maintenance in the family of adoption (*f*).

I. 1. B. 2. 2. (*b*).—Between the Adoptive Mother and Son.

"As soon as a son is adopted by a widow, he succeeds to her husband's estate. Her independent rights and those of her mother-in-law forthwith cease" (*g*).

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pp. 539, 549, 551. A person cannot disinherit his son by will, *Gopeymohun Deb* v. *R. Raykissen*, East's Notes, Case 75; *Pranvullubh Gokul* v. *Deocristen Tooljaram*, Bom. Sel. Rep. 4.

(*b*) *Sadanund Mohaputtee* v. *Bonomallee*, C. S. D. A. R. 1863, p. 205. See above, p. 1011. In Khandesh, it was stated in answer to Steele's inquiries, that exclusion from caste does not cause a forfeiture of property or of the right of inheritance. Steele, L. C. 152. See above, p. 816. But the holder of any religious office peculiar to Hindus naturally forfeits it by change of religion. *Ibid.* Answer from Satara.

(*c*) *Ruvee Bhudr* v. *Roopshunker*, 2 Borr. 656; *Mahader Ganu* v. *Rayaji Sidu*, I. L. R. 19 Bom. 239. On his resigning, the right descends to the next in succession. This might be his son, who would take in preference to the mother.

(*d*) *Balkrishna* v. *Sabitribai*, I. L. R. 3 Bom. 54. See above, p. 354.

(*e*) *Udaram Sitaram* v. *Ranu Panduji*, 11 Bom. H. C. R. 76, 86.

(*f*) 2 Str. H. L. 235. See above, pp. 256 ss., 694.

(*g*) MS. 1716. See Steele, L. C. 48, 49. "Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper stridhana, it ceased to be hers at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property coming into the hands of a pregnant widow by the same means cannot be used by her as her own after the birth of a son. An adopted child is in most respects precisely similar to a posthumous

"The possession of authority to adopt a son by a widow in Bengal does not destroy or supersede her personal rights as widow, which continue until the adoption is actually made. . . . The property is in the widow from the death of the husband until the power of adoption is exercised. . . . It is only an alienation by the widow improper as against the subsequent heirs generally, that the adopted son can get rescinded" (*h*). The authorization in fact is as if non-existent until it is acted on by the widow (*i*).

An adopted son becomes son of both father and mother, and performs funeral rites to both (*k*). He is heir to the adoptive father, and, in the absence of a daughter, to the mother's stridhana (*l*). "In the lower castes a partition sometimes occurs, but the adoptee is heir to his adoptive mother, and generally manager during her life" (*m*).

Adoption by a widow in Bengal, under her husband's permission, deprives her of her widow's estate (*n*), and entitles her to maintenance (*o*). The same is the result even when the adoption is valid without the husband's permission, as amongst the Agarvali Jains (*p*). It follows from this that a Hindu widow, after adopting a son, cannot mortgage the family property as her own, nor can such a transaction be validated by the son's ratification (*q*).

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son. From the moment of the adoption taking effect, the child became heir of the widow's husband; and the widow could have no other authority but that of mother and guardian." Colebrooke in 2 Str. H. L. 127.

(*h*) *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. 178, 180, 185, 206.

(*i*) *Uma Sunduri Dabee* v. *Sourobinee Dabee*, I. L. R. 7 Cal. 288. See above, p. 813.

(*k*) *Teencowree Chatterjee* v. *Dinonath Banerjee*, 3 C. W. R. 49. "An adopted son," the judgment says, "has all the rights and privileges of a son born." Datt. Mim., sec. I., para. 22. "Women have legally no right to adopt for the transmission even of their separate property but . . . such a custom may obtain in the caste." Ellis in 2 Str. H. L. 128.

(*l*) Above, p. 480. *Tincowri* v. *Denonath*, 3 W. R. 49; *Pudma Coomari Debi* v. *Court of Wards*, L. R. 8 I. A. 229.

(*m*) Steele, L. C., p. 186.

(*n*) *Nundkomar Rai* v. *Rajindurnarqen*, 1 C. S. D. A. R. 261; *Musst. Solukhna* v. *Ramdolal Pande et al.*, 1 C. S. D. A. R. 324; *Durma Samoodhany Ummal* v. *Coomara Venkatachella Reddyar*, M. S. D. A. R. for 1852, p. 111; *Radhabai* v. *Damodar Krishnarav*, Bom. H. C. P. J. for 1878, p. 9; *Mondakini* v. *Adinath*, I. L. R. 18 Cal. 69.

(*o*) *Musst. Rutna Dobain* v. *Purladh Dobey*, 7 C. W. R. 450.

(*p*) *Sheo Singh Rai* v. *Musst. Dakho*, L. R. 5 I. A. 87.

(*q*) *Siddheshvar* v. *Ramchandrarao*, I. L. R. 6 Bom. 463.

An adoption works retrospectively and relates back to the death of the husband of the adoptive mother. It invalidates a gift or sale, unless it was effected under inevitable necessity, and entitles the adopted son to succeed to his estate as the same stood at the death of his adoptive father (r). In *Rajah Vyankatrao's Case* the adoption was made by the widow about seventy years after her husband's death (s). It follows from the widow's limited power that, as the Judicial Committee said, the rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes (and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption) (t). In the case, however, of an adopted son succeeding collaterally, his right, it is said, vests only from the adoption. At least he cannot retrospectively take away what passed to another collateral through his own non-existence, when the succession opened (v).

An adopted son, moreover, though he is competent to question his mother's acts during his minority or before his adoption, cannot question a sale effected by her with consent of all the legal heirs then existing and ratified by the Civil Courts (w).

A woman's religious gift of a house as her own which belonged to the family estate was pronounced invalid as against the adopted son. "There is no merit in a Krishnarpana made without the consent of the son" (x).

First there was permission given to adopt, then a sale by a Court of the property, then after twelve years there was actual adoption

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(r) *Rajah Vyankatrav* v. *Jayavantrav*, 4 Bom. H. C. R. A. C. J. 191; *Nathaji* v. *Hari*, 8 Bom. H. C. R. A. C. J. 67; *Ranee Kishenmunee* v. *Rajah Oodwunt Singh*, 3 C. S. D. A. R. 228; *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. 169.

(s) See above, sec. III. B. 3. 23; 3. 34.

(t) *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. 443.

(v) *Bamundoss Mookerjea* v. *Musst. Tarinee Dibia*, Beng. S. D. A. R. for 1850, p. 533; S. C. 7 M. I. A. 169; *Musst. Bhoobun Moyee Debia* v. *Ramkishore Acharj*, 10 M. I. A. 279; S. C. 3 C. W. R. 15 P. C.; Beng. S. D. A. R. for 1856, p 122; *Bhubaneswari Debi* v. *Nilkomul Lahiri*, L. R. 12 I. A. 137. On this subject see above, sec. III. B. 3. 23; 3. 25; 3. 34; 3. 35; and below, B. 2. 5.

(w) *Rajkristo Roy* v. *Kishoree Mohun Mojoomdar*, 3 C. W. R. 14; *Pilu* v. *Babaji*, 34 Bom. 165; *Vinayak* v. *Govind*, I. L. R. 25 Bom. 129; *Bijrangi Singh* v. *Manokranika Bakhsh*, I. L. R. 30 All. 1. See above, p. 349.

(x) MS. 714. For Krishnarpana, see pp. 91, 449.

under the permission. It was held, that what was sold was not merely the widow's interest, as the proceeds of the sale were applied to debts for which the property was liable. The purchaser was held not subject to eviction by the adopted son, after the death of the widow, who had enjoyed a life estate under the deed of permission to adopt (*y*).

"Under pressure of absolute necessity only an adoptive mother, living apart from her son, may sell the immovable family estate" (*z*).

A Sudra widow after adopting a son bought a field in her own name. It was held that she could give this to her daughter against the wish of her daughter-in-law, though she could not alienate the common property (*a*). As regards the patrimony the case would be different; the adopted son transmits to his widow a succession which excludes his mother (*b*).

In the event of successive adoptions the relations of the parties are determined by the following decisions. In the first it was said—

"The first adopted son became his father's heir. On the death of that son the widow became the heir, not of her late husband, but of the adopted son" (*c*).

Through adoption a widow, it was said, divests her own estate only, and by succeeding to her son as heir, she does not lose the right to exercise the power of adoption (*d*). The correctness of this depends on the principles considered in Sec. III. (*e*). She would, it seems, lose the right by the adopted son's leaving a widow (*f*). In other cases of adoption by a mother it has been said that a widow who has succeeded to her son, and who after-

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(*y*) *Rajah Debendro Narain Roy* v. *Coomar Chundernath Roy*, 20 C. W. R. 30 C. R. (P. C.). It may be questioned whether, on strict principle, the permission could thus cut down the adopted son's interest. See above, sec. VI. A. 6. As to the widow's authority, see pp. 87, 349.

(*z*) MS. 14. This implies that the son is inaccessible, or else when applied to refuses sustenance. See above, pp. 605, 698. But the right is questionable in any case. She should sue the son. See pp. 238 ss., 605.

(*a*) MS. 1577. See above, pp. 298, 299, 475.

(*b*) *Vencata Soobamal* v. *Vencumal*, 1 Mad. S. D. A. R. 210.

(*c*) Privy Council in *Ramasawmy Aiyan* v. *Venkataramaiyan*, L. R. 6 I. A., p. 208.

(*d*) *Bykant Monee Roy* v. *Kisto Soonderee Roy*, 7 C. W. R. 392.

(*e*) Sub-secs. B. 3. 23; 3. 25; 3. 35.

(*f*) See *Musst. Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*, 10 M. I. A., at p. 310. Above, pp. 789, 1013.

wards adopts a son, thereby divests herself of the estate (*g*). Regarded as an unseparated brother of the deceased the adopted son would take precedence of the mother. As a separated brother he would not; but in adopting a son the widow must perhaps be considered as replacing the one deceased with all his rights. The transaction is so anomalous (*h*) that any determination of these must be in a great measure arbitrary. In similar circumstances the Judicial Committee hesitated to give a final decision, saying only "whether by the act of adopting another son, she in point of law divested herself of that estate in favour of the second son, may be a question of some nicety, on which their Lordships give no opinion" (*i*). In *Kannepalli Suryanarayan* v. *Pucha Venkata* (*k*) it has been held that a widow on the death of the first adopted son can validly adopt a second son if the power given to her to adopt was without any specific limitation. It follows that the rights and the duties of such a son must be those of an adopted son. The case of *Venkappa* v. *Jivaji Krishna* (*l*) is an authority for the proposition that a second son after the death of the first adopted son may be adopted.

A second adoption does not nullify an intermediate alienation by a widow after the death of the first adopted son (*m*).

A son adopted by the widow of a Hindu is legal representative of the deceased, and can maintain a suit under Act XIII. of 1855 for the benefit of persons entitled to compensation under the Act; but he is not entitled to any portion of the compensation awarded. Whether he would have been if adopted by the deceased himself is a question (*n*).

A widow cannot sue as representative of her husband so long as

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(*g*) *Vellanki V. Krishna* v. *Venkata Rama Lakshmi*, I. L. R. 1 Mad. 174; *Jamnabai* v. *Raychand*, I. L. R. 7 Bom. 225.

(*h*) See above, p. 904.

(*i*) *Ramasawmy Aiyan* v. *Vencataramaiyan*, L. R. 6 I. A., at p. 208.

(*k*) L. R. 33 I. A. 145; *Lakshmibai* v. *Rajaji*, I. L. R. 22 Bom. 996.

(*l*) I. L. R. 25 Bom. 306.

(*m*) *Gobindo Nath Roy* v. *Ram Kanay*, 24 C. W. R. 183.

The widow succeeded the first adopted son, who seems to have died in childhood. Her power of alienation would then be governed by the estate she took. See above, pp. 102, 314, 349, 422, 424. She would not be allowed to make a second adoption a means of fraud. See above, p. 348 ss. Supposing the deceased son had sold or incumbered without reason, the anomaly of a second adoption acting retrospectively would be very manifest.

(*n*) *Vinayak Raghunath* v. *G. I. P. R. Co.*, 7 Bom. H. C. R. O. C. J. 113.

her adopted son is alive (*o*), nor can she prefer an appeal. A mere disclaimer by sons, and therefore by an adopted son, in the absence of proof of the widow's being herself the next reversioner after the sons (*p*) will not enable her to sue as owner. There must be a distinct assignment.

Where, pending a suit for partition by a widow in an undivided family, she adopts, though the suit is prosecuted in her own name, she is considered as guardian and trustee and accountable to her son for the profits of the property decreed (*q*).

An adoptive son like a real son will not, where there are dissensions, and a probability of waste, be allowed to take the estate out of his adoptive mother's hands without providing for her maintenance (*r*). Nor can he, by selling the family dwelling, deprive her of her right to residence (*s*).

As to the property more especially regarded as stridhana the relations are thus stated:—

The adoptive mother "retains, during life, the right over her own property, but the adoptee is heir to his adoptive mother" (*t*). "A son adopted by a widow," the Sastri said, even "without her deceased husband's permission, inherits her property" (*v*).

The son adopted by a daughter-in-law after an adoption by her father-in-law succeeds to her and her husband's property (*w*). The property taken in inheritance by a daughter is stridhana according to the Mitakshara (*x*). Hence an adopted son succeeds

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(*o*) *Ram Kannye Gossamee* v. *Meernomoyee Dossee*, 2 C. W. R. 49; *Jannobee* v. *Dwarkanath*, 7 C. W. R. 455; *Narsava* alias *Gangava* v. *Ramangavda*, A. D. 1868.

The widow must proceed in the adopted son's name after obtaining a certificate of administration under Act XX. of 1864 unless the property is of a trivial value, falling under sec. 2 of the Act.

(*p*) *Ram Kannye Gossamee* v. *Meernomoyee Dossee*, 2 C. W. R. 49; *Jannobee* v. *Dwarkanath*, 7 C. W. R. 455.

(*q*) *Dhurm Das* v. *Musst. Shama Soondri*, 3 M. I. A. 229; S. C. 6 C. W. R. P. C. 43. In Bombay she could not claim a partition. See above, p. 627.

(*r*) *Jamnabai* v. *Raychand*, I. L. R. 7 Bom. 225. See above, pp. 256, 605, and as to the circumstances justifying a demand on the mother's part for a separate assignment of property, *Venkatammal* v. *Andyappa*, I. L. R. 6 Mad. 130.

(*s*) See above, pp. 674, 675, 751.

(*t*) Steele, L. C., p. 188.

(*v*) MS. 1710. This is not true in the Bombay Presidency, if without permission means contrary to his wish; see above, pp. 970 ss.; 2 Str. H. L. 91.

(*w*) MS. 1666. See above, pp. 353, 845.

(*x*) Above, pp. 138, 139, 319.

to the property which his adoptive mother inherited from her father (*y*), but not as first heir. An adopted son succeeds to his mother's stridhana in the absence of daughters (*z*).

As to the reciprocal succession to the son the decisions are:—A widow succeeds to her adopted son as to her son by birth (*a*), and takes a life-interest upon the death of the adopted son under age (*b*).

I. 1. B. 2. 2. (*c*).—Relations Between Adoptive Step-Mother and Son.

"The adopted son succeeds to all his step-mothers" (*c*).

Where a widow had adopted a son under authority of her husband, on the death of the widow and the boy, the other co-widow was allowed to succeed to a moiety of the estate in her own right, not in that of a son adopted by her with due authority from her husband (*d*). This decision is questioned, and it is obvious the widow had no right except to maintenance. The boy adopted by her, if validly adopted, was entitled to the whole estate (*e*).

On the death of one, adopted as son of one of two co-widows, the property does not descend to the other widow, but, it was said, to the next legal heir who was nephew of the original

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(*y*) *Sham Kuar* v. *Gaya Din*, I. L. R. 1 All. 255. See, too, Col. Dig., Book V., TT. 273—275, Comm.

(*z*) *Teencowree Chatterjee* v. *Dinonath Banerjee*, 3 C. W. R., p. 49. See above, pp. 140, 308.

(*a*) 2 Str. H. L. 129.

(*b*) *Soondur Koomaree* v. *G. Pershad Tewarree*, 7 M. I. A. 54; S. C. 4 C. W. R. P. C. 116. See above, pp. 102, 422.

(*c*) MS. 1658. See above, p. 489. "If a son be adopted by a man married to two wives, he would have two maternal grandfathers, and would claim as maternal ancestry both their lines of forefathers. This seeming difficulty is thus reconciled : although there be two sets of maternal ancestors, they should be jointly considered as manes of ancestors, and they should be thus named in performing the Sraddha, 'Such a one, maternal grandfather, sprung from such a primitive stock ! to thee (to each of you) this funeral cake is offered,' and so forth, as is done by the son of the wife considered as a son of two fathers. Thus some reconcile the difficulty." Col. Dig., Book V., T. 273, Comm.

(*d*) *Narainee Dibeh* v. *Hirkishor Rai*, 1 C. S. D. A. R. 39.

(*e*) *Mondakini* v. *Adinath*, I. L. R. 18 Cal. 69; *Bai Motivahu* v. *Bai Mamubai*, L. R. 24 I. A. 93.

proprietor or adoptive father (*f*). The succession being to the son, his step-mother's position would be determined by the rules given above, pp. 102, 441 ss.

A son adopted by one wife may succeed to the stridhana of another co-wife (*g*) in Bengal. In another case in that province the reciprocal right was denied. According to the Mitakshara, it was said, a step-mother cannot succeed to the estate of her step-son, or a step-grandmother to the estate of her step-grandson (*h*). According to the principles admitted in *Lullobhoy* v. *Cassibai* (*i*), the step-mother ought to come next in succession to the father's mother, and the analogy of the law of partition is in her favour (above, pp. 605, 606, 627).

The importance of the right to adopt as between two or more widows becomes evident when it is borne in mind that the one taking the place of mother succeeds first to her son on his death without a child or widow (*k*). The step-mother is comparatively a remote successor. H. H. Wilson (*l*) discusses in rather caustic terms a Bengal case of a contest amongst three widows (*m*). The youngest as mother of a posthumous son, who died, was entitled as his or as her husband's heir. The husband, however, had left directions for an adoption by his eldest or his youngest widow with the assent of the middle one. No concurrence proving possible, the master was ordered to report on a fit boy. He reported in favour of one named by the second widow, and son of her father's brother. This relation led the Court to order his adoption, not by the second widow but by the eldest. Thus the widow who had resisted his adoption became his mother and heir, while the one who had proposed him and the one in whom the estate had vested were reduced to the position of step-mothers. The property having been mostly ancestral, the learned author contends that the father could not by his will make a valid disposition which would affect the complete title of his posthumous son, and the estate taken by that son's mother as his heir (*mm*). This, while it goes further,

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(*f*) *Kasheeshuree Debia* v. *Greesh Chunder*, C. W. R. Sp. No. 71.

(*g*) *Teencowree Chatterjee* v. *Dinonath Banerjee*, 3 C. W. R., p. 49.

(*h*) *Lala Joti Lal* v. *Musst. Durani Kower*, B. L. R. F. B. 67. See above, p. 443.

(*i*) L. R. 7 I. A. 212.

(*k*) *Annapurni* v. *Forbes*, L. R. 26 I. A. 246

(*l*) Works, vol. V., p. 58 ss.

(*m*) Sir F. Macn. Cons. on H. L. 168.

(*mm*) H. H. Wilson, Works, pp. 61, 62.

agrees in principle with the decisions of the Judicial Committee (*n*) against the capacity of a mother-in-law to adopt under a power so as to divest her daughter-in-law of the estate taken by the latter in succession to her husband.

I. 1. B. 2. 2. (*d*).—Relations between Adopted Son and Grandparents.

In *Siddappa* v. *Ningangavda* (*o*) it was held that the widow of a predeceased son was competent to make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner had vested as heir.

I. 1. B. 2. 3.—Relations with Respect to Obligations.

(*a*) Between the Father (and Grandfather) and the Son as to Debts and Claims.

" An adopted son like another is responsible independently of assets received for the debt of the grandfather by adoption though not incurred for the family " (*p*). Jagannatha agrees with the Sastri. The adopted son's liability for his father's debts, he says, like that of the son by birth, arises at the father's death, and is independent of assets (*q*). A previous partition even only throws the burden first upon those sons who remained in union with the father.

An adopted son is liable for his father's debts to the extent of the inheritance received by him, and if he waives or does not obtain the inheritance, his self-acquisition is not liable for the debts (*r*).

A son adopted in pursuance of an *unoomoti puttro*, some time after the death of his adoptive father, does not require, and is not entitled to obtain, a certificate under Act XXVII. of 1860, to

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(*n*) *Bhoobun Moyee's Case*, 10 M. I. A. 278; *Pudma Coomari Debi* v. *The Court of Wards*, L. R 8 I. A. 229, 245; *Venkappa* v. *Jivaji Krishna*, I. L. R. 25 Bom. 306.

(*o*) I. L. R. 38 Bom. 724; *Payapa* v. *Appamma*, I. L. R. 23 Bom. 327.

(*p*) MS. 979. See above, pp. 75, 160.

(*q*) See Col. Dig., Book I., TT. 167—170, Comm.

(*r*) *Jummal Ali* v. *Tirbhee Lall Doss*, 12 C. W. R. 41. The adoption was that of a brother, but it was not a point in issue.

enable him to collect debts in respect of the properties left by his adoptive father, which accrued due while they were under the management of his adoptive mother. The estate of the adoptive father, if the adoption is a good one, vests immediately on the adoption in the adopted son, and debts to it, if they accrued due after the death of the adoptive father, are debts recoverable by the adopted son in his own right, and not as representative of his adoptive father (*s*).

I. 1. B. 2. 3. (*b*).—BETWEEN THE ADOPTIVE MOTHER AND SON.

A mortgage [before adoption] by a widow to pay off her husband's debts was upheld as against a boy subsequently adopted (*t*). On a similar ground of benefit received by the son, a bond executed by a widow in possession was held binding on the adopted son of the last zamindar, the bond having been given for debts which the adopted son as zamindar had by his acts admitted his liability to pay (*v*).

The widow's authority as manager makes the son liable for necessary debts. " A son adopted by a widow is responsible for a debt incurred by her for the family during his minority " (*w*). But he has once or twice been thought answerable merely as son for his mother. Thus an adopted son was pronounced liable for the mother's debt incurred for purposes not ascertained, he having taken her property, and as generally answerable apart from that for parents' debts (*x*).

In one case the High Court of Bengal seems to have thought that a second adopted son was liable in his estate for all debts, without distinction, incurred by the mother between the death of the first and the adoption of the second son (*y*). For this the case of *Bhoobun Moyee Debia* (*z*) is referred to, but it does not

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(*s*) *Narain Mal* v. *Kooer Narain Mytee*, I. L. R. 5 Cal. 251.

(*t*) *Satra Khumaji* v. *Tatia Hanmantrav*, Bom. H. C. P. J. 1878, p. 121.

(*v*) *Chetty Colum Coomara Vencatachella* v. *Rajah Rungasawmy Jyengar*, 4 C. W. R. P. C. 71. The Judicial Committee say—" Unless those moneys so advanced to the widow personally were advanced to pay subsisting charges on the estate or otherwise, for its advantage, they, of course, could constitute no charge on the zemindary."

(*w*) MS. 1678.

(*x*) MS. 943. See above, pp. 164, 165.

(*y*) *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*, 24 C. W. R. 183.

(*z*) 10 M. I. A. 279.

seem to deal with any such point. It views with some doubt the possibility of an adoption where a previous son had reached an age to fulfil the ceremonial duties (*a*), but nothing as to the liabilities arising should a second adoption be admitted (*b*).

It was said to be a nice question: What is the effect of admission of the adopter as binding on a subsequently adopted person (*c*)? It would seem that such admissions made by a widow would be subject to objection if prejudicial to the adopted son or the estate (*d*).

During the minority of a boy, adopted by a widow, she squandered her husband's property, contracted debts, and refused to render accounts to her son. It was held that as the son was liable to pay the *bonâ fide* debts of the mother, she was liable to account to him for her management, or to pay the damages claimed (*e*).

An adopted son's estate is not liable for personal debts of the adoptive mother (*f*), but a sale of part by the adoptive mother, a widow, to recoup co-sharers' payments of Government land revenue, was upheld as a lawful exercise of discretion by a guardian.

The adoptive mother is the legal representative of her son, and entitled to a certificate under Act XXVII. of 1860 (*g*).

I. 1. B. 2. 4.—Relations between Son by Adoption and Children by Birth.

(*a*) Immediate Personal Relations.

The adopted son gives place to a son by birth, should there be one in the performance of the kriya and the sraddhas. The

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(*a*) See above, sec. III. B. 3. 25.

(*b*) It is an additional argument against an adoption by a mother after the death of an adult son, that the hazard to which creditors would be exposed would greatly impede her good management of the estate.

(*c*) *Brojendro Coomar Roy* v. *The Chairman of the Dacca Municipality*, 20 C. W. R. 223.

(*d*) The adopted son takes by a right paramount to that of the widow and will be bound by her acts and admissions only so far as these can be ascribed to her as manager or agent. See above, p. 349.

(*e*) *Nurhur Shamrao* v. *Yeshodabaee*, Bellasis, Rep. 65.

(*f*) *Roopmonjooree* v. *Ramlall Sirkar*, 1 C. W. R., p. 145.

(*g*) *Sreemutty Deeno Moyee Dossee* v. *Doorga Pershad Mitter*, 3 C. W. R. Misc. 6.

adopted son takes a minor part in some celebrations which it is needless to give in detail (*h*).

As the adopted son becomes a member of the adoptive family, the restrictions on marriage between him and female members of the family may be deemed the same as if he had been born into the place he occupies. This at least is so to three degrees from the stem, so that a woman may not be married to her first cousin by adoption (*i*). Whether the prohibitions extend further is uncertain; questions on the subject are very infrequent owing to the general prejudice against the marriage of near relatives.

Should an adopted son or his widow desire to adopt, the same grounds of preference and the same general principles would apply as if he had been born in the family of adoption (*k*).

(*b*) Relations with Respect to Property.

The relative rights of children by birth and by adoption in the matter of inheritance to the family estate have been discussed in *The Digest of Vyavasthas* (*l*). In relation to the adoptive mother's property as well to that of the father, the adoptive son takes a right (*m*) subject by analogy to a partial defeasance in competition with a son by birth.

"The share of an adopted son is one-fourth of the share of a son born to the adoptive father after the adoption" (*n*).

The heirs of a deceased Hindu in Shahabad being a real and an adopted son, the adopted son takes one-fourth, and the real son three-fourths of his property (*o*).

"If after the adoption of a boy, a son be legally begotten and

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(*h*) See Datt. Chand, sec. II.

(*i*) See above, pp. 837, 838.

(*k*) See sec. III. and sec. IV.

(*l*) Above, pp. 351, 354 ss.

(*m*) Above, p. 480.

(*n*) *Ayyavu Muppanar* v. *Niladatchi Ammal et al.*, 1 M. H. C. R., p. 45; *Giriapa* v. *Ningapa*, I. L. R. 17 Bom. 100; *Ruklal* v. *Amrushet*, I. L. R. 16 Bom. 347. As to the proportion of the adopted son see Col. Dig., Book V., T. 301, Comm.; above, pp. 347, 354, 355. The begotten son cuts down the adopted to one-fourth according to Vasishtha XV. 9. In Bengal the ratio is one-third, Tag. Lec. 1880, p. 539. In the Punjab he takes equally, Cust. Law, II. 158.

(*o*) *Preag Singh* v. *Ajoodya Singh*, 4 C. S. D. A. R. 96.

born in marriage, the latter will inherit three-fourths of the father's property, the former one-fourth. The Kaustubh gives the adoptee one-third or even one-half" (*p*).

"After the adoption of a son, one is born to the adopter. The latter succeeds to his father's watan" (*q*). The precedence of the legitimate son by birth over the son by adoption is secured by several texts (*r*).

The Dattaka Chandrika, which says that the illegitimate son of a Sudra in competition with any heir down to the daughter's son takes but half a share (*s*), gives to the adopted son of a Sudra an equal share in a partition made during the father's life, and half a share in a partition after his death (*t*).

A woman's illegitimate son, it was said, takes nothing by inheritance from her in competition with her adopted son. Even her conveyance of her property to the former was pronounced invalid as against the heritable right of the latter (*v*). This could hardly be maintained unless the property was that of the deceased husband; of her separate estate the widow could dispose (*w*).

In one case an adoption had been contested. The adopted son took the estate and then died. It was sought to exclude from

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(*p*) Steele, L. C., p. 47. "In some places, the two boys (the begotten and adopted) share all property equally; in others, the former takes two-thirds; in others, three-fourths; in others, the father, on the birth of his begotten son, gives the adoptee a present according to his ability, and separates him from the family, and in consequence he takes no share; in others, the adoptee obtains nothing without a complaint to the Sirkar. The former is entitled to management of hereditary property, and if an Enamdar or Wuttundar to the Dastkhat (right of signature), Sikka (seal), Naonagar (mark, or signature of a Patel), and other privileges of eldership." Steele, L. C., pp. 186, 187. See above, pp. 65, 678.

(*q*) MS. 1739. The watan is regarded as going by preference to the head of the family, see above, pp. 65, 180, 676, 836; Steele, L. C. 218, 229; and as an impartible estate, so far as it supports the office, see above, pp. 175, 676; *Purshotam* v. *Mudakangavda*, Bom. H. C. P. J. 1883, p. 228.

(*r*) See Datt. Mim. IV. 26.

(*s*) See above, pp. 79, 712.

(*t*) Sec. V. 30. As a Sudra father may give to his illegitimate son an equal share with his legitimate sons (see above, p. 708), it seems to follow that he should be able to do as much for his adopted son, though this is not provided for in the sacred writings, which do not indeed contemplate adoption by Sudras. Strange says, that "among Sudras . . . the after-born son and the adopted share equally the parental estate." 1 Str. H. L. 99.

(*v*) 2 Str. H. L. 110.

(*w*) Above, pp. 301, 319, 352, 353, 656; 2 Str. H. L. 127.

succession the son of him who had formerly denied the adoption; but the Court said:—"*Deendial's* denial [formerly] of *Munnoo's* adoption *de jure*, cannot, therefore, estop his son from claiming the right of succession to Munnoo's property unquestionably acquired by him *de facto* by adoption and by no other title" (*x*).

A sister succeeds to the brother by adoption as to one by birth (*y*).

Relations between the Adopted Son and Remoter Connexions by Blood.

I. 1. B. 2. 5.—Of the Adopted Father.

The adopted son becomes impure through deaths and births in the family of adoption, but for a shorter time than a son by birth (*z*). The son adopted into a united family becomes a participator in the family sacra celebrated by the head of the family (*a*). In the event of a partition after his adoption the sacra becomes dispersed, and he thenceforth offers sacrifices separately. If his father, being separated, had sacra of his own, the adopted son will naturally continue them, as even in a united family there are some services to the father's manes which devolve necessarily on the son. But if a member of an undivided family having no separate sacred fire of his own has died sonless, and then a partition has taken place causing a dispersion of the general family sacra amongst the parceners (*b*), the son afterwards adopted by the widow has no share in these. He honours his adoptive father's spirit, but cannot draw back the common sacrifices (*c*). The connexion of the estate with the sacra makes this consideration important for the law of property. There is no failure of the family sacrifices while the state of union continues. Every member joins in them directly or vicariously. On a partition it

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(*x*) *Sheo Sohai Misser* v. *Musst. Billasee*, N. W. P. S. D. R. N. S. Pt. I. 1864, p. 504.

(*y*) *Mahantapa* v. *Nilgangowa*, Bom. H. C. P. J. for 1879, p. 390.

(*z*) Datt. Chand. IV. 1—5.

(*a*) Vyav. May. Chap. IV. sec. VII., para. 28.

(*b*) It is a general maxim that what was prevented at its proper season may not be taken up afterwards. See Colebrooke L. and Essays, vol. II. 138.

(*c*) The religious duties of separated brethren are necessarily divided. See Vyav. May., Chap. IV., sec. VII., pp. 28, 29; Manu III. 69; Narada XIII. 37, 41, 383; Mit., Chap. II., sec. XII., para. 3.

were sacrilege to let them sink into abeyance, and once separately appropriated they cannot, without sacrilege, be given up.

The adopted son, though he may be partially superseded by a begotten son, yet, in the absence of such a son, takes the whole share of his adoptive father in a partition of the joint estate (*d*). Nor do the Hindu authorities draw any distinction in this respect between a son adopted before and one adopted after the death of the adoptive father. Each member of a united family is replaced in the family by his son down to a partition of the inheritance (*e*). From the moment of partition the son fully replaces him only in the new family thus set on foot (*f*). The son adopted by a widow, ranking as posthumous, blends with the united family and takes his ideal father's interest in the estate (*g*), nor can this be prevented by the existence of other joint interests which the intruder impairs by sharing them (*h*). The control of the widow by the surviving brethren is an attribute of their guardianship, not of their ownership, and is itself subject to control if unfairly used according to Hindu notions. But if a partition has been made after the death of a sonless coparcener, and a provision has been made for his widow and daughter (*i*), it seems that a subsequent adoption will not enable the adopted to reclaim his ideal father's share from those amongst whom it has been dispersed. The texts say that a proposed partition must be postponed until the result of a widow's pregnancy is seen (*k*). They also provide for a redistribution in favour of an actually posthumous son (*l*). But they do not say that the parceners must await a widow's election to adopt or not, or that a share must be made up for the son subsequently adopted (*m*). As, therefore, there is a general

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(*d*) Above, p. 836. *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*, 9 C. W. R. 423.

(*e*) *I.e.*, so far as the great-grandson of one in actual participation. See above, pp. 61, 62, 324, 711.

(*f*) Above, p. 338.

(*g*) Above, p. 348.

(*h*) See above, pp. 856, 859, 861.

(*i*) See above, pp. 694, 709, 712.

(*k*) Above, pp. 72, 608, 770, 847; Mit., Chap. I., sec. VI., para. 12.

(*l*) Above, p. 722.

(*m*) The Sastris in one case declared that—"Inspired legislators had made provision for the custody of the estate of minors, but neither they, nor any writer, had provided for the charge of the estate of the unborn during an indefinite time; therefore the unborn could have no property." *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. 188. See above, pp. 63, 554. The joint estate supporting

rule allowing partition at the will of the existing members and explicit exceptions for two particular cases, it would be opposed to the Hindu principles of construction to admit a claim in a third case on which there is no express authority for taking the property back from its separate owners (*n*).

The fact, again, of property held by one descendant or group of descendants from the same stock unshared by other descendants implies partition or separate acquisition. By an extinction of the united proprietary group the continuity and unity of ownership are destroyed. The principles of partition rather than of inheritance, as conceived by the Hindu lawyers (*o*), come into play, and the law distributes the property once for all to those who are at that moment entitled, by a distinct transfer and a creation of new interests incompatible with any continuance of the old. The revival of an interest once extinguished is nowhere contemplated. The law as laid down in cases of adoption subsequent to a partition following the adoptive father's death, or to the opening of a collateral succession, seems thus quite in accordance with Hindu principles. In the two cases immediately to be cited it does not appear that the distinction between the divided and the undivided family was kept quite clearly in view. In these there had not been a partition, and the family still admitted of increase by adoption. An adoption made by a widow will not, it was said, devest the surviving joint sharers with her late husband's father of any part of the property, nor when his father was separated will it devest the deceased husband's sisters of their succession to their father, unless made in either case with the assent of the persons entitled (*p*). Property vested in one of two united brothers by the death of the other, it was said in *Govind Purshotam* v *Lakshmibai* (*q*), cannot be devested by the subsequent adoption of a son to the deceased. In the absence of a partition it would seem that the adopted son must take his father's place, as in *Sri Raghunada's Case*.

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common sacra remains accessible to an adopted son of an undivided member until it has been divided. After this there is no authority for recovering any portion.

(*n*) See above, pp. 552, 554.

(*o*) See above, p. 561.

(*p*) *Ramchandracharya* v. *Shridharacharya*, Bom. H. C. P. J. 1881, p. 145. See above, p. 889.

(*q*) Bom. H. C. P. J. 1882, p. 12; *Bhubaneswari Debi* v. *Nilkomul Lahiri*, L. R. 12 I. A. 137.

An adopted son succeeds collaterally as well as lineally (*r*) to ancestral property (*s*). But though an adopted son succeeds collaterally as well as lineally (*t*), his right, it is said, vests for this purpose only from the adoption (*v*), *i.e.* the widow till then can sue in her own right. Nor can he retrospectively take away what passed to another through his non-existence or non-adoption when the succession opened (*w*).

In a leading case the Judicial Committee said:—

"Their Lordships think, therefore, looking at these authorities (*x*), and the weight that is due to them, that an adopted son succeeds not only lineally but collaterally to the inheritance of his relations, and, if so, these appellants are not in a condition to succeed, because they have distinctly admitted in their own pleadings, and by the answer of their own pleaders given to the Court, that an adopted son of the brother by the whole-blood was in existence at the time of their suit being commenced. If an adopted son of the whole-blood is in the same situation as the natural son of the whole-blood, then the only remaining question is whether the son of the brother of the whole-blood succeeds in preference to the sons of the brother by the half-blood; and upon that point there is no dispute, for the authorities are uniform" (*y*).

That an adopted son of a whole-brother is preferred to a natural son of half-brother (*z*), follows from the principles stated in the

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(*r*) *Sham Chunder et al.* v. *Nurainee Dibeh*, 1 C. S. D. A. R., p. 209; *Sumboochunder Chowdry* v. *Naraini Dibeh*, 3 Knapp, p. 55; S. C. 5 C. W. R., p. 100 P. C.; *Gour Hurrie Kubraj* v. *Musst. Rutnasuree Debia et al.*, 6 C. S. D. A. R., p. 203; *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*, 9 C. W. R. 423; *Lokenath Roy et al.* v. *Shamsoonduree*, Beng. S. D. A. R. for 1858, p. 1863.

(*s*) *Gokul Chund* v. *Narain Dass*, N. W. P. R. 1862, Pt. I., p. 47.

(*t*) *Sumboochunder Chowdry* v. *Naraini Dibeh*, 3 Knapp, 55.

(*v*) *Bamundoss Mookerjea* v. *Musst. Tarinee*, 7 M. I. A. 169. See above, A. 5.

(*w*) *Musst. Bhoobun Moyee Debia* v. *Ram Kishore Acharj*, 10 M. I. A. 279; *Bhubaneswari Debi* v. *Nilkomul Lahiri*, L. R. 12 I. A. 137.

(*x*) See Mit., Chap. I., sec. XI., pp. 30, 31; Suth. Syn. Head IV., Col. Dig., Book V., TT. 184, 217, Comm.

(*y*) *Sumboochunder Chowdry* v. *Naraini Dibeh*, 3 Knapp, Pr. Co. 61—62. See Mitakshara, Chap. II., sec. IV., paras. 5 and 7; Daya-Bhaga, Chap. XI., sec. VI., para. 2. "Can a son given be heir to a kinsman, or not? . . . A text of Manu shows that a son given, being endowed with every virtue, shall take the heritage." Col. Dig., Book V., T. 277, Comm.

(*z*) See above, pp. 103, 104, 354. The Mitakshara gives the succession to the half-brother in preference to the whole brother's son, but still the latter precedes the son of a half-brother. The Judicial Committee placed the right

earlier part of this work. It will be noticed too that in a case between separated brothers and their sons, the latter do not represent their predeceased father in succession to his post-deceased brother, or take so long as another brother survives. Much less, therefore, would an adopted son take back any part of the succession thus disposed of before he was adopted. In the case of a daughter's son, as he is not by his birth, nor therefore by his adoption, a co-owner with his maternal grandfather whose proprietary personality could thus be conceived as persisting in him, he cannot take back the estate from those to whom the law before his existence has given it. This is the application of the general principle made by the Sastris at 7 M. I. A. p. 188. In Bombay the daughter herself would succeed in the case supposed, and then supposing her father had had an undivided brother predeceased, the question would arise of whether the daughter's existence was a bar to adoption by the widow of the first deceased brother, or to the succession of the son thus taken. There is not the slightest Hindu authority for saying that the adoption could not be made; and when made it would react so as to put the boy adopted in the place held by his adoptive father in the undivided family. A daughter, though she inherits, does not continue the estate and the sacra as a son or a widow does (*a*). Her existence is no bar to adoption, and in the case supposed the right to adopt a fit person would subsist though she were a son.

In the case of collaterals generally, the nearest or those who are equally the nearest of the nearest kin succeed. Amongst them too there is no waiting for the possible birth of a posthumous son, who, if already born, would precede those in existence (*b*). The widow of a gotraja sapinda under the Bombay Law intercepts the estate for her unborn child, but amongst the Bandhus the principle of interpretation adopted by the Vyavahara Mayukha (*c*) would shut out a child from succession, though when born, the nearest to the propositus, if his birth followed instead of preceding the opening of the succession. Similarly in the case of a son adopted: he can retroactively continue an estate, but cannot recover one given to others prior to his adoptive existence. If his mother has

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of the adopted son on his becoming "for all purposes the son of the [adoptive] father." See Rep., p. 60.

(*a*) See above, pp. 87, 120, 121, 789.

(*b*) Comp. p. 542, Q. 2, Rem. 2; p. 546, Q. 8, Rem. 1.

(*c*) Above, p. 460.

succeeded as representative of her husband's line, he as son can supersede her: if she has not, he cannot supersede others whose personality is not identified with his adoptive father's (*d*).

That the estate which has once passed away to a separated collateral cannot be affected even in part by a subsequent adoption is strongly shown by the case of *Nilcomul* v. *Jotendro Mohun Lahuree* (*e*), where even a postponement of adoption procured by fraud was allowed to prevent the adopted boy, as a collateral, from defeating the intermediate collateral succession of the guilty party.

In the case of collateral succession to the property of separated branches or members of a family, there is no rule reducing the share of an adopted son in competition with a son by birth. The rule applies in terms only to the patrimony in which interests are acquired by birth and by adoption, not to an estate passing through default of co-sharers to a collateral line. The adopted son is a sapinda (*f*), equally with the son by birth, and the analogy of the equality of the half-blood with the full-blood in the case of sapindas not specifically provided for (*g*), may fairly be extended to the adopted son. As the collaterals in the adoptive family inherit equally from him as from a son by birth, so should he inherit from them equally with a son by birth.

An adopted son of a coparcener excluded on account of blindness, &c., from a share in a partition is, according to the Dattaka Chandrika, entitled to maintenance (*h*).

A niece's son adopted by her paternal uncle was pronounced entitled to the management of business as managing Patel, while the widow of the deceased nephew was pronounced heir to his property (*i*). (Nothing is said of the caste or of division or non-division. Division and Sudra caste seem to be assumed.)

"An adopted son is not precluded from inheriting the estate

(*d*) In the event of a property falling in collaterally to a branch united in itself, this inheritance would be taken by the then existing members to the exclusion of a son afterwards adopted by a widow of a predeceased member of the group. Such at least is the view that seems most conformable to principle for the reasons set forth above, pp. 648, 659; but the matter as shown there is one of controversy amongst the Hindu lawyers.

(*e*) Above, pp. 350, 890. I. L. R. 7 Cal. 178. Affd. *Bhubaneswari Debi* v. *Nilkomul Lahiri*, L. R. 12 I. A. 137; S. C. I. L. R. 12 Cal. 18.

(*f*) Above, pp. 107, 108, 435.

(*g*) Above, p. 116.

(*h*) Sec. VI. 1.

(*i*) MS. 5.

of one related lineally, though at a distance of more than three generations from the common ancestor." "The rights of an adopted son, except in a few instances precisely defined in the Dattaka Chandrika and the Dattaka Mimamsa by express texts, are in every respect similar to those of a natural-born son. The adopted son succeeds to the sapinda kinsmen of his father, and as regards the sapinda relationship, there is no difference between the adopted and natural-born son" (*k*).

In Bengal, it has been held that an adopted son succeeds to the property of a son of his sister by adoption (*l*).

One adopted succeeds another as nearest collateral relative (*m*).

Relations between the Adopted Son and Remoter Connexions by Blood.

I. 1. B. 2. 6.—Of the Adoptive Mother.

As to the succession of an adopted son to property in right of a connexion through his mother with her family of birth (*n*) the decisions have differed (*o*). In *Chinnaramakristna Ayya* v.

(*k*) *Puddo Kumaree* v. *Juggut Kishore*, I. L. R. 5 Cal. 615; in appeal S. C. L. R. 8 I. A. 229; *Mokundo Lall Roy* v. *Bykunt Nath Roy*, I. L. R. 6 Cal. 289, quoting *Tara Mohun Bhuttacharjee* v. *Kripa Moyee*, 9 C. W. R. 423; *Kali Komul Mozoomdar* v. *Uma Shankar Moitra*, L. R. 10 I. A. 138. See above, p. 838. Sutherland, 2 Str. H. L. 116, says, he (the adopted son) inherits collaterally as well as lineally according to the Mitakshara, notwithstanding passages in Datt. Mimamsa and Datt. Chandrika limiting his sapindaship to three degrees.

(*l*) *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*, I. L. R. 5 Cal. 615; S. C. L. R. 8 I. A. 229.

(*m*) *Gour Hurrie Kubraj* v. *Musst. Rutnasuree*, 6 C. S. D. A. R. 203; *Sham Chunder et al.* v. *Naraiani Dibeh*, 1 C. S. D. A. R. 209.

(*n*) See above, p. 456 ss. "In a case where the right is not dubious, the funeral cake shall be offered by a daughter's son to his maternal grandfather, although he do not claim the estate and family." Col. Dig., Book V., T. 276, Comm.

(*o*) Under the Roman Law an adoption did not make the adopted a cognate of his father's cognates; the mutual rights of inheritance were restricted to those connected as agnates. With the adoptive mother's family he had no connexion to form a basis for mutual rights. (See Willems, Dr., Pub. Rom., p. 87; above, p. 836.) Justinian's rule under which the adopted son remained in the family of his birth corresponded to the preference long established by practice of the marriage without "Manus" to that accompanied by "Manus." The Roman wife in the later ages remained a member of her father's family.

Minnatchi Ammal (*p*) he was refused the place of a daughter's son as heir to her father's property. The P. Sadr Amin had decided in his favour on the authority of the Dattaka Mimamsa, but the High Court set him aside in favour of the grandson of a brother of the adoptive mother's father. The latter is by the Madras High Court ranked as a Bandhu. According to the Mitakshara he is a gotraja sapinda of the propositus, but would still rank after the daughter's son; but the Madras decision denies to the adopted son any right at all as a grandson to his mother's father.

In the North-West Provinces on the other hand it was held, in *Sham Kuar* v. *Gaya Din* (*q*) that the adopted son succeeds to the property inherited by his adoptive mother from her father, and as the doctrine of a mere life estate being taken by a female heir prevails there (*r*), the adopted son must have been thought a competent heir to his maternal adoptive grandfather.

In Bengal a decision precisely the reverse had been given in *Gunga Mya* v. *Kishen Kishore Chowdry* (*s*). In *Teencowree Chatterjee* v. *Dinonath Banerjee* (*t*) it was ruled, that to his adoptive mother's stridhan the adopted son succeeds in the absence of daughters. It had previously been held that *Gunga Mya's Case* was not conclusive, and that where an adopted son was the propositus, the maternal relatives inherited from him as from a son by birth (*v*). This would seem to establish a reciprocal connexion by which the adopted son ought in his turn to benefit, but such a doctrine was denied in *Moun Moyee Debeah* v. *Bejoy Kishto Gosave* (*w*), and it was by this case that the Madras Court was governed in that of *Chinnarama* v. *Kristna Ayya*. The text of Manu is very explicit in giving the right only to a son begotten

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She did not become a member of her husband's family. It was, therefore, most natural that her husband's adopted son whose connexion even with the adoptive father's family was limited to the agnates should have none at all with hers. The mutual rights of succession between mother and child rested on special laws. See Ortolan, Inst. § 152. Willems, Dr., Pub. Rom., p. 77.

(*p*) 7 M. H. C. R. 245.

(*q*) I. L. R. 1 All. 255.

(*r*) See above, p. 316.

(*s*) 3 C. S. D. A. R. 128.

(*t*) 3 C. W. R. 49.

(*v*) *Gangapersad Roy* v. *Brijessurree Chowdhrain*, 15 S. D. A. R. 1091. See above, p. 454 ss.

(*w*) W. R. F. B. 121. See 1 Hay, 260.

by the daughter's husband (*x*), and the "daughter's son" in Vishnu (*y*) probably had no other in view. But as the adopted son now makes oblations to his adoptive mother's male ancestors (*z*) the connexion may logically be attended with mutual rights of inheritance, as in the case of a daughter's son by birth (*a*).

The question came before the Judicial Committee in *Rani Anand Kunwar* v. *The Court of Wards* (*b*), but their Lordships did not pronounce upon it. The High Court of Bengal, however, has held that, according to Hindu Law, an adopted son takes by inheritance from the relatives (father and brother) of his adoptive mother in the same way as a legitimate son (*c*). A similar opinion has more recently been expressed by the Judicial Committee in *Kali Komul Mozoomdar* v. *Uma Sunkar Moitro* (*d*). Their Lordships say:—"As to the second question, their Lordships have held in *Pudma Coomari Debi* v. *The Court of Wards* (*e*), that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relatives by adoption. In that case the claimant was the adopted son of the maternal grandfather of the deceased, and it was argued for the appellant that it was distinguishable from this case. But their Lordships laid down that an adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimamsa. That this is the Hindu law is shown by the careful examination of the authorities by the learned native Judge who delivered the judgment

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(*x*) Above, p. 421.

(*y*) Above, p. 420.

(*z*) See Col. Dig., Book V., T. 275, Comm.

(*a*) Above, pp. 418, 460.

(*b*) I. L. R. 6 Cal. 764; S. C. L. R. 8 I. A. 14.

(*c*) *Uma Sunker Moitro* v. *Kali Komul*, I. L. R. 6 Cal. 256. "It is, therefore, clear, that the adopted son confers the same spiritual benefit upon the relatives of his adoptive mother as a legitimate son does, and that he is cut off from the inheritance of the relatives of his original mother. That being so, it would accord with the dictates of natural justice, as well as with the principles upon which the Law of Inheritance in the Bengal School is based, to hold that an adopted son succeeds to the property of the relatives of his adoptive mother in the same way as a legitimate son." (Jud. Cit., p. 262.) This is approved and followed in *Surjokant Nundi* v. *Mohesh Chunder Dutt Mojoomdar*, I. L. R. 9 Cal. 70.

(*d*) L. R. 10 I. A. 138.

(*e*) L. R. 8 I. A. 229.

of the Full Bench of the High Court, which is the subject of this appeal. The respondent claims to succeed as being the daughter's son, and consequently the heir of his maternal grandfather at the death of his widow, which he would be if he were a natural-born son, and as an adopted son he is in the same position. This is clear from the Dattaka Mimamsa, sect. 6, p. 50, where it is said, 'The forefathers of the adoptive mother only are also the maternal grandsires of sons given and the rest, for the rule regarding paternal is equally applicable to maternal grandsires (of adopted sons).' Their Lordships are, therefore, of opinion that the decree of the High Court in favour of the respondent is right."

I. 2.—Imperfect Adoption under the Ordinary Law (*f*).

The law of the Sastras, or what was supposed to be so (*g*), has practically been superseded by the customary law and the decisions of the Courts as to the status of a boy defectively adopted. These decisions are of course authoritative so far as they extend. Still it may be useful to consider what the Hindu lawyers have said as to the consequences of an imperfect adoption as affecting the relations between the adopted and the family of birth and the family of adoption, and the view taken of his relations as a grantee of public lands or endowments.

The customary law is thus stated:—

"Adoptions may be annulled if made contrary to caste custom. Several of the caste enquire into the irregularity complained of, and their decision is carried into effect (whether declaring the validity or annulment of the adoption)" (*h*).

"In such case the separating adopted son might take a small share (one-tenth) without being chargeable with the payment of his adoptive father's debts" (*i*).

I. 2. A.—Relations to the Family of Birth.

An adoption may have been imperfect in the sense of not constituting the proposed relation or, in having failed merely in

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(*f*) See sec. VI. A. 5. Should no adoption be attempted the estate descends as if none were intended. See sec. VIII. and 2 Str. H. L. 90.

(*g*) Above, pp. 835, 836.

(*h*) Steele, L. C. App., p. 388.

(*i*) Steele, L. C. App., pp. 389, 390.

some unessential particular not impairing its jural effect. The Hindu lawyers recognize an intermediate result, where the gift has been so far completed as to sever the child from his family of birth, but the acceptance in adoption has not been so made as to make him a member of the adoptive family (*k*). This status of the adopted is of only theoretical interest; both the castes and the Courts, as we have seen, refuse to acknowledge a parting from the one family without a union to the new one.

The rights of a man in his family of birth remain unaffected when his adoption has been invalid (*l*).

I. 2. B.—Relations to Family of Adoption.

To disqualify for sharing in a partition leprosy of a virulent form (*m*) or the like defect must have arisen previous to division; but if succession is once vested exclusively in the others, it is not devested by adoption (*n*) on the part of the disqualified man whose share has been appropriated. It seems that such persons cannot themselves adopt, but that sons already adopted are entitled to a provision for their maintenance (*o*). Custom sometimes allows a vicarious adoption (*p*).

When an adoption of a son has once been absolutely made and acted on, it cannot be declared invalid or set aside at the suit of the adoptive father. A cancellation of adoption might, it was ruled, be based upon the grounds—(1) The adoption was not in

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(*k*) The gift alone severs connexion with the family of birth, even if the rites are insufficient to establish a connexion with the family of adoption. (Datt. Chand. II. 19, 20; see 2 Str. H. L. 122.)

(*l*) *Bhawani Sankara Pandit* v. *Ambabay Ammal*, 1 M. H. C. R. 363, 365; above, p. 836. "Examples of irregularities justifying annulment are: adoption of a father's brother or sister's son, or an elder than the adopter, or of a boy without the necessary consent, or of a boy who is a cripple, or disabled in senses or understanding." Steele, L. C. App., p. 388. As to a defective gift being null, 2 Str. H. L. 433; H. H. Wilson, Works, vol. V., p. 73.

(*m*) *Mohunt Bhagwan Ramanuj Das* v. *Das*, L. R. 22 I. A. 94.

(*n*) *Sevachetumbara Pillay* v. *Parasucty*, M. S. D. A. R. for 1857, p. 210; 1 Str. H. L 163. Above, p. 886.

(*o*) See above, sub-sec. I. 1 B. 2. 5, and pp. 544, 551, 689, 690, 795. The son adopted when the adopter was competent, as before he was afflicted with leprosy, ought on general principles to take his father's place as though the father had died. See above, pp. 149, 542.

(*p*) See above, p. 546.

the manner and according to the ceremonies required by Hindu Law; (2) The boy was not a fit and proper person to perform the plaintiff's obsequies or to make offerings for the benefit of the souls of the plaintiff's ancestors, being devoid of education and religious knowledge and principles, and the associate of thieves, gamblers, and women of immoral character; (3) He failed to perform his part of an agreement or compromise in writing entered into by him with the plaintiff (*q*).

An absolute disqualification of the boy, the performance of the ceremonies of adoption on a boy of a different caste, or the omission of them in adopting a boy of a different gotra (*r*), is variously said to make the adoption null, while severing the boy from his family of birth or to constitute an adoption of an inferior kind. According to either view the boy defectively adopted is entitled to maintenance on the footing of a das or slave (*s*). The gift alone is supposed to sever him completely from his family of birth (*t*). The authority last cited makes the performance of the ceremonies by the adoptive father effectual to release even a tonsured son from connexion with his family of birth, and to raise him from the servile rank to that of a son to the adoptive father (*v*). It would now probably be held that there must be the proposed change of status or none at all, and that failing a complete adoption, the boy must remain a member of his family of birth (*w*). The gift or sale, which formerly gave a good title to the purchaser as owner of a slave, can no longer operate since the passing of Act V. of 1843 (*x*). The doctrine of a complete gift and acceptance as son being sufficient, and the attendant ceremonies only incidental, not absolutely essential, gets rid of many difficulties arising from the precepts just considered (*y*). That there cannot be a complete gift without complete acceptance, *see* the Viram. Transl. pp. 33, 35, and comp. Datt. Mim. sec. IV. 3. The work

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(*q*) *Sukhbasi Lal* v. *Guman Singh*, I. L. R. 2 All. 366. Above, pp. 843, 845.

(*r*) Datt. Mim. V. 56.

(*s*) See Steele, L. C. 46, 184; Datt. Mim., sec. III. 2, 3; sec. IV., 40 ss.; Col. Dig., Book III., Chap. I., T. 29, 33, Comm.; Book V., T. 182, 273, 275, Comm.

(*t*) Datt. Chand., sec. II. 19.

(*v*) See *ibid.*, para. 27.

(*w*) See Colebrooke in 2 Str. H. L. 223; Steele, L. C. 388. Comp. Just. Inst., Book I., T. XI. 2; and Ortolan, § 138.

(*x*) See 2 Str. H. L. 221, 224.

(*y*) See Col. Dig., Book V., T. 273, Comm.

last cited specifies a gift, acceptance, and burnt offering as indispensable (*z*), and with this, as to Brahmanas, custom seems to agree (*a*). Colebrooke explains the slavery incurred by the *quasi*-adopted as servitude only of that highest kind from which a man frees himself by resigning his right to subsistence (*b*). The servitude indeed could not be more than nominal, seeing that though the son irregularly adopted was not entitled to succeed or to share the patrimony, his adoptive father was bound to get him married, and so set him up as a householder (*c*).

If one of a different caste has been adopted, the authorities exclude him from any share in the patrimony, but declare him entitled to maintenance (*d*), a right which arises in every case of severance from the family of birth without complete acceptance into that of adoption. Thus " in case of discovery that the boy being of another gotra, was not adopted with [the regular] ceremonies, or that he was of another caste, the adoption is null and the boy is to receive maintenance as a das or slave " (*e*). A Smriti passage frequently repeated says: " If a doubt arises as to a remote kinsman (adopted), *i.e.* as to his qualifications, the adopter shall set him apart like a Sudra " (*f*).

The decisions recognizing the particular status we are now considering have been very few. In one it was held that a Hindu invalidly adopted is entitled to maintenance in the adoptive family (*g*). In another case it was ruled that the adopted son of one whose adoption has been held invalid, cannot claim through the right of his adoptive father to be maintained by the alleged adoptive grandfather (*h*).

(*z*) See sec. V. 56. (*a*) Steele, L. C. 184.

(*b*) As to this, see Col. Dig., Book III., Chap. I., T. 29, 48; 2 Str. H. L. 223, 226, 228.

(*c*) Datt. Mim., sec. V. 45, 46; Datt. Chand. sec. II. 18; sec. VI. 3, 4; MS. 1744. The earlier Roman Law required both a *mancipatio* to transfer the son from his family of birth, and a *vindicatio* or claim to him by the adoptive father as son to make a complete adoption. This *vindicatio* had to take place before a judicial officer, whereby formality and publicity were secured. See Ortolan, Inst. § 133 note, § 140. Later the requisite sanction was derived either from an imperial rescript for the case of one *sui juris* or an order of a judge for one *alieni juris*. *Ibid.*, §§ 136, 137.

(*d*) Datt. Mim., sec. III. 1—3.

(*e*) Steele, L. C., p. 46. (*f*) Vas. XX. 7.

(*g*) *Ayyavu Muppanar* v. *Niladatchi Ammal*, 1 M. H. C. R. 45.

(*h*) *Bawani Sankara* v. *Ambabay Ammal*, 1 M. H. C. R. 363. The adopted father's adoption had been pronounced invalid on the ground that the widow adopting had not authority from her husband.

The Sastris treat this semi-adoption as a living institution, as in the following answers:—"A son illegally adopted had," it was said, "a right to maintenance and marriage expenses" (*i*). "A boy adopted after his chuda and other sacraments becomes a das entitled only to such property as may be conferred on him by gift" (*k*).

The British Courts, rejecting generally any distinction except that of belonging to the one or the other family, regard an essentially defective adoption as no adoption. Thus it was said, an authority to adopt "must be strictly pursued, and, as the adoption is for the husband's benefit, so the child must be adopted to him and not to the widow alone. Nor would an adoption by the widow alone for any purpose required by the Hindu Law give to the adopted child, even after her death, any right to the property inherited by her from her husband" (*l*). An attempt was made in one case to establish the principle, that an adoption incompetent to the person who made it through the existence of a representative of the family and estate might, on the removal of this person by death, acquire the validity it would have had in the absence of the obstacle at the time when it was made (*m*). In *Bhoobun Moyee's Case* (*n*) it was ruled, that a power to adopt could not be exercised after the death of the natural son leaving a widow. This in a later case (*o*) was interpreted as meaning that the adoption was absolutely invalid, not merely ineffectual to deprive the son's widow of her estate by succession to the deceased son her

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(*i*) MS. 1744. See above, p. 836. He is put on an equal footing with an illegitimate, and "the father is obliged to support his natural son, he performing the duties of a servant." Steele, L. C., p. 179.

(*k*) MS. 1674. The Sastri, 2 Str. Hindu Law, 121, speaks of a Nitya Datta or permanent adoption, and an Anitya Datta or temporary one, and this, as he explains, depends on the performance or non-performance of the upanayana before adoption. Colebrooke says, the son of such a dvyamushyayana belongs to the family of his father's upanayana (and consequent gotraship).

(*l*) *Chowdry Pudum Singh* v. *Koer Oodey Singh*, 12 M. I. A. 350, 356.

(*m*) The nearest analogy, perhaps, would be the setting up of a bigamous marriage amongst Christians, as validated by the subsequent death of the obstructive spouse. The adoption of a son in the lifetime of another is not validated by the death of the latter. See above, p. 844.

(*n*) 10 M. I. A. 279.

(*o*) *Pudma Coomari Debea* v. *The Court of Wards*, L. R. 8 I. A. 229; *Chandra* v. *Gojrabai*, I. L. R. 14 Bom. 463; *Payapa* v. *Appanna*, I. L. R. 23 Bom. 327; *Sidappa* v. *Ningangavda*, I. L. R. 38 Bom. 224.

husband (*p*). The argument of the High Court of Calcutta that the adoption, though ineffectual as against the son's widow, became effectual on her death, and made the adopted son, then a brother by adoption of her deceased husband, was rejected by the Judicial Committee. The elder widow could not indeed give effect by acquiescence or ratification to that which was absolutely void; and the so-called adopted son was held not to have taken any rights (*q*). In Bombay the son's widow would, unless he had intimated his dissent, have had a right to adopt to him as a separated Hindu (*r*), and with his authority, or the sanction of his father (*s*), or when the father is dead with the consent of his united brethren, if he was unseparated (*t*). But as in Bengal the mother armed with authority from her deceased husband could not adopt (*v*) after the estate and the sacra had wholly centred in her son by the completion of his samskaras (*w*), neither in Bombay could she by such an authority, or by a mere implied authority drawn from her son, adopt so as to withdraw the son's property from him to whom the law had intermediately given it (*x*). It is the widow and she only who continues her husband's spiritual existence (*y*), and can replace him at any moment by an adopted son (*z*), subject in a united family to the assent of the surviving male members on account of her religious subordination to

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(*p*) An opinion of Colebrooke to precisely the same effect, even where the adopted was a nephew of the deceased adoptive father, is given at 2 Str. H. L. 93.

(*q*) L. R. 8 I. A. 229.

(*r*) Above, pp. 868, 880, 885. *Lakshmibai* v. *Sarasvatibai*, I. L. R. 23 Bom. 789.

(*s*) *Vithoba* v. *Bapu*, I. L. R. 15 Bom. 110.

(*t*) Above, p. 881.

(*v*) This seems to be the correct doctrine. See above, p. 880 ss. Comp. *V. V. Krishnarao* v. *Venkatrama Laxmi*, I. L. R. 1 Mad., at p. 187.

(*w*) As to the theory advanced in *Ram Soonder Singh* v. *Surbanee Dossee*, 22 C. W. R. 121, see above, sub-sec. I. 1. B. 2. 2. No adoption is approved by the Hindu Law over an initiated man's head, even when he has migrated to the other world. Even a single adoption may be replaced by a widow's sacrifices and austerities. See above, pp. 790, 1012, and Col. Dig., Book IV., Chap. III., sec. II.

(*x*) Above, p. 880. Sutherland, in 2 Str. H. L. 94, denies that a mother can adopt for a son. *Gopal* v. *Vishnu*, I. L. R. 23 Bom. 250; *Payappa* v. *Appanna* I. L. R. 23 Bom. 327.

(*y*) Above, pp. 86, 397.

(*z*) Above, pp. 869, 880.

them (*a*). However, a mother succeeding to her deceased son who has left no widow nor issue is competent to adopt (*b*); but it has been held in *Krishnarav* v. *Shankar Rav* (*c*) that her power to adopt is exhausted if she succeeds as heir to her son on his decease as well as that of his widow. According to this decision her power to adopt once postponed cannot be revived; but in Bengal it has been laid down that when the estate is once more vested in her (*d*) her right to adopt revives.

I. 2. C.—Relation as a Grantee.

It may be gathered from what is said of the customary law in Steele, L. C. 183, that under the native system an adoption would not in general be recognized by a sovereign or the grantor of an estate as imparting a right of succession to it without the superior's consent being gained (*e*).

An adopted son can succeed to his father's jagir, but if he rests his title to succeed on a confirmative sanad, he is bound, it was said, to prove it (*f*).

II.—Consequences of Adoption or *Quasi*-Adoption not Governed by the Ordinary Law.

II. A.—Validity Recognized.

A. 1.—Without Limitation (save by an Exceptional Law).

" By agreement at the time of adoption or by the operation of law when the adoptee is a brother's son (*g*) a boy may represent both fathers. But without this he cannot succeed to his natural father's property " (*h*).

(*a*) Above, p. 881.

(*b*) *Venkappa* v. *Jivaji Krishna*, I. L. R. 25 Bom. 306.

(*c*) I. L. R. 17 Bom. 164.

(*d*) *Manikchand* v. *Jagattsettani*, I. L. R. 17 Cal. 518.

(*e*) See above, pp. 853, 901. Comp. Blackst. Comm. Book II. Chap. 4, as to the feudal succession, recognition, and relief.

(*f*) *Maharajah Juggurnath Sahaie et al.* v. *Musst. Mukhun Koonwur*, 3 C. W. R. 24 C. R.

(*g*) *Krishna* v. *Paramshri*, I. L. R. 25 Bom. 537.

(*h*) MS. 1692. See above, p. 808 ss. *Behari Lal* v. *Shib Lal*, I. L. R. 26 All. 472; *Krishna* v. *Paramshiri*, I. L. R. 25 Bom. 537. As to this form of adoption among the Lingayats see *Chenava* v. *Basangavda*, I. L. R. 21 Bom. 105.

"If a Brahman adopts a son of a different gotra the boy is to be regarded as a dvyamushyayana, not as a legal son of the adopter. If the boy's chaul and munj have been performed he becomes a das entitled only to maintenance. But he may perform the adoptive father's Sraddha and succeeds in the absence of [a begotten] son, widow, and other near relatives" (*i*).

"A boy adopted from a different gotra after his munj becomes a dvyamushyayana," which the Sastri describes as one "bound to observe the prohibitions as to marriage applicable to both families" (*k*).

A dvyamushyayana does not take the name of his adoptive father (*l*).

When an only son is adopted he succeeds to his natural as well as to his adoptive parents (*m*) if taken as a dvyamushyayana. The effect by the Hindu Law of an adoption as a dvyamushyayana (son of two fathers) is not to deprive the adopted son of his lineage to his natural father, or to bar him of his right of inheritance to his father's estate (*n*). But in Bombay he does not inherit from his real father except in the absence of other sons (*o*).

II. A.—Validity Recognized.

A. 2.—With Local Limits.

A kritrima son adopted by a male inherits, it was said, in both families (*p*); and similarly it was said that "one adopted by the

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(*i*) MS. 1675.

(*k*) MS. 1674. The boy would generally be dvyamushyayana merely because he could not properly be given except as a dvyamushyayana.

(*l*) *Musst. Edul Koonwar* v. *Koonwar Debee Singh*, 5 N. W. P. Dec. 341.

(*m*) *Nilmadhub Doss* v. *Biswambar Doss*, 12 C. W. R., p. 29 P. C.; S. C. 3 Beng. L. R., p. 27 P. C.; S. C. 13 M. I. A. 85. The Judicial Committee say—"Again, if there is, on the one hand, a presumption that Goorooproshad Doss would perform the religious duty of adopting a son, there is, on the other, at least as strong a presumption that Purmanund would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a dvyamushyayana, or son to both his uncle and his natural father."

(*n*) *Nilmadhub Doss* v. *Biswambar Doss et al.*, 13 M. I. A. 85. See above, p. 810.

(*o*) See above, p. 809.

(*p*) *Musst. Deepoo* v. *Gowreeshunkur*, 3 C. S. D. A. R. 307. See above,

kritrima form, which is in use in Behar, Tirhoot, &c., takes the inheritance both in his own family and in that of his adoptive father" (*q*).

With regard to kritrima adoptions it has further been ruled that a person adopted by the husband stands to him in the relation of a son, and is heir to his estate; but does not become the adopted son of the adoptive wife, nor succeed to her peculiar property (*r*).

Nor does the person adopted by the wife, as her son, become the adopted son of her husband, or succeed to his property, even by the Maithila shasters, though the adoption should have been permitted by the husband. But, as her son, he will succeed to her property (*s*). But if the husband and wife jointly appoint an adopted son, he stands in the relation of a son to both, and is heir to the estate of both (*t*).

When an adoption has been made in the kritrima form, the sons of the adopted have no right to set aside alienations which the adoptive father of the adoptee made of his self-acquired property for alleged illegitimate purposes (*v*).

A son, adopted by a widow without her husband's permission, has no right to her property until her death (*w*).

II. A.—Validity Recognized.

3.—Amongst Certain Classes.

Among the Talabda Kolis of Surat, the son adopted according to their fashion celebrates his adoptive father's obsequies with a feast, and succeeds him. His adoptive father may dispose

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p. 906. The kritrima adoption like that of a palak putra bears a pretty close resemblance to the Roman adoption in its latest stage. See above, pp. 827, 828.

(*q*) *Srinath Serma* v. *Radhakaunt*, 1 C. S. D. A. R. 15.

(*r*) *Srinarain Rai et al.* v. *Bhya Jha*, 2 C. S. D. A. R. 27.

(*s*) *Ibid.*

(*t*) *Ibid.* *Collector of Tirhoot* v. *Huropershad Mohunt*, 7 C. W. R. 500.

(*v*) *Baboo Banee Pershad* v. *Moonshee Syud Abdool Hye*, 25 C. W. R. 192.

(*w*) 2 Hay, 410. This, of course, implies where she has a right, otherwise the adoption would be invalid for all purposes. See above, I. 2 B.; 2 Str. H. L. 91

of his property as he pleases, but failing this the adopted son succeeds (*x*).

An adoptive father may, according to the custom of the Talabda Koli caste, repudiate an adopted son for such reasons as would justify a natural father in disinheriting his son (*y*).

II. B.—Validity not Recognized.

1.—Obsolete.

A person cannot succeed as adopted son of a daughter who has brothers alive, and who cannot be an appointed daughter if she had brothers when she married, nor can he succeed as claiming under a bought son (*z*).

One sold or given by his parents or by himself ranks as a slave according to Manu quoted by Jagannatha in Coleb. Dig. Bk. III. chap. I. sec. I. T. 33 and Commentary. Attempts to procure a son in this way are thus made abortive in the present age.

B. 2.—Adoption Partly Assimilated to that under the Ordinary Law.

Two brothers attempting to adopt the same sons declared—" According to our Sastras the said two adopted sons will perform our obsequies, and shall become successors of our ancestral and self-acquired property." Though this showed an intention to make and take a gift, yet it was pronounced inoperative if the persons did not fulfil the character of adopted sons (*a*).

" A person taken as pupil by a Gosavi cannot on his natural father's death claim a debt due to the latter " (*b*).

(*x*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*y*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67, 70.

(*z*) *Yachereddy Chinna Bassavapa* v. *Yachereddy Gowdapa*, 5 W. R. P. C. 114.

(*a*) *S. Siddesory Dossee* v. *Doorgachurn Sett*, 1 Bourke, 360. The Datt. Mim., sec. I. 30, says the same person cannot be adopted by two, but caste custom seems to have recognized it in a few instances in Central India. And the Datt. Mim. II. 47, 49, allows the adoption of one son (a nephew) by several united brothers, on the principle that the son of one is in a sense the son of all.

(*b*) MS. 1248.

B. 3.—Merely Analogous.

A son-in-law having been adopted succeeded to the estate. It was attached for the debt of the adoptive father. The Sastri said that the adopted son's son by a wife not his adoptive father's daughter had no claim to raise the attachment (*c*).

The Hindu Law does not recognize any legal status for the foster-son, either in the matter of performing ceremonies or of inheritance (*d*). "Nephews, though separated, inherit before a mere foster-son" (*e*).

"A palak putra is not entitled to share in any property *de jure* (*f*) generally in the Dakkhan; but in a few cases, such as the one above, p. 356, Q. 18, the Sastris have been more indulgent. In the case at 2 Str. H. L. 426, the Sastri so far assimilates the foster-son to an ordinary son, that he says a gift may be made to him in his absence without delivery of possession (*g*).

(*c*) MS. 31. If there was a true adoption, the son-in-law would transmit to his son the same rights as if he had been a son by birth. Probably the case was one like an Illatam adoption in Madras, see above, p. 398. Amongst the Motati Kapus, a low caste in Madras, an affiliation is allowed of a son-in-law in the absence of a begotten son. He takes the place of such a son in succession, and shares equally with one born after his affiliation. The question of his resembling an adopted son in other respects than for the purpose of succession was not decided, *Hanumantamma* v. *Rami Reddi*, I. L. R. 4 Mad. 272, 274. Similar customs are recognized by some of the Bombay castes; thus—"Should a man have a daughter and no son, he may give her in marriage to a gharjawahee, who is invested with the management of the house and property, but who becomes proprietor only of such property as his father-in-law gives him at his marriage, or with the consent of his other relations." Steele, L. C. App., p. 358.

(*d*) *Bhimana Gaudu* v. *Tayappa*, M. S. D. A. R. 1861, p. 124; *Samy Josyen* v. *Ramien*, M. S. D. A. R. 1852, p. 60; *Nilmadhub Doss* v. *Biswambhar Doss*, 12 C. W. R. P. C. 29; S. C. 3 B. L. R. P. C. 27; S. C. 13 M. I. A. 85; *Kalee Chunder* v. *Sheeb Chunder*, 2 C. W. R. 281. See above, p. 828.

(*e*) MS. 119. The Sastri, above, p. 906 (*m*), allowed that a foster-son might be heir by custom; and amongst Sudras he was in one instance given a place in the family. See above, p. 362, Q. 10.

(*f*) Steele, L. C., p. 184.

(*g*) See above, pp. 180, 634. The passages cited by H. H. Wilson, Works, vol. V., p. 90, show that while some change of possession is necessary in general to complete a title, yet a partial possession may, when rightly taken, be extended to the whole, and may be dispensed with where the deed is incontrovertible. As to the distinction taken by the Sastri between the ceremonies necessary for the transfer of immovable and of movable property, see the Mit., Chap. I., sec. I., para. 31; Col. Dig., Book II., Chap. IV., T. 33 Comm.; Book V., T. 390, Comm.

The Oudich (Kaletiya) Brahmanas of Broach answered Borradaile that either a foster-son or an adopted son might be taken. He would share *equally* with an after-born son, and he might, failing any other son of his real father, take both estates (like a dvyamushyayana) (*h*).

Adoption (so-called) amongst Naikins does not create any legal rights similar to those arising from a true adoption (*i*).

(*h*) MS. Book A., p. 63. The place given to the foster-son in this section is assigned to him only in deference to the uniform effect of the decisions of the Courts. See above, p. 829. Since that page was printed, the present writer has re-examined in the Borradaile MS. Collection the accounts given of their usages by 51 castes and sub-castes in Gujarath. Of these 38 reject both the adopted and the foster-son; of this number are Brahmanas of various classes. Two castes allow either kind of son. Ten allow only the foster-son. Two allow adoption only, but limited to a brother's son. In one caste (Vaghirs) the only recognized affiliation is by purchase. Four or five allow a dharma-putra to perform the parents' obsequies. Wherever the palak-putra is allowed, his heritable right to his foster-father is recognized, and, with a couple of exceptions, a right in relation to his real father, like that of a dvyamushyayana. In one caste (Surya Vamshi Kshatris of Broach) the foster-son takes only the self-acquired property of the foster-father, not the ancestral estate. In another (Guduja Machi) " one may take a boy and give him a little." One (Surathiya Mali) expressly excludes him from collateral succession in his new family. In most cases the foster-son is allowed to share equally with an after-born son; in others he is reduced to one-third or one-half as much. The relative shares are in a couple of instances subject to control by the father. A widow may take a foster-son from her husband's family, except (in some castes) when there is a nephew. The sanction of the family is required to her taking from her own family or a stranger, if there is property left by the husband (Surya Vamshi Kshatris). Liberty to re-marry disqualifies a widow for taking a foster-son (Kahnumiya Hajjam). No rites are prescribed for taking as a foster-son beyond an expression of consent by the parties concerned.

It may be gathered that adoption is generally disallowed or unknown as a usage in Gujarath, though, should any one take it on himself to adopt, the castes would find it hard to contend against the Sastra; and it is supposed that in such a case the ceremonies would be governed by the scripture rules. Where a substitutionary son is allowed, it is, considering the relative members in the castes, in at least nine cases out of ten, a foster-son. The actual usage of the people thus seems to be quite opposed on this subject to the opinions of the Sastris, and the decisions of the Courts influenced by those opinions. The difference is the more important, as from many of the answers of the castes it appears they were by the Government of the day promised the maintenance of their customary law when thus ascertained.

(*i*) *Mathura Naikin* v. *Esu Naikin*, I. L. R. 4 Bom. 545. The mere nurture and recognition by a temple woman of a man as her son was apparently thought sufficient by the Sastri to make him her heir. (See sec. IV. *ad fin.* Above, p. 945.)

SECTION VIII.—SUITS AND PROCEEDINGS CONNECTED WITH ADOPTION.

The principal decisions bearing on the substantive law of Adoption have been considered in the preceding sections (*k*). In the present section it is proposed to supplement them with a certain number illustrating the questions that arise in litigation, and the way in which these have been dealt with by the Courts. The decisions will be distributed with reference mainly to the object of the litigation. Such a classification, though wanting in scientific precision, seems the most convenient for the practical purposes at which the present section aims.

The exercise of jurisdiction by the Sovereign in this class of cases is fully recognized by the Hindu Law (*l*). The source of the rights and duties that come in question is in the religious law, but the relations themselves are of a kind on which the Civil Courts are bound to adjudicate. According to the customary law—"The caste is competent to decide on the question of a legal adoption. If unsettled by them, it may be referred to the Sirkar" (*m*).

1.—Suits and Proceedings Arising out of Non-Adoption.

"A man cannot cancel his agreement to adopt by entering into a different one" (*n*).

No suit can be maintained for an order directing a minor widow to adopt, nor, it was said, was this a case in which a decree could be made declaring the validity of a direction (*o*) to adopt.

Where a will says—"I declare that I give my property to K., whom I have adopted. My wives shall perform the ceremonies and bring him up. . . . Should he die, and my younger brother

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(*k*) The cases of adoption in the Bombay Presidency "may be taken to be governed by the Mayukha." (*The Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 M. I. A. 397, 439.)

(*l*) Compare what is said on matrimonial law by the Judicial Committee in *Ardaseer* v. *Perozeboye*, 6 M. I. A., at p. 391.

(*m*) Steele, L. C., pp. 185, 186. As to the jurisdiction of the caste and the appellate jurisdiction of the Courts of the King recognized, in all cases, see Ellis in 2 Str. H. L. 267—268; Yajnavalkya, Chap. II. 5, and the commentary of Vijnanesvara, 1 Macn. H. L., pp. 133, 141 ss.

(*n*) MS. 1745.

(*o*) *Musst. Pearee Dayee* v. *Musst. Hurbunsee Kooer*, 19 C. W. R. 127; *Mutasaddi Lal* v. *Kundun Lal*, L. R. 33 I. A. 55. See above, pp. 891, 902.

have more than one son, my wives shall adopt a son of his "—the gift to K, is absolute. So long as he is alive, no other can be adopted, nor can his right as devisee be defeated, whether the widows perform or decline to perform the ceremonies (*p*).

Where a person made a will to the effect that two sons should be adopted in case his pregnant widow should bear a daughter, and no child was born, and one of the two to be adopted died, and the other was not adopted, the latter was held not entitled to take any property as adopted son or legatee under the will (*q*).

A suit to declare void certain deeds of gift and acceptance of a child in adoption, brought by the donee against the donor,—the child not being a party to the suit,—was held not to be maintainable. The deeds, it was held, were not necessary to a valid adoption, and if the deeds were set aside, the adoption, if it had taken place, might be proved *aliunde*. If the deeds operated merely as an agreement to give and take in adoption, and a breach thereof had occurred, such breach, it was held, would not render the deeds void, or constitute any ground for setting them aside, or for declaring them void (*r*).

2.—Suits as to Rights and Duties of Widow Prior to Adoption.

A suit to obtain a declaration that a widow is heir of her deceased husband will lie, though she had authority to adopt. She does not forfeit her right by her omission or refusal to adopt (*s*). It seems she cannot be forced to adopt. Where no adoption is made " under an authority for the purpose," the widows having equal rights in the estate may no doubt share it, making due provision for the maintenance of " the mother and sister of the deceased husband " (*t*).

" In the interval then between the death of her husband and the exercise of the power, the widow's estate is neither greater

(*p*) *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee*, L. R. 3 I. A. 253.

(*q*) *Abhai Charan* v. *Dasmani Dasi*, 6 Beng. L. R. 623.

(*r*) *Sree Narain Mitter* v. *Sreemutty Kishen Soondory Dassee*, L. R. Supp. I. A. 149.

(*s*) *Bamundoss Mookerjea* v. *Musst. Tarinee Dibbeah*, B. S. D. A. R. for 1850, p. 533; S. C. 7 M. I. A. 169; and *Prasannamayi Dasi* v. *Kadambini Dasi*, 3 B. L. R. O. C. J. 85; *Mutasaddi Lal* v. *Kundun Lal*, L. R. 33 I. A. 55.

(*t*) Colebrooke in 2 Str. H. L. 91. See above, pp. 95, 241.

nor less than it would be if she enjoyed no such power or died without making an adoption. She has the same power, no greater and no less, to deal with the estate. Such acts of hers as are authorized and would be effective against reversioners will bind the son taken in adoption. Such acts as are unauthorized and in excess of her powers may be challenged by the son adopted or by any other successor to the estate" (*v*).

An adopted son is at liberty to question alienations made by the widow, the adoptive mother, before his adoption. But a presumption exists in favour of her transactions assented to by the persons next in succession when they took place (*w*).

A Hindu widow claimed a share of ancestral property (under an anumatti patra, or deed of permission to adopt a son, alleged to have been executed by her husband) on behalf of the son whom she might adopt. It was held by the Sudder Dewanny Adawlut, that, until the adoption was made, no action would lie, and that the expression of any opinion as to the authenticity of the deed was in the present action uncalled for (*x*).

The possession of a widow (who has authority to adopt) previous to the adoption is not that of a trustee for the son to be adopted, so as to prevent limitation (*y*) from operating. A widow in Bengal adopted a boy under a power from her deceased husband in the course of a suit by her against his unseparated brother. This was held competent to her, and also the continuance of the suit in her own name, as that had not been objected to, and she might take the estate as trustee for her son (*z*).

A widow does not incur a penalty of absolute forfeiture by an attempt at a false adoption of a son (*a*).

If a widow succeeds to her adopted son, and then adopts

(*v*) *Lakshmana Rau* v. *Lakshmi Ammal*, I. L. R. 4 Mad. 160, 164.

(*w*) *Jadomoney Dabee* v. *Sarodaprosunno Mookerjee*, 1 Bouln. 120; *Rajkristo Roy* v. *Kishoree Mohun*, 3 C. W. R. 14, in which many earlier cases are referred to; *Ramakrishna* v. *Tripurabai*, I. L. R. 33 Bom. 88.

(*x*) *Musst. Subudra Chowdhryn* v. *Goluknath Chowdree et al.*, 7 C. S. D. A. R. 143.

(*y*) *Gobin Chandra* v. *Anand Mohan*, 2 B. L. R. A. C. J. 313. See above, pp. 87, 88.

(*z*) *Dhurm Das Pandey* v. *Musst. Shama Soondri Debiah*, 6 C. W. R. 43, Pr. Co.

(*a*) *Komul Monee Dossee* v. *Alhadmonee Dassee*, 1 C. W. R. 256.

again (*b*) her intermediate alienation is not affected by such adoption (*c*).

3.—Suits to Establish Adoption.

A party claiming in Bengal as a son adopted by a widow must establish by evidence—(1) authority given by the husband to adopt; (2) his actual adoption by the widow as her husband's son (*d*).

A plaintiff who desires, as an adopted son, to recover property, must sue for it, not for a mere declaration of his status as adopted son (*e*).

A vatandar in possession of vatan property may, as such, sue for a declaration of his adoption, preliminary to his application to the Collector for recognition of his right to officiate as a vatandar (under Bom. Act III. of 1874) (*f*).

An adopted son, who is afterwards discarded, may maintain a suit to establish his rights. According to the Hindu Law the suit may be brought on his behalf by any kinsman or friend (*g*). This would now be subject to the provisions of the Code of Civil Procedure (Act V. of 1908, O. XXXII., rr. 1, 2 and 3) and to the ruling of the Judicial Committee in *Doorga Persad's Case* (*h*).

On an estate descending to an adopted son, and from him to his widow, a further power to adopt given by the adoptive father to his widow becomes incapable of execution (*i*), [except Bengal, where on the death of the daughter-in-law, the widow's right to adopt revives (*k*)]. An adoption under it is void. It does not give

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(*b*) *Venkappa* v. *Jiraji Krishna*, I. L. R. 25 Bom. 306.

(*c*) *Gobindo Nath Roy* v. *Ram Kanay Chowdhry*, 24 C. W. R. 183. See above, p. 349.

(*d*) *Chowdhry Pudum Singh* v. *Koer Oodey Singh*, 12 C. W. R. P. C. 1; S. C. 2 B. L. R. P. C. 101.

(*e*) *Ramchandra Narayan* v. *Krishnaji Moreshwar*, Bom. H. C. P. J. 1881, p. 288.

(*f*) *Ramchandra* v. *Radhabai*, Bom. H. C. P. J. 1880, p. 160.

(*g*) 2 Str. H. L. 79.

(*h*) L. R. 9 I. A. 27. See above, p. 701.

(*i*) *Pudma Coomari Debi* v. *The Court of Wards*, L. R. 8 I. A. 229; *Krishnarav* v. *Shankar Rav*, I. L. R. 17 Bom. 164. See above, sec. VII. I. 2 B., and pp. 870, 878.

(*k*) *Manikchand* v. *Jagatsettani*, I. L. R. 17 Cal. 518.

to the adopted a right ripening into that of a duly adopted son when the elder widow succeeds to the property (*l*).

Where a widow adopts under authority of her husband, the authority must be strictly proved (*m*). If the husband's authority to adopt is verbal, it must be proved by witnesses, the widow's testimony alone being insufficient (*n*).

If the husband's authority is in writing, and his handwriting is proved, the signature of witnesses is unnecessary. Otherwise it must be proved by witnesses (*o*).

In a case of inconsistent evidence as to the fact of adoption, the non-designation of the adopted in a public document as son of the adoptive father decided the Court against the alleged adoption (*p*).

In *Gangava* v. *Rangangavda* (*q*), the following facts were held inconsistent with an alleged adoption:

(1) The adoptive mother's name continued in Government records for lands belonging to her husband, after the alleged adoption. (2) The adopted acted as deputy under the adoptive mother. (3) The adoptee assumed his natural father's name after the date of his alleged adoption (*r*).

A presumption arises against the genuineness of a deed of permission to adopt from its not being acted on for seventeen years after the husband's death (*s*).

The omission of the usual intimations and ceremonies is a ground for strong suspicion as to the genuineness of an alleged adoption (*t*).

The registration of deeds giving power to the widow to adopt was recommended. When such a deed is not registered, the

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(*l*) See above, sec. VII. I. 2 B. "Relation shall never make an act good which was void for defect of power." Vin. Abrt. Tit. Relation (H) 4; *Butler and Baker's Case*, 3 Rep. 29A. See, too, *Hawkins* v. *Kemp*, 2 Ea. 410.

(*m*) *Chowdhry Pudum Singh* v. *Koer Oodey Singh*, 12 C. W. R. P. C. 1; 2 B. L. R. 101 P. C.; 12 M. I. A. 350.

(*n*) *Musst. Tara Munee Dibia* v. *Dev Narayun Rai et al.* 3 C. S. D. A. R. 387; *Ry Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. Dec. 101; 2 Macn. H. L. 183.

(*o*) *Ry. Sevagamy Nachiar* v. *Heraniah Gurbah*, 1 Mad. S. D. A. Dec. 101.

(*p*) *Musst. Sabitree Daee* v. *Sutur Ghun Sutputtee*, 2 C. S. D. A. R. 21.

(*q*) Bom. H. C. P. J. 1881, p. 248.

(*r*) See above, p. 1062.

(*s*) *Chundermonee Debia Chowdhoorayn* v. *Munmoheenee Debia*, 8 M. I. A. 477.

(*t*) *Sootrugun Sutputty* v. *Sabitra Daee*, 2 Knapp, 287.

weight of evidence for or against an alleged adoption has to be compared (*v*). In the particular case it removed suspicion.

In the absence of strong documentary evidence for an alleged adoption, the Privy Council preferred the judgment of the lower Appellate Court to that of the High Court, as it had a better opportunity of testing the probabilities of the case (*w*).

Evidence is not necessary of the execution of a permission to adopt according to the exactness required in the case of a will (*x*).

When the Court is satisfied of the power comparatively slight evidence of the ceremonies will suffice (*y*).

The identity of a deed of permission to adopt was held sufficiently established by a reference to it in a subsequent proved deed (*z*).

The probabilities are in favour of an alleged adoption, where the document authorizing the widow to adopt bears the genuine signature of the deceased husband, and the next heir who disputes the document is shown to be on bad terms with the deceased (*a*).

In some cases upon a disputed question of adoption, though the Courts in India held the evidence not sufficient to prove the adoption, the Privy Council has reversed the decision and decreed in favour of the adoption (*b*). Thus the Privy Council decided in favour of adoption, upon a conflict of evidence as to whether it took place during pollution or not (*c*).

A bequest to two persons as adopted sons was held to fail through the simultaneous double adoption being void (*d*).

Where the plaintiff claims the full rights arising under

(*v*) *Chundernath Roy* v. *Kooar Gobindnath; The Collector of Moorshedabad* v. *Ry Shibessuree Dabea*, 11 B. L. R. 86.

(*w*) *Nilmadhub Das* v. *Biswambhar Das*, 12 C. W. R. P. C. 29; S. C. 3 B. L. R. P. C. 27; S. C. 13 M. I. A. 85.

(*x*) See above, pp. 859, 862.

(*y*) *Mohendrolal* v. *Rookiney Dabey*, Coryt. R. 42.

(*z*) *Kishen Shunker Dutt* v. *Moha Mya Dossee*, C. W. R. Sp. No. 210.

(*a*) *Sri Virada Pratapa Raghunada* v. *Sri Brozo Kishoro Patta Deo*, 25 C. W. R. P. C. 291; S. C. I. L. R. 1 Mad. 69; S. C. 7 M. H. C. R. 301.

(*b*) *Huradhun Mookurjia* v. *Muthooranath Mookurjia*, 4 M. I. A. 414; S. C. 7 C. W. R. P. C. 71; *Rungama* v. *Atchama et al.*, 4 M. I. A. 1; S. C. 7 C. W. R. P. C. 57.

(*c*) *Ramalinga Pillay* v. *Sadasiva Pillay*, 9 M. I. A. 506; S. C. 1 C. W. R. 25 P. C.

(*d*) *Siddesory Dossee* v. *Durgachurn Sett*, Bourke, 360. Above, p. 877.

an ordinary adoption, a different form of adoption (*i.e.*, dvyamushyayana) cannot be set up (*e*).

Persons claiming as adopted sons of a widow must prove their own adoption, and that the widow had possession in her own right (*f*); so too where plaintiff sues as adopted son of the owner himself (*g*); but the plaintiff need not in the former case prove how the widow came into possession (*h*). A suit to establish adoption independently of any claim to property can be maintained upon an institution fee of rupees ten, provided the plaintiff shows distinctly that he has a cause of action and a right to consequential relief (*i*).

A certificate cannot be refused to administer an adopted minor's estate, though his adoption has never been recognized, for such a certificate is necessary to clothe any administrator with authority to sue for such recognition of the adoption of the minor (*k*).

A certificate of guardianship under Act XL. of 1858 will not entitle a minor or his guardian, until the adoption is proved, to interfere with the possession of the estate by the widow of the deceased who denies the adoption (*l*).

4.—Suits to Set Aside Adoption.

The Legislature has by Acts VII. of 1870 and IX. of 1871 and XV. of 1877 and Act IX. of 1908 recognized the right to bring a suit to set aside an adoption independently of any claim to property (*m*).

The *onus probandi* lies on the adopted son, though defendant, to prove the validity of the adoption, and not on the plaintiff suing as heir to prove its invalidity, even though he alleges fraud, and adduces no evidence in support of it (*n*).

(*e*) *Musst. Edul Koonwar* v. *Koonwar Dabee Singh*, 5 Dec. N. W. P. 341.

(*f*) *Chutturdharee Lall* v. *Musst. Parbutty Kowar*, 12 C. W. R. 120.

(*g*) *Bhairabnath Sye* v. *Maheschandra*, 4 B. L. R. A. C. J. 162; *Ishur Panday* v. *Musst. Buskeela Koonwar*, B. S. D. A. R. for 1858, p. 471.

(*h*) *Chutturdharee Lall* v. *Musst. Parbutty Kowar*, 12 C. W. R. 120.

(*i*) *Baji Balvant* v. *Raghunath Vithal*, Bom. H. C. P. J. for 1876, p. 142.

(*k*) *Chintaman* v. *Sitaram*, Bom. H. C. P. J. 1879, p. 566.

(*l*) *Panch Cowree Mundul* v. *Bhugobutty Dossia*, 6 C. W. R. Misc. 47.

(*m*) *Kalova* v. *Padapa*, I. L. R. 1 Bom. 248, *per* Westropp, C.J. In the same case the points for consideration on a question of adverse possession by a widow, and on one of the validity of an adoption, are set forth with a reference on the latter point to earlier cases.

(*n*) *Tarini Charan* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. J. 145; S. C. 11 C. W. R. 468; *Roopmonjooree* v. *Ramlall Sircar*, 1 C. W. R. 145; *Kripa*

The presence of a brother of the adoptive father at an adoption and his associating the adopted son as such with him in a suit prevents his sons from afterwards denying the adoption (*o*).

The following grounds have been held insufficient for setting aside an adoption, once effected:—

(1) Its not having taken place at the usual residence of parties (*p*); (2) Its having taken place long after the death of adoptive father (*q*); (3) Want of permission from Government (*r*); (4) Tonsure having been performed in the family of birth after gift and acceptance but before fire sacrifice (*s*); (5) Existence of a nearer relation than adoptee available for adoption (*t*); (6) Want of presence of the mother (natural or adoptive), of burnt offerings, or of drinking saffron water by other than adoptive father, amongst Sudras (*v*).

A has two sons *B* and *C*. *B* marries *D* and dies before *A*. *C* dies unmarried after *A*. *E*, as widow of *A*, relinquishes her rights in favour of *D* and her adopted son *F*. This being sufficiently proved, *E* cannot question *F's* adoption (*w*).

A stranger having no interest in the matter has no right, even with the consent of the presumptive reversionary heirs, to sue for a declaration that an adoption made by a widow is invalid (*x*).

Although a suit, to contest an adoption, made by a Hindu widow of a son to her deceased husband, may be brought by a contingent

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Moyee Debia v. *Goluck Chunder Roy*, 4 C. W. R. 78; *Bissessur Chuckerbutty* v. *Ram Joy Mojoomdar*, 2 C. W. R. 326; *Lal Kunwar* v. *Chiranji Lal*, L. R. 37 I. A. 1; S. C. I. L. R. 32 All. 104; *Chandra Kunwar* v. *Narpat Singh*, L. R. 34 I. A. 27; S. C. I. L. R. 29 All. 184. See above, sec. VI. A. 5.

(*o*) *Nidhoomoni Debya* v. *Saroda Pershad Bookerjee*, L. R. 3 I. A., at pp. 253, 256; *Chintu* v. *Dhondu*, 11 Bom. H. C. R. 192. The principle of estoppel was followed in the similar case, *Sadashiv* v. *Hari*, *ibid.* 190. See above, sec. VI. A. 5.

(*p*) *Bhasker Buchajee* v. *Narro Ragoonath*, Bom. Sel. R. 24.

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) *Musst. Dullabh De* v. *Manu Bibi*, 5 C. S. D. A. R. 50.

(*t*) *Gocoolanund Dass* v. *Wooma Daee*, 15 B. L. R. 405; S. C. 23 C. W. R. 340; *Sree Brijbhookunjee Maharaj* v. *Sree Gokoolootsaojee Maharaj*, 1 Borr. 181, 202 (2nd ed.).

(*v*) *Alvar Ammal* v. *Ramasawmy Naiken*, 2 M. S. D. A. R. for 1867; *Sootrugun Sutputty* v. *Sabitra Dye*, 2 Knapp 287; S. C. 5 C. W. R. P. C. 109.

(*w*) *Musst. Ladoo* v. *Musst. Oodey Kowree*, N. W. P. S. D. R., Pt. II. 1864, p. 365.

(*x*) *Brojo Kishoree Dassee* v. *Sreenath Bose*, 9 C. W. R. 463; S. C. 8 C. W. R. 241.

reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule, the suit must be brought by the presumptive reversionary heir—that is to say, by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering.

If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing, or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest, competent to sue. In such a case, upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent, in that respect, to sue, and whether it was requisite or not that any nearer heir should be made a party to the suit.

In a suit to have an alleged adoption set aside, the plaintiff, a minor, through his guardian, claimed to sue, on the strength of being the adopted son of (the husband of) a daughter of a brother of the father of the deceased, under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee, without deciding that as an adopted son this minor had the same rights as a natural-born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out, that he could only have succeeded as a distant bandhu (*y*), and that he had not a vested, but at most a contingent, interest. Their Lordships held, that there being, in fact, heirs nearer in the line of succession than this minor, the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated (*z*). The conclusions in the suit referred to were, that a suit to set aside an adoption by a widow may be brought—(1) by a presumptive reversionary heir; (2) by an heir a little more distant, in case the former act in collusion

(*y*) See above, pp. 458, 466.

(*z*) *Rani Anand Kunwar et al.* v. *The Court of Wards*, I. L. R. 6 Cal. P. C. 764. See above, p. 466.

with the widow; possibly (3) by an adopted son of a deceased brother's daughter's son, as a bandhu (*a*).

An obscure association of a boy as adopted son of a deceased person, in a suit brought by his widows to recover the husband's share in joint property, was held not conclusive of the boy's adoption. A reversioner was allowed to prove its not having taken place (*b*).

In a suit on a ground of existing right of inheritance and for possession and mesne profits in which the claims to relief are abandoned, the Court will not allow a change of claim and declare an adoption invalid (*c*).

A power to adopt imposed the condition of the consent of the husband's mother. A suit was brought against the adopted son, but the objection of non-fulfilment of the condition precedent of consent was not raised until the case was taken in appeal to the Privy Council. It was held then too late (*d*).

Ignorantia legis non excusat, it was said, is a maxim applicable to the Hindu law of adoption (*e*). There may, however, be an excusable ignorance, as when the Judicial Committee said:—" The concurrence of the widow, and the various acts of acquiescence attributed to her, would be important if they were brought to bear upon a question which depended upon the preponderance of evidence; but if the facts are once ascertained, presumptions arising from conduct cannot establish a right which the facts themselves disprove. The appellant is a Hindu female. So long as she is acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or will ought not to prejudice her. In such a case as the present it was hardly to be expected that she would be capable of distinguishing between an adoption in fact and a legal adoption, or between a will in fact and a valid will. The acts attributed to her are really no confirmation of the

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(*a*) *Ibid.*

(*b*) *B. Sheo Manog Singh* v. *B. Ram Prakas Singh*, 5 C. S. D. A. R. 145.

(*c*) *Ry Rajessuree Koonwar v. Maharanee Indurjeet Koonwar*, 6 C. W. R. 1.

(*d*) *Rajendronath Holdar* v. *Jagendronath Banerjee*, 14 M. I. A. 67; so also *Musst. Mulleh* v. *Purmanund*, 4 Dec. N. W. P. 201.

(*e*) *Radhakissen* v. *Sreekissen*, 1 C. W. R. 62. Ignorance of the law does not relieve from a liability, but it operates no further. See *per* Blackburn, J., in *Reg.* v. *Mayor of Tewkesbury*, L. R. 3 Q. B., pp. 629, 635. See also *per* Lord Westbury in *Cooper* v. *Phibbs*, L. R. 2 E. and I. A., at p. 170. Jagannatha in Col. Dig., Book II., Chap. IV., T. 54, and the judgment of the Judicial Committee in *Periasami* v. *Periasami*, L. R. 5 I. A. 61, 76.

respondent's case, as every one of them upon which reliance is placed might equally have been done with respect to a legal or an avoidable adoption" (*f*).

An acquiescence arising from ignorance is not binding, though the ignorance is of the law applicable to the particular case (*g*). So too consent given by the first adopted son to an arrangement of his father under which the second adopted son was allotted certain property would not, it was ruled, be binding on the first adopted son, if he gave the consent in ignorance of his right, or if the father departed from the arrangement to the complete disinherison of the first son himself (*h*).

An assent obtained by a widow on a representation of an authority from her husband will not avail as against the sapinda heirs. The assent, too, being moved by self-interest, was held insufficient (*i*).

5.—Suits in which Adoption is an Incidental Question.

An adoption *de facto* must be supposed to be valid until set aside (*k*). An objection that an adoptee was the eldest son of his natural father was rejected in special appeal, because though raised it was not pressed in the lower Courts, nor taken specially in the petition of special appeal (*l*).

A case in which a conveyance was absolute, unless the grantor should adopt a son, but in that case to be subject to redemption, was held a sale subject to conversion into a mortgage during the vendor's life, but to become irredeemable on his death (*m*).

A widow may resist an ejectment brought by a person whom she has recognized as adopted son on the ground of the invalidity

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(*f*) *Tayammaul* v. *Sashachalla Naiker*, 10 M. I. A. 429.

(*g*) See *Rangamma* v. *Atchamma*, 4 M. I. A. 1; *Beauchamp* v. *Winn*, L. R. 6 E. and I. A. 223; *Thomson* v. *Eastwood*, L. R. 2 A. C. 215, and *per* Sir G. Jessel, M.R., in *Lacey* v. *Hill*, L. R. 4 Ch. D., at p. 546.

(*h*) *Sudanund Mohapattur* v. *Bonomallee*, Marshall, 317.

(*i*) *Karunabdhi* v. *Gopala*, I. L. R. 7 I. A. 173, 177. Savigny denies the generally nullifying effect of error. See his System, vol. 3, App. VIII., and in the same sense Colebrooke, Book II., Ch. IV., T. 54 Comm.

(*k*) *Nunkoo Singh* v. *Purm Dhun Singh*, 12 C. W. R. 356.

(*l*) *Joy Tara Dossee* v. *Roy Chunder Ghose*, 1 C. W. R. 136. See above, sub-sec. IV.

(*m*) *Subhabhat* v. *Vasudevbhat*, I. L. R. 2 Bom. 113.

of the adoption, though her acknowledgment has been acted on by the authorities (*n*).

A plaintiff sued as widow of an adopted son for property of the adoptive father, and also on the ground of devise to the son. The adoption was held invalid according to Hindu Law, yet the High Court held that as the language of the testator sufficiently indicated the person who was to be the object of his bounty, that person was entitled to the property, although the testator conceived him to possess a character which, in point of law, could not be sustained (*o*). In a similar case it was held by the Judicial Committee that according to the true construction of the testator's will there was a gift of property to a designated person, independently of the performance of ceremonies (*p*).

6.—Suits and Proceedings Consequent on Adoption.

In granting a certificate under Act XXVII. of 1860 to an adopted son, a nephew of the deceased, the Judge ought to look into the fitness as well as the propinquity of the adoptee (*q*).

After adoption, the father had a son born to him. In a partition he gave the adopted boy a larger share than he was by law entitled to receive. The father then married a second wife, and had by her several children. These, it was held, could not contest the above disposition in favour of the adoptee (*r*).

Documents of the like tenor were executed by a man and his adopted son by which the property of the former was made over to his wife for life, without power of alienation, and a succession was secured to the adopted son. This was construed as a family settlement, giving to the son an estate in remainder, not as giving to the wife as a widow such an estate as if there had been no son (*s*).

The title of a second (invalidly) adopted son could not be maintained, it was held, on the ground of acquiescence by the

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(*n*) *Thakoor Oomrao Singh* v. *Thakooranee Mahtab Koonwar*, 2 Agra Rep. 103. See above, sub-sec. 4, p. 1076.

(*o*) *Jivanee Bhayee* v. *Jivu Bhayee*, 2 M. H. C. R. 462.

(*p*) *Nidhoomoni Debya* v. *Saroda Pershad*, L. R. 3 I. A. 253.

(*q*) *Nunkoo Singh* v. *Purm Dhun Singh*, 12 C. W. R. 356.

(*r*) *Yekeyamian* v. *Agniswarian et al.* 4 M. H. C. R. 307. See above, pp. 73, 648, 709.

(*s*) *Musst. Bhagbuttee Daee* v. *Chowdry Bholanath Thakoor*, L. R. 2 I. A. 256.

first, as this had proceeded on an assertion by the father of the second son's right. Whether the first son's ratification would have the effect in such a case of previous consent was thought doubtful; but at any rate there had not been the knowledge which would make it binding (*t*). The first adopted son, however, was allowed to retain all he could claim against the father's disposition only on condition of giving up to the second all over which the father had unfettered power.

An adoptee, like a natural-born son, cannot claim to have a specific share declared and defined, but is only entitled to a decree declaring that the property is ancestral (*v*). A suit by the son of a first adopted son having been brought as heir of the second adopted son, the plaintiff cannot in appeal change his ground of action, treat the second adopted son as trespasser, and seek to recover property as belonging to his ancestor (*w*).

A son adopted *pendente lite*, to be bound by a pending suit affecting his adoptive father's ancestral property, must be made a party to the suit (*x*).

A representation made by one party for the purpose of influencing the conduct of the other party (as to marriage, giving in adoption, &c.), and acted on by him will in general be sufficient to entitle him to the assistance of the Court for the purpose of realizing such representation (*y*).

After the death of an adopted son, a widow alienated part of the property and subsequently adopted again. It was held that the second adopted son took subject to the alienation (*z*).

(*t*) *Rangamma* v. *Atchamma*, 4 M. I. A. 1, 103. On the doctrine of Acquiescence see *Beauchamp* v. *Winn*, L. R. 6 E. & I. App. 233. On Election, see *per* James, L.J., in *Codrington* v. *Lindsay*, L. R. 8 Ch. A., pp. 578, 592.

(*v*) *Heera Singh* v. *Burzar Singh*, 1 Agra H. C. R. 256. He cannot claim definition without partition, as the shares may vary through births and deaths, &c.

(*w*) *Gopee Lall* v. *Musst. Chandraolee Buhoojee*, 11 B. L. R. P. C. 391; S. C. 19 C. W. R. P. C. 12. The adoption here of the second son was invalid according to Hindu Law, as the first had left a son. See above, p. 843.

(*x*) *Rambhat* v. *Lakshman Chintaman Mayala*, I. L. R. 5 Bom. A. C. J., p. 630.

(*y*) *Bhala Nahana* v. *Parbhu Hari*, I. L. R. 2 Bom. 67.

(*z*) *Gobindo Nath Roy* v. *Ram Kanay Chowdhry* 24 C. W. R. 183. Reference is made to *Bhoobun Moyee's Case*, 10 M. I. A. 165; see *Sreemutty Deeno Moyee Dossee* v. *Doorga Pershad Mitter*, 3 C. W. R. 6 Misc. R. Above, p. 349.

A widow redeems a mortgage of her husband and sells the property at a profit. She then adopts a boy, and in the deed of adoption agrees to let the boy have the property "when released." The purchaser is said to have attested the deed of adoption. It was held that the attestation does not bind the purchaser either as to an agreement of resale or as to the price for which the property was to be sold (*a*).

When a widow applies under Act XL. of 1858 for a certificate in respect of an estate alleged to belong to an adopted son, the questions for inquiry are: (1) minority of the boy; (2) fitness of the petitioner for management (*b*). A certificate under Act. XL. of 1858 is rightly given to the guardian, where there is no doubt of the fact of adoption, the objector, who does not claim to be the guardian, having no *locus standi* (*c*). A certificate of guardianship was refused when the validity of the adoption was disputed (*d*).

An adoptive mother, as next heir, was held entitled to the management of a lunatic's estate in preference to a uterine brother (*e*).

A lady who has adopted a son may, as his guardian, be served with an order of foreclosure under the Bengal Law (*f*).

"In a Nuggur Panchaet case . . . in which both parties and Panch were Brahmans and Kulkarnis, the widow of an adoptee obtained a decree for the possession of a vatan given to him by the adopter (by the deed of adoption), in opposition to a claim set up by the nephew of the latter according to blood" (*g*).

A widow has not really such an interest in the appeal or such a *locus standi* as entitles her to insist that an appeal should go on, though the minor party, her adopted son, in whose name the suit was brought, after coming of age, wishes to withdraw from it (*h*).

A widow, claiming under the will of her husband, is the proper

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(*a*) *Rambhat* v. *Ramchandra*, Bom. H. C. P. J. 1879, p. 426.

(*b*) *Brohmo Moyee* v. *Chettur Monee*, 8 C. W. R. 25.

(*c*) *Kisto Kishore Roy* v. *Issur Chunder Roy*, 15 C. W. R. 166.

(*d*) Above, pp. 911—12.

(*e*) *Huree Kishore Bhya* v. *Nullita Soonduree Goopta*, 18 C. W. R. 340.

(*f*) *Ras Muni Dibiah* v. *Pran Kishen Das*, 4 M. I. A. 392. See now above, p 624.

(*g*) Steele, L. C., p. 188.

(*h*) *Ry Bistoopria Putmadaye* v. *Nund Dhull*, 13 M. I. A. 602.

person to obtain a certificate under Act XXVII. of 1860, notwithstanding the objection of a person alleged to be the adopted son of deceased (*i*).

A, alleging himself to be an adopted son, opposed the application for the grant of certificate under Act XXVII. of 1860 to *B*, who, irrespective of the alleged adoption, would be the legal lineal heir of the deceased; the Court before which the application was made refused to grant the certificate on the ground that sufficient *primâ facie* evidence existed establishing the validity of the adoption. On appeal it was held that the Appellate Court, concurring with the opinion expressed by the Court of first instance in respect of the *factum* of the adoption, would not be justified in setting aside the decision on the ground that such Court was wrong in entering into and deciding the question as to the validity of the adoption. It was laid down that on an application for the grant of certificate under Act XXVII. of 1860, opposed by a party alleging a preferential title to it, the Courts should adjudicate the question of title with a view to determine which party has the preferential right to the certificate (*k*).

A permission to adopt during the life of the son cannot have effect given to it (*l*).

A widow, by virtue of the authority given by her husband's will, adopted a son and afterwards discarded him for misbehaviour. The boy, on attaining maturity, applied for the withdrawal of the certificate and for the grant of one to him. The validity of the will, it was said, could only form the subject-matter of a regular suit. It could not be contested in a summary proceeding (*m*).

Where a will gave the testator's widow permission to adopt and made provision for the adopted son entering into possession only after her death, providing further that if the adopted son died unmarried the estate should pass to the testator's nearest *sapinda*

(*i*) *Bissumbhur Shaha* v. *Sy Phool Mala*, 21 C. W. R. 31; *i.e.*, until he establishes his adoption.

(*k*) *Sheetanath Mookerjee* v. *Promothonath Mookerjee*, I. L. R. 6 Cal. 303. Reference was made to *Kali Coomar Chatterjee* v. *Tara Prosunno Mookerjee*, 5 Cal. L. R. 517; *Musst. Anundee Kooer* v. *Bachoo Sing*, 20 C. W. R. 476; *In re Oodoychurn Mitter*, I. L. R. 4 Cal. 411; *Koonj Behary Chowdhry* v. *Gocool Chunder Chowdhry*, I. L. R. 3 Cal. 616.

(*l*) See above, p. 865.

(*m*) *Issur Chunder* v. *Pooruna Beebee*, 4 C. W. R. Misc. 16. It would be hard to find any authority for a widow's "discarding" a son really adopted. She is dependent on him, not he on her. See above, pp. 1017, 1033.

gnyati, it was held that the gift or bequest was, according to the doctrine laid down in the case of *Tagore* v. *Tagore*, void and of none effect, because the nearest sapinda was a person who might not be in existence at the death of the testator, and one who could not be ascertained at that time (*n*).

"The case of *Baijnath Sahai* v. *Desputty Singh* (*o*) was this. A Hindu testator died, leaving *B*, alleged to be his adopted son, and *C*, who would be his heir in default of adoption, and made a will of which *B* applied for probate, and it was held under the Succession Act and Hindu Wills Act that creditors of *C* were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. Their Lordships think this was a right decision" (*p*).

7.—Judgments and Evidence in Previous Cases.

A decision by a competent Court upon a question of adoption is not a judgment *in rem* or binding upon strangers, nor is a decree in such a case admissible as evidence against strangers (*q*), nor is it binding on any reversionary heir not a party to the suit, nor upon an adoptee in a suit by a reversionary not a party to the former suit (*r*).

The plaintiff's adoption, it was said, having been in issue in a former suit, though the defendant was not a party to it, and decided in the plaintiff's favour, was to be held good against the defendant until he got proof against the adoption (*s*) or could prove fraud or collusion (*t*). But in *Padma Coomari Debea's Case* (*v*) it was held that a former judgment against the validity of an adoption was not *res judicata* when the parties had been changed,

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(*n*) *Ramguttee Acharjee* v. *Kristo Soonduree Debia*, 20 C. W. R. 472. See above, p. 212.

(*o*) L. R. 2 Cal. 208.

(*p*) *Rajah Nilmoni Singh Deo Bahadoor* v. *Umanath Mookerjee*, L. R. 10 I. A., pp. 80, 86.

(*q*) *Kanhya Lall* v. *Radha Churn*, 7 C. W. R. 338; *Lal Kunwar* v. *Chiranji Lal*, L. R. 37 I. A. 1; *Chandra Kunwar* v. *Narpat Singh*, L. R. 34 I. A. 27.

(*r*) *Jumoona Dassya* v. *Bamasoondari Dassya*, 25 C. W. R. 235; S. C. L. R. 3 I. A. 72. There is not in fact a recognized process by which an adoption can be established or set aside as to all persons.

(*s*) *Seetaram* v. *Juggobundoo Bose*, 2 C. W. R. 168.

(*t*) *Rijkristo Roy* v. *Kishoree Mohun Mojoomdar*, 3 C. W. R. 14.

(*v*) L. R. 8 I. A. 229.

but that the decision of the point of law on which the judgment had turned was binding as a precedent. A suit to set aside the adoption of the defendant, in which the adoptive mother was made a party, was held barred by Section 2 Act VIII. of 1859, because the same issue as to the validity of the adoption had been tried substantially in a former suit between the same parties as to a portion of the property now at issue (*w*). A plaintiff suing for property belonging to a Hindu widow on the ground of his being an adopted son of her husband's brother is not barred by a decision, in respect of other property, that he was not such (*x*).

In a suit between the adopted son of a landlord and the adopted son of his tenant, the decree being in favour of plaintiff by a competent Court, an appeal to the Privy Council or an omission to take rent for many years or to eject defendant, did not, it was held, alter the relationship of landlord and tenant between the parties (*y*).

The denial by *A* in an enquiry under Bombay Regulation VIII. of 1827 that *B* was adopted son of *C*, does not absolutely estop *A* from asserting in a subsequent suit that *C* adopted *B* (*z*).

A deposition of a plaintiff, in a suit against defendant, a widow (managing for her minor first adopted son), is not admissible in evidence under Sec. 33 of the Evidence Act in a subsequent suit by the defendant widow as mother and guardian of a second adopted son, as that son is not a representative in interest of the widow who was party to the former suit, but sues in his own right (*a*).

(*w*) *Kristo Beharee Roy* v. *Bunwaree Loll Roy*, 19 C. W. R. 62. See now Act V. of 1908, sec. 11.

(*x*) *Kripa Ram* v. *Bhugwan Doss*, 10 C. W. R. 100. The parties having been the same would be bound by a prior adjudication on the same question of right or jural relation between them, though the physical objects of their contention were different, see Act V. of 1908, sec. 11; *Krishna Behari Roy* v. *Musst. Brojeshwari Chowdhrani*, L. R. 2 I. A. 285. A question of limitation decided in a suit as to one piece of property was disallowed in a suit as to another in *Maharaja Rajender Kishen Sing* v. *Raja Saheb Pershad Sein*. P. C. 21, May, 1874.

(*y*) *Huronath Roy* v. *Golucknath Chowdhry*, 19 C. W. R. 18. Limitation is computed from the determination of the tenancy, and the time is twelve years. Act. IX. of 1908, Sched. I., Art. 139.

(*z*) *Pandurang Ballal* v. *Dhondo Ballal*, Bom. H. C. P. J. 1876, p. 209.

(*a*) *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea*, 15 B. L. R. 1; S. C. 23 C. W. R. 42. The decision may be questioned on the ground that there must be a continuity of the estate and of representation of it. The other party must, of course, be the same in both suits to make his deposition admissible.

A certificate may be granted to a widow, as guardian of her minor son, to collect her husband's debts, notwithstanding that her husband's adoption has been set aside (*b*).

8.—Limitation.

The limitation prescribed for a suit for a declaration of the validity of an adoption is six years from an interference with the rights of the adopted son as such (*c*). The Bombay (*d*) and the Madras (*e*) High Courts hold that Art. 119 of the Limitations Acts (now Act IX. of 1908, Sch. I.) would apply even though the suit be for the recovery of real property and not for a declaration of the validity of the adoption provided the plaintiff in order to succeed had no other title but the establishment of his adoption. The Calcutta (*f*) and the Allahabad (*g*) High Courts, on the other hand, lay down that Art. 119 does not apply where the suit is for possession of land, although the consideration of the validity of an adoption is involved. In a suit for a declaration that an adoption was not made or was not valid, the same period of limitation runs from " when the alleged adoption becomes known to the plaintiff " (*h*). The Judicial Committee have held that an omission to bring a suit within the time prescribed by Art. 118 for a declaration that an alleged adoption was invalid, or never, in fact, took place is no bar to a suit for recovery of the property (*i*). The Calcutta (*k*) Allahabad (*l*) and Madras (*m*) High Courts take

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(*b*) *Nitto Kallee Debee* v. *Obhoy Gobind*, 5 C. W. R. Misc. R. 10.

(*c*) Act IX. of 1908, Sched. I., Art. 119. The intention must, it seems, be to bar a suit on the ground of adoption in respect of the rights interfered with. An adoption cannot be cancelled by a mere seizure of an insignificant piece of property on a denial of adoption which remains unchallenged only because it is not worth while to challenge it.

(*d*) *Gangabai* v. *Tarabai*, I. L. R. 26 Bom. 720.

(*e*) *Ratnamasari* v. *Akilandammal*, I. L. R. 26 Mad. 291.

(*f*) *Jagannath Prasad* v. *Ranjit Singh*, I. L. R. 25 Cal. 354.

(*g*) *Lali* v. *Murledhar*, I. L. R. 24 All. 195; *Chandania* v. *Salig Ram*, I. L. R. 26 All. 40.

(*h*) *Ibid.*, Art. 118. See above, p. 895, note (*b*).

(*i*) *Thakur Tirbhurwan* v. *Raja Rameshar*, L. R. 33 I. A. 156; *Muhamed Umer Khan* v. *Muhamed Niazuddin Khan*, L. R. 39 I. A. 19.

(*k*) *Ramchandra Mukerjee* v. *Ranjit Singh*, I. L. R. 27 Cal. 242; *Parbhu Lal* v. *Mylne*, I. L. R. 14 Cal. 401.

(*l*) *Natthu Singh* v. *Gulab Singh*, I. L. R. 17 All. 167.

(*m*) *Velaga Mangamma* v. *Bandlamudi*, I. L. R. 30 Mad. 308.

the same view; but the Bombay High Court (*n*) is of opinion that a suit for possession of the property in question under the circumstances would be barred.

Where a widow, after the death of her son, adopts a boy under an alleged will of her husband, and a sister of the natural son sues for the inheritance on behalf of her son, disputing the will and the adoption, the cause of action arises on the death of the widow, not on the date of the adoption. An acknowledgment of the sister, previous to the birth of her son, admitting the adoption, does not bar the son's right (*o*); and he may sue within three years from attaining his majority. A reversioner's right to sue for possession by setting aside an adoption by a widow accrues on the death of the widow and not on the date of an adoption (*p*). Possession by strangers as adopted sons of a widow is not adverse against the reversioners so long as she is alive (*q*). As against an adopted son, suing for his share in the ancestral estate, limitation begins on demand and refusal (*r*). The time now runs from when a person excluded is aware of the exclusion (*s*).

(*n*) *Strinivasa* v. *Hanmant*, I. L. R. 24 Bom. 260, 266, F. B.; *Laxman* v. *Ramappa*, I. L. R. 32 Bom. 7; *Srinivasa Sargerav* v. *Balwant Venkatesh*, I. L. R. 37 Bom. 513

(*o*) *Tarini Charan* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. J. 145; S. C. 11 C. W. R. 468. See note (*h*). In Bombay the daughter would have to sue in her own right, which precedes that of her son. See above, pp. 96, 99.

(*p*) *Srinath Gangopadhya* v. *Mahes Chandra Roy*, 4 B. L. R. 3 F. B.; *Musst. Raj Koonwar* v. *Musst. Inderjeet Koonwar*, 13 C. W. R. 52; *Tarini Charan* v. *Saroda Sundari Dasi*, 3 B. L. R. A. C. J. 145; S. C. 11 C. W. R. 468. Comp. note (*h*), p. 1084.

(*q*) *Srinath Gangopadhya* v. *Mahes Chandra*, 4 B. L. R. 3, F. B.

(*r*) *Ayyavu Muppanar* v. *Niladatchi Ammal*, 1 M. H. C. R. 45; 3 M. H. C. R. 99.

(*s*) *Hari* v. *Maruti*, I. L. R. 6 Bom. 741; Act IX. of 1908, Sched. I., Art. 127.

APPENDIX.

Translations of Yajnavalkya, II. 47, 50, *and* 175, *with the Commentary on these verses of the Mitakshara.* BY DR. A. FUHRER.

Yajnavalkya, II. 47 (*a*).

"A son need not pay, in this world, money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor anything idly promised."

Vijnanesvara's Commentary.

A debt incurred by a drinker of spirituous liquors, or under the influence of lust for the sake of enjoying a woman, or caused by losses at play, what remains due of a fine or toll (*b*), and money idly promised, that is, promised to impostors, bards, wrestlers, or the rest; for it is declared in a *Smriti*: "Fruitless is a present given to an impostor, a bard, a wrestler, a quack, a knave, a fortune-teller, a spy, or a robber"; all such debts incurred by the father, his son or other heir need not pay to the vintner and the rest. In the above clause, it is mentioned that the remaining portion of a fine or toll should not be paid; by that is not to understand that he has to pay the whole sum, if it is to be paid. For *Usanas* says in his Smriti: "The son need not pay the fine or the balance of a fine, a toll or the balance of a toll, or [any debt of the father] which is not proper" (*c*). Also *Gautama* [XII., 41] says: "Money due by a surety, a commercial debt, a toll, debts contracted for spirituous liquors, a loss at play, and a fine shall not involve the sons, that is, they shall not be paid by the sons [of the debtors]." In this way it has been mentioned which kinds of debts should not be paid.

(*a*) See above, p. 582.

(*b*) Haradatta in his Commentary on Gautama, XII. 41, explains sulka "fee due to the parents of the bride." The same does Jagannatha, see Col. Dig., I., 202.

(*c*) According to Viramitrodaya, l. 106, p. 1, debts for wines and spirits are improper debts.

Yajnavalkya, II. 50 (*d*).

"The father being gone to a foreign country, or deceased [naturally or civilly], or afflicted with an incurable disease, the sons or their sons must pay his debt, but, if disputed, it must be proved by witnesses."

Vijnanesvara's Commentary.

If the father is dead [naturally deceased, or having become a religious anchorite], or has gone to a distant abode in a foreign country, before having paid the due debts, or if he be afflicted with an incurable disease, the debts contracted by him must be paid by the sons and grandsons, even if he has left no property, on account of their being his sons and grandsons. The order of paying is this: In the absence of the father the son, in the absence of the son the grandson; but if the son or the grandson were to deny, that which has been proved by witnesses and the rest [*i.e.* documents] should be discharged. In the first clause, it is said that the debt should be paid off in case the father has gone to a foreign country; but as to the question when it should be paid off, the date fixed by Narada is to be admitted. For *Narada* says in his Smriti [I. 3, 14]: "The father, paternal uncle, or elder brother, having travelled to a foreign country, the son [or nephew, or younger brother even] shall not be forced to discharge the debt, until twenty years have elapsed." After the death of the father, the son if he be apraptavyavahara [*i.e.* if he has not yet reached full age], is not bound to pay the debt: otherwise, if he be fully grown up, he is to discharge it. The time has also been fixed by *Narada*, for he says [I. 3, 37, 38*a*]: "A child is comparable to an embryo up to his eighth year; a boy is called youth (pauganda) up to his sixteenth year. Afterwards he is of age and independent, in case his parents be dead." He is not bound to pay the debt, even after the death of his parents, though he be independent, being still a boy. For it is said in a *Smriti*: "If he have not yet reached full age—apraptavyavahara—and be independent, he is not bound to pay the debt, because the independence depends on his age, and that age is to be counted by qualifications and the years." The term apraptavyavahara includes also those that are forbidden to proclaim and to summon (before a court of law). For a *Smriti* says: "Apraptavyavaharas, messengers, those that are ready to give alms, ascetics, or those immersed in difficulties should not be proclaimed to or summoned by the king." Therefore it is declared in another *Smriti*: "When the son has reached his full age—praptavyavahara—he should, not caring for his own interest, discharge the debt in such a way that he may not go to hell." As regards the performance of funeral rites (Sraddha), even a boy is admitted. For *Gautama* [II. 5] says: "Except the religious performances in honour of the deceased father, the boy is not allowed to recite Vedic texts anywhere." By the plurality of sons and grandsons spoken of in the first clause it is to be understood, that if there are many, they should discharge the debt each in proportion to his own share, if living separated. And if living united,

(*d*) See above, p. 582.

the head of them all should pay it from the common stock in the proportion of the different debts (gunapradhana). For *Narada* [I. 3, 2] says: "After the death of the father, the sons, living separated, shall discharge the debt according to their respective shares, and if living united, he who has taken the burden [of a paterfamilias] upon himself, shall pay it." Though, in the first clause, it is said in general that the sons and grandsons shall discharge the debt of the father, still it should be paid by sons with the interest as the father does; the difference being that the grandson should only pay the principal and not the interest. For *Brihaspati* says: "The sons must pay the debts of their father, when proved, as if it were their own [*i.e.* with interest]; the grandson has to pay only the principal, while the great-grandson shall not be compelled to pay anything unless he have assets." When proved, signifies when established by the testimony of witnesses. Thus has been shown the liability for debts of the debtor, his son, and his grandson, and to whom it belongs to pay when they exist together.

Vijnanesvara's Commentary on Yajnavalkya, II. 175 (*e*).

On the Resumption of Gifts. Now, according to the lawful and unlawful way, I mention at large the chapters on law (vyavahara) styled "Non-Resumption of Gifts" (dattanapakarma) and "Resumption of Gifts" (dattapradanika). *Narada* [II. 4, 1] thus mentions the form of dattapradanika: "When a man, having unduly given a thing, desires to recover it, it is called "Resumption of Gift," which is a title of judicial procedure. Resumption of gifts is that title of administrative justice according to which a man wishes to take back a gift which has not been made in a due form [that is, in a prohibited mode] *i.e.* that title of law by which a gift is withdrawn which has been made unduly. That title of law is styled "Non-Resumption of Gifts" (dattanapakarma) by which a gift cannot be taken back when once given by ways sanctioned by laws. Gifts are four-fold; for *Narada* [II. 4, 2] says: "In civil affairs, the law of gift is four-fold: what may be given (deya), or what may not be given (adeya); and what is a valid gift (datta), or what is not a valid gift (adatta)." An alienable gift is that which is fitting the danakriya (the action of giving gifts), and which is sanctioned by law. An unalienable gift is that which cannot be given as a gift either because one cannot own it or because its giving is not sanctioned by law. An alienated gift is that which is given away and cannot be taken back because of its being given by one when in a sane state. An unalienated gift is that which can be taken back though once given. Now I mention briefly the four-fold gifts. *Yajnavalkya* [II. 175] says: "Without injuring the family estate, personal property may be given away, except a wife or a son; but not the whole of a man's estate, if he have issue living; nor what he has promised to another." That may be given away which is one's self-acquired property and which has been left after the expenses for the maintenance of the family have been defrayed, because the support of the family is necessary. For *Manu* [VIII. 35] says: "Aged parents, an honourable

(*e*) See above, p. 695.

wife, an infant child must be maintained even by means of a hundred trespasses." Thereupon it has been stated that alienable gifts are of one kind only, namely, as regards personal property. What is bailed for delivery, what is let for use, a pledge, joint property, and a deposit; these five have been proved, on the contrary supposition, to be unalienable gifts. For *Narada* [II. 4. 4, 5] mentions eight unalienable things: "An article bailed for delivery, a thing borrowed for use, a pledge, joint property, a deposit, a son, a wife, the whole estate of a man who has issue living, and [of course] what has been promised to another: the sages have declared unalienable even by a man oppressed with grievous calamities." By saying "these five things are unalienable" is not to be understood that we have only a (mere) claim on these things, since a wife, son, and what has been promised are included in the term "personal property"; but that personal property may be given away, excepting a wife, or a son. If then a son, or grandson, or the like survive, the whole property shall not be given away. For it is said in a *Smriti*: "He who has begotten a son and performed his tonsure shall provide for his sustenance." If he has promised a golden piece or the like to somebody, he is not allowed to keep his promise (at the cost of privation to his offspring).

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* *Collector of Broach* v. *Rajaram Laldas*, I. L. R. 7 Bom. 542.

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* On the recognition of custom as a source of law by the Hindu authorities, *see* R. S. V. N. Mandlik's Vyav. Mayukha, Introd. p. xliv. ss.

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* *Burjore Bhavani Pershad* v. *Musst Bhagana*, L. R. 11 I. A. 7. The family custom was of a patnibhag, of exclusion of daughters, and of limitation of a widow's adoption to sons of near sapindas of the husband.

* See Mitakshara, Chap. I. Sec. V. para. 3 note; Vyavahara Mayukha Chap. IV. Sec. II. para. 2.

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* Administrator as next friend or guardian. On this subject see *Murlidhar and Vasudev* v. *Supdu and Balkrishna*, I. L. R. 3 Bom. 149; and *Jadow Mulji* v. *Chhagan Raichand*, I. L. R. 5 Bom. 306.

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* *Kalidas Ravidat* v *Pranshankar Jibhal*, Bom. H. C. P. J. 1884, p. 8.

† *Gan Savant* v. *Narayan Dhond Savant*, I. L. R. 7 Bom. 467

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* The rules presume an estate descended to the father or taken by him in partition, not a mere right which he may assert, as before partition. In the latter he cannot be superseded by his sons. See Mit. Ch. I. Sec. II. para. 6; Sec. V. para. 3 and *note*; and Yajn. II. 117, 120, 121. The Smriti rule as to the share claimable by a son after his father's death is extended to the case of a claim made by the son on his father after the father's separation but no further.

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* *See* Bo. Gov. Sel. No. 114, p. 6, para. 12.

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* *See* Bom. Gov. Rec. No. 114. At p. 5 is an instance of the village changing the seat of cultivation triennially, which illustrates Tac. Germ. 26. *See* too 5th Rep. 723.

†*Kumar Tarakeswar Roy* v. *Kumar Soshi Shikhareswar*, L. R. 10 I. A. 51.

* See *Iari Dutt Koer* v. *Musst. Hansbutti Koerain*, L R. 10 I. A. 150

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* *Baboo Hurdey Narain Sahu* v. *Baboo Rooder Perkash Mitter*, L. R. U. I. A. 26.

* An account of the Samskaras now practised will be found in R. S. V. N. Mandlik's Vyav. May. Introd. pp. xxx. ss.

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* Bo. Gov. Rec. No. 114, p. 134.

† For the Sraddhas in actual use *see* R. S. V. N. Mandlik's Vyav. May. Introd. pp. xxxvi. ss.

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* *Achal Ram* v. *Udai Partab Addiya Dat Singh*, L. R. 11 I. A. 51.
† *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhareswar*, L. R. 10 I. A. 51.

* *Hurdy Narain Sahu* v. *Rooder Perkash Misser*, L. R. 11 I. A. 26.

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* St. 21 Geo. III. Ch. 70, Sec. 18.
† St. 21 Geo. III. Ch. 70, Sec. 17.

* Subject to Bombay Act III. of 1874 and other statutes.